

# Exhibit H

2000 WL 1678039

United States District Court, S.D. New York.

CABLE NEWS NETWORK, L.P., L.L.L.P., Gannett Satellite Information Network, Inc., Media West-GSI, Inc., The New York Times Company and its wholly owned subsidiary, Times Company Digital, Inc., the Washington Post Company, and its wholly owned subsidiary, Washingtonpost.Newsweek Interactive Company, Plaintiffs,

v.

GOSMS.COM, INC., Gosms.com, Ltd, Yuval Golan, Dr. Michael Golan, Brian Sagi and Karen Spinks, Defendants.

No. 00 Civ. 4812(LMM).Nov. 6, 2000.

## Opinion

### MEMORANDUM AND ORDER

MCKENNA, J.

\*1 Plaintiffs Cable News Network, L.P., L.L.L.P., Gannett Satellite Information Network, Inc., Media West-GSI, Inc., The New York Times Company and its wholly-owned subsidiary Times Company Digital, Inc., and the Washington Post Company and its wholly-owned subsidiary Washingtonpost.Newsweek Interactive Company (collectively “plaintiffs”) have brought this action against Defendants GoSMS.com, Inc. (“GoSMS.com-CA”), GoSMS.com, Ltd. (“GoSMS.com-Israel”) (collectively “GoSMS.com”), Yuval Golan (“Golan”), Dr. Michael Golan (“Dr.Golan”), Brian Sagi (“Sagi”), and Karen Spinks (“Spinks”) (collectively “defendants”) alleging copyright infringement under the Copyright Act, 17 U.S.C.A. § 501(a) (West Supp.2000), false advertising and trademark infringement and dilution under the Lanham Act, 15 U.S.C.A. § 1114 (West 1997 & Supp.2000), § 1125(c) (West 1998 & Supp.2000) and state law claims for tortious interference with contract, trademark infringement and dilution, unfair competition and deceptive acts and practices.

Defendants have moved to dismiss for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2); defendants Sagi and Spinks move to dismiss for failure to state a claim upon which relief may be granted pursuant to Fed.R.Civ.P. 12(b)(6); and defendants GoSMS.com-CA, Sagi and Spinks move to dismiss for improper venue

pursuant to 28 U.S.C. § 1391 (1994). For the reasons set forth below, defendants’ motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(2) is denied with leave to renew at the end of discovery; defendants Sagi and Spinks’ motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is granted and their motion to dismiss for improper venue is denied as moot; and defendant GoSMS.com-CA’s motion to dismiss for improper venue is denied.

### BACKGROUND

Plaintiffs bear the burden of establishing this Court’s jurisdiction over the defendants. *See Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir.1996). Prior to discovery, a motion to dismiss pursuant to Rule 12(b)(2) may be defeated if the plaintiffs’ complaint and affidavits contain sufficient allegations to establish a prima facie showing of jurisdiction.<sup>1</sup> *See id.* Moreover, the Court must assume the truth of the plaintiffs’ factual allegations, *see PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir.1997), even in light of defendants’ “contrary allegations that place in dispute the factual basis of plaintiff[s]’ prima facie case.” *Pilates, Inc. v. Pilates Inst., Inc.*, 891 F.Supp. 175, 178 (S.D.N.Y.1995).

<sup>1</sup> In considering a Rule 12(b)(2) motion, the court may consider affidavits and documents submitted by the parties without converting the motion into one for summary judgment under Rule 56. *See Laborers Local 17 Health and Ben. Fund v. Philip Morris, Inc.*, 26 F.Supp.2d 593, 604 (S.D.N.Y.1998).

Plaintiffs are established, well-known news organizations that have each set up independent web sites to deliver original articles (“content”) to computer users worldwide. Plaintiffs have or are in the process of registering this content with the United States Copyright Office. In addition, each plaintiff has licensed its content for republication in a variety of media, including syndication to internet service providers. Several of the plaintiffs have licensed their content to services similar to GoSMS.com.

\*2 Defendant GoSMS.com-CA is a corporation organized under the laws of the State of California and has its principle place of business in San Diego, California. Defendant GoSMS.com-Israel is a corporation organized under the laws of Israel and has its principal place of business in Tel-Aviv, Israel. Defendant Golan is the CEO of GoSMS.com and resides in Israel. Defendant Dr. Golan is the Chief Technical Officer of GoSMS.com and resides in Israel. Defendant Sagi is the manager of GoSMS.com and resides in San Diego. Defendant Spinks

is the director of GoSMS.com and resides in San Diego.

GoSMS.com's service offers its users the ability to receive information from the internet on various devices such as mobile telephones or computers. At least two times a day, GoSMS.com copies the trademarked and copyrighted content on plaintiffs' web sites onto a set of servers. GoSMS.com then converts the content into a "short message service" ("SMS") format which strips the content of all non-text material, such as advertisements and graphics, and transfers the SMS version of the content onto another set of servers for transmission to its subscribers. Both types of servers are located in San Diego and Israel.

The GoSMS.com service is currently offered free of charge in the United States. There are three ways plaintiffs' content is potentially accessed through GoSMS.com. The "GeeWeb" service allows users to send requests to GoSMS.com. GoSMS.com then browses the internet for responsive information and transmits it to mobile telephones with SMS capability or two-way e-mail devices. (Potenza Decl. Ex. A.) The "GeeAlert" service allows users to request that certain information be transmitted to their mobile telephones or two-way e-mail devices at pre-arranged times. (*Id.*) Finally, GoSMS.com's internet web site offers a simulation of the GeeWeb and GeeAlert services to computer users by transmitting information in the format as it would be displayed on a device capable of receiving information from GoSMS.com. (*Id.* Ex. B.) Use of all three services can result in the unauthorized copying of plaintiffs' copyrighted and trademarked content and the transmittal of that content.

The parties contest certain attributes of the GoSMS.com service that are crucial to determining whether jurisdiction properly can be asserted over the defendants by this Court, namely, whether the GoSMS.com service has ever been used by a New York resident.

Plaintiffs argue that the GoSMS.com service is available in New York by both mobile telephone and e-mail users.<sup>2</sup> Defendants counter that the only mobile telephone users in the United States who can use its service are those participating in a trial with Pacific Bell in California. Plaintiffs, however, point to defendants' representations on their web site and elsewhere that apparently indicate that the GoSMS.com service can be accessed via mobile telephones nationwide as well as internationally. Regarding e-mail users, defendants do not confirm or deny that there were New York residents who used the GoSMS.com service via e-mail.

<sup>2</sup> Since the filing of this lawsuit, GoSMS.com has discontinued its service for e-mail users.

\*<sup>3</sup> Although the 12(b)(2) standard requires the Court to construe all allegations in favor of the plaintiff, courts have granted Rule 12(b)(2) motions to dismiss when either plaintiff's allegations have been affirmatively disproved, see Stewart v. Vista Point Verlag & Ringier Publ'g, No. 99 Civ. 4225, 2000 WL 1459839, at \*4 (S.D.N.Y. Sept. 29, 2000), or were neither "factually based [nor] intuitively apparent." Mantello v. Hall, 947 F.Supp. 92, 102 (S.D.N.Y.1996). Defendants have not affirmatively disproved plaintiffs' allegations that GoSMS.com delivered infringing content to New York residents, particularly with respect to e-mail users. Nor do defendants allege that GoSMS.com could not transmit or prevents the transmission of such content via e-mail to New York residents. Although plaintiffs