

Specific Jurisdiction Over Website Owners: 10th Circuit Jackson Cooper

The dominant case on finding specific personal jurisdiction over a website owner in the Tenth Circuit is *Soma Medical International v. Standard Chartered Bank*.¹ In *Soma*, the Tenth Circuit followed the District of Utah court, which adopted the Fifth circuit's "Zippo" sliding-scale test² in *Patriot Systems, Inc. v. C-Cubed Corp.*³

The plaintiff in *Soma* was a corporation that opened an account in the defendant bank's Hong Kong branch, the contents of which plaintiff alleged were fraudulently transferred to the account of a third party. The defendant, incorporated under the laws of Great Brittan, moved to dismiss the suit based on a lack of personal jurisdiction.

The Tenth Circuit, after finding a lack of general personal jurisdiction, turned to the plaintiff's arguments regarding specific personal jurisdiction. The court noted that, "in order to find personal jurisdiction over a nonresident in a diversity action, a plaintiff must show that jurisdiction is legitimate under the laws of the forum state and that the exercise of jurisdiction does not offend the due process clause of the Fourteenth Amendment."⁴

The forum state for this case was Utah, so Utah law governed the exercise of personal jurisdiction. In Utah, the evaluation of specific jurisdiction requires the evaluation of three considerations: (1) the defendant's acts or contacts must implicate Utah under the Utah long-arm statute; (2) a "nexus" must exist between the plaintiff's claims and the defendant's acts or

¹ *Soma Med. Int'l v. Std. Chtd. Bank*, 196 F.3d 1292, 1295 (10th Cir. 1999).

² *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123-24 (W.D. Pa. 1997); *see also Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir., 1999) (adopting Zippo court analysis).

³ *Patriot Systems, Inc. v. C-Cubed Corp.*, 21 F. Supp. 2d 1318, 1323-24 (D. Utah 1998).

⁴ *Soma* at 1295 (quoting *Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1074 (10th Cir. 1995)).

contacts; and (3) application of the Utah long-arm statute must satisfy the requirements of federal due process.⁵

The Utah long-arm statute has been found to be coextensive with the due process clause of the Fourteenth Amendment to the United States Constitution by both the Utah Legislature and the Utah Supreme Court.⁶ Therefore, the test for personal jurisdiction here is whether the exercise of personal jurisdiction over the defendant meets federal due process standards.

The test for satisfying the federal due process requirements is “minimum contacts,” as articulated in *International Shoe*.⁷ Those minimum contacts are established when the defendant has purposefully directed his activities at residents of the forum, and the litigation results from allegations that arise out of or relate to those activities.⁸ If the minimum contacts portion of the test is met, then the court will determine whether the exercise of jurisdiction offends traditional notions of fair play and substantial justice.⁹

In *Soma*, the court evaluated the plaintiff’s argument that the defendant’s operation of a website, accessible in Utah, was sufficient to establish personal jurisdiction in that state. The court followed the Utah federal district court in *Patriot Systems* that adopted the test from the Western District of Pennsylvania in the *Zippo* case.¹⁰ That test was later adopted by the Fifth Circuit in *Mink*.¹¹

⁵ *Soma* at 1297 (quoting *National Petroleum Mkt’g, Inc. v. Phoenix Fuel Co.*, 902 F. Supp. 1459, 1465 (D. Utah 1995)).

⁶ *Soma* at 1297-98.

⁷ *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (U.S. 1945).

⁸ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (U.S. 1985).

⁹ *Int’l Shoe Co.* at 316.

¹⁰ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123-24 (W.D. Pa. 1997).

¹¹ *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir., 1999).

The Zippo test states that websites fall into one of three categories along a sliding scale of interactivity, and that the category in which the website falls determines whether or not the website creates sufficient contact with the forum to establish personal jurisdiction.¹²

The first category, where personal jurisdiction is clearly established, is where “a defendant clearly does business over the internet, such as entering into contracts which require the “knowing and repeated transmission of computer files over the Internet.”¹³

The second category, where finding personal jurisdiction is not appropriate, is where the website is passive, and just makes information available to those interested.¹⁴ Here, the website owner’s only action was to post the information on the internet, where it could be seen in the forum (and everywhere else).¹⁵

The third category includes websites with interactive features which allow the user, in addition to downloading the information posted by the owner, to post information and exchange information with the host computer.¹⁶ With this third category, the determination of whether or not personal jurisdiction is appropriate will turn on “the level of interactivity and commercial nature of the exchange of information that occurs on the [website].”¹⁷ Summed-up by the court in Zippo: “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.”¹⁸

While the court in *Soma* primarily discussed the Zippo test in the context of general jurisdiction, it also applied the analysis to the website in question in finding that there was not

¹² *Soma* at 1296.

