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Allison E. Cahill

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interest in resolving disputes in which an Ohio company is a party because the suits involve Ohio law trade names and trademarks claims. More than \$10 million may be at stake, and the result of the case would have an impact on CompuServe's relationships with other shareware providers. The court found the relationship between Patterson and Ohio substantial enough and, therefore, reasonable for an Ohio court to assert personal jurisdiction over Patterson.

The court limited its holding to the circumstances in this case. Further, the court, noting the emergence of communications and business on the Internet, explained the potential of additional lawsuits, and other related

issues, on the horizon, which will need to be resolved in the future. The court stressed that it did not hold that Patterson would be subject to lawsuits in states where his software was purchased or used or where his software might have caused a "computer virus." In addition, the court's holding did not extend to a situation where CompuServe would attempt to sue any subscriber for nonpayment of its services in Ohio. In reversing the district court's dismissal, the court of appeals held that people like Patterson who employ a computer network service to market a product can reasonably expect to resolve lawsuits in the state where the service's headquarters is located. •

World Wide Web site does not create personal jurisdiction

by Allison E. Cahill

In *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), the United States District Court for the Southern District of New York dismissed a claim of trademark infringement for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). The court held that the creation of a World Wide Web site is not an offer to sell in New York. Thus, New York's long arm statute does not apply. The court further held that "even if personal jurisdiction was proper under the long arm statute, the assertion of personal jurisdiction would violate due process."

Bensusan, a New York Corporation which owns "The Blue Note" jazz club in New York City, brought

suit alleging that Richard B. King ("King") infringed on the Blue Note trademark by posting a site on the World Wide Web to promote a Missouri jazz club which he owned. King moved to dismiss for lack of personal jurisdiction.

In April 1996, King posted a general access site on the Internet. The site contained a disclaimer, a calendar of events, and names and addresses of ticket outlets in Columbia, Missouri. The disclaimer stated that "[t]he Blue Note's Cyberspot should not be confused with one of the world's finest jazz club[s] [the] Blue Note, located in the heart of New York's Greenwich Village." This site also contained a hyperlink, which allows Internet

users to connect to Bensusan's Blue Note site.

Providing information about the product is not a sale

Bensusan argued that the tortious act provisions of New York's long arm statute established personal jurisdiction over King. N.Y.C.P.L.R. § 302 (a)(2), (a)(3)(ii). Section 302(a)(2) of New York's long arm statute ("Section 302 (a)(2)") provides that personal jurisdiction may be found if one not domiciled in New York "commits a tortious act within the state" and the plaintiff's cause of action arises from this act. The Second Circuit, in *Vanity Fair*

Mills, Inc., set forth the standard for determining whether trademark infringement has occurred. See *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 639 (2d Cir. 1956). Under *Vanity Fair Mills, Inc.*, an offer to sell “even one copy of an infringing product in New York” is sufficient to establish personal jurisdiction. This is true even if no sale actually occurs. Accordingly, the issue in this case was whether the creation of a Web site constituted an offer to sell a product in New York.

The court held that King’s Web site, containing a telephone number to order tickets to a club in Missouri, does not constitute an offer to sell the alleged infringing product in New York. Thus, under Section 302 (a)(2), the court could not properly exercise personal jurisdiction over King.

The court pointed out that almost anyone with Internet access could gain access to King’s Web site. However, the court stated that obtaining information concerning the product is different from “a person advertising, promoting, selling or otherwise making an effort to target its product in New York.” The court noted that nothing suggests King shipped the product into New York or that King directed any other infringing activity to New York.

New York has no personal jurisdiction over King

Bensusan further contended that Section 302 (a)(3)(ii) of New York’s long arm statute (“Section 302 (a)(3)”) permitted the court to exercise personal jurisdiction over

King. Bensusan argued that under this provision, a court may “exercise personal jurisdiction over any non-domiciliary for tortious acts committed outside the state that cause injury in the state if the non-domiciliary ‘expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.’” The court rejected this argument because King did not receive substantial revenue from his Web site. Mere participation in interstate commerce is not enough to grant personal jurisdiction over a defendant where the defendant gained no “substantial revenue from interstate commerce.” The court noted that 99% of King’s revenue was derived from local residents in Columbia, Missouri.

Furthermore, the court stated that King’s knowledge that the Bensusan club was located in New York did not establish foreseeability; in order to meet the foreseeability requirement, the defendant must make a “discernible effort” to serve a market in New York. Finally, the court ruled that Bensusan did not show any “significant economic injury.” Thus, the court held that Section 302 (a)(3) did not authorize personal jurisdiction over King.

Personal jurisdiction over King in New York would violate due process

The court further held that even if personal jurisdiction was proper under New York’s long arm statute, granting personal jurisdiction in this case would violate the Due Process Clause of the United States Constitution. U.S. CONST. amend. XIV, § 1.

Due process requires minimum contact with the forum state such that “traditional notions of fair play and substantial justice” are not offended. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The minimum contact standard requires the examination of three factors:

- (1) whether the defendant purposefully availed himself of the benefits of the forum state;
- (2) whether the defendant’s conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there; and
- (3) whether the defendant carries on a continuous and systematic part of its general business within the forum state. *Id.*

The court held that King did not “purposefully avail himself of the benefits” of New York. He merely created a Web site which allowed anyone to access it. The court stated that creating a Web site is analogous to placing a product in the stream of commerce and is not purposefully directed at the forum state. The court further noted that King conducted no business in New York. Finally, the court stated that Bensusan’s allegation that King “should have foreseen that users could access the site in New York and be confused as to the relationship of the two Blue Note clubs is insufficient to satisfy due process.” Thus, the court held that King did not conduct “continuous or systematic” business within the

forum state.

In conclusion, the court granted King's motion to dismiss the trademark infringement case for lack of personal jurisdiction. The court held that King did not direct any

infringing activity toward New York. In addition, King did not make "a discernible effort" to market his club in New York. Finally, the court held that even if personal jurisdiction was proper

under New York's long arm statute, it would violate the Due Process Clause because King did not purposefully establish minimum contacts with New York. •

NBA games not "original works of authorship" — no protection under federal Copyright Act

by Thomas O'Connor

In *NBA v. Motorola, Inc.*, 105 F.3d 841 (2nd Cir. 1997), the United States Court of Appeals for the Second Circuit held that the transmission of scores and other information by way of a hand-held pager during National Basketball Association ("NBA") games does not constitute a misappropriation of "hot news," because athletic events are not original works of authorship and, thus, are not copyrightable.

Motorola developed "real time" NBA score pager

Motorola developed a hand-held pager which displays scores and other information from NBA games while the games are being played. Motorola receives the information from Sports Team Analysis and Tracking Systems ("STATS"), a company that monitors NBA games and gathers information. STATS employs reporters who watch the games on television or listen to them on the radio and subsequently enter the scores into personal computers. The information is relayed to a host computer which compiles and analyzes the data and sends it to a common carrier. The common carrier then sends the information, via satellite, to local FM radio networks which, in turn, emit a signal received by the Motorola pager. A lag of two to three minutes exists between the actual game and the display of information on the pager. The NBA maintained that the games and television broadcasts were "original works of authorship" and, therefore, were protected by the federal

Copyright Act ("the Act") and state misappropriation law.

Scores reproduced from copyrighted broadcast not infringement

In 1976, Congress amended the Copyright Act to provide copyright protection to broadcasts of live events, including sports. However, the issue in this case was not a rebroadcast of the game, but a reporting of scores and statistics from the broadcast. The scores and statistics are facts which any person attending an NBA may obtain. Facts are not copyrightable. Only expressions of originality may be copyrightable. Accordingly, the court held that STATS did not infringe on the copyrighted broadcasts.

Court differentiates between athletic events and the broadcasts of those events

While broadcasts of live basketball games involve skill and production, such that an unauthorized reproduction of the game would violate copyright laws, actual games and the correlative information and scores are not copyrightable. The court held that basketball games do not constitute "original works of authorship" under 17 U.S.C. § 102(a), as athletic events are not among or analogous to any of the eight categories of protected "works" in the Act. The court noted that any "scripting" of the events in a game is suggestive and general, and