¹³ *Zippo* at 1123-24.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 1124.

specific personal jurisdiction.¹⁹ The court noted that the entirely passive website in that case did not constitute the kind of purposeful availment necessary for the exercise of personal jurisdiction.²⁰

Soma has been followed and cited in dozens of cases in the Tenth Circuit, both by district and appellate courts.²¹ The adoption of the Zippo test for the evaluation of websites as a means for establishing specific personal jurisdiction has been unquestioned in the circuit, and has become the standard for evaluating the issue.

Courts in other circuits have cited *Soma* as an example of the adoption of the Zippo test (1st²², 2nd²³, 4th,²⁴ 8th,²⁵ and 9th²⁶) and *Soma* has been followed by courts in other circuits (6th²⁷ and 7th²⁸). While many circuits also focus on the kind of interactivity at the root of the Zippo test, some have criticized and rejected its use as a separate framework for internet-based jurisdiction.²⁹

There is at least one case, however, where the Tenth Circuit addressed the issue of specific personal jurisdiction over a website owner without even mentioning *Soma*, *Zippo*, or the sliding

¹⁹ *Soma* at 1299.

²⁰ *Id.*

²¹ See *Good v. Fuji Fire & Marine Ins. Co.*, 271 Fed. Appx. 756, 759 (10th Cir. N.M. 2008); *Miller v. Kelly*, 2010 U.S. Dist. LEXIS 120332 (D. Colo. Nov. 12, 2010); *Dunn v. United Reg'l Health Care Sys.*, 2009 U.S. Dist. LEXIS 28206 (W.D. Okla. Apr. 2, 2009); *1-800-Contacts, Inc. v. Mem'l Eye, PA*, 2009 U.S. Dist. LEXIS 48673 (D. Utah June 4, 2009).

²² *Auburn Mfg. v. Steiner Indus.*, 493 F. Supp. 2d 123, 129 (D. Me. 2007).

²³ *Lenahan Law Offices, LLC v. Hibbs*, 2004 U.S. Dist. LEXIS 30528 (W.D.N.Y. Dec. 22, 2004).

²⁴ *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002).

²⁵ *Boyko v. Robinson*, 2007 U.S. Dist. LEXIS 61070 (D.N.D. Aug. 17, 2007).

²⁶ *Zuffa, LLC v. Showtime Networks, Inc.*, 2007 U.S. Dist. LEXIS 60711 (D. Nev. Aug. 15, 2007).

²⁷ *Bailey v. Turbine Design, Inc.*, 86 F. Supp. 2d 790, 795 (W.D. Tenn. 2000).

²⁸ *Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 550 (7th Cir. 2004); *Litmer v. PDQUSA.com*, 326 F. Supp. 2d 952, 957 (N.D. Ind. 2004).

²⁹ *Zuffa, LLC v. Showtime Networks, Inc.*, 2007 U.S. Dist. LEXIS 60711 (D. Nev. Aug. 15, 2007); *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F. Supp. 2d 1154, 1160 (W.D. Wis. 2004).

scale of interactivity. In *Silver v. Brown*, the court addressed slander, defamation, and duress claims arising out of statements made on a blog with the URL “DavidSilverSantaFe.com.”³⁰

In *Silver*, the court focused on the fact that the alleged torts were ‘purposefully directed’ at the forum state, and did not reach the issue of the interactivity of the website. The ‘purposefully directed’ portion of the minimum contacts test was further defined in *Calder v. Jones*.³¹ In *Calder*, the court held that when the defendant is charged with intentional actions, expressly aimed at the venue state, that the defendant must reasonably anticipate being hauled into court in that state.³²

The Tenth Circuit, in *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, explained the reasoning in *Calder* by stating that purposeful direction can be found in the presence of: (a) an intentional action that was (b) expressly aimed at the forum state, with (c) the knowledge that the brunt of the injury would be felt in the forum state.³³

In *Silver*, the court found that the website in question was about a forum state resident and company, and that the plaintiff knew that the brunt of the harm would be felt in the forum state.³⁴ In finding this express aiming, the court did not address the interactivity of the website, only whether the statements thereon were purposefully directed at the forum state. While not expressly overruling *Soma*, this holding does provide another level of analysis not present in *Soma*’s conclusion that operation of a passive website cannot constitute the purposeful availment necessary for specific personal jurisdiction.

³⁰ *Silver v. Brown*, 2010 U.S. App. LEXIS 12090 (10th Cir. June 14, 2010).

³¹ *Calder v. Jones*, 465 U.S. 783 (1984).

³² *Id.* at 790.

³³ *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008).

³⁴ *Id.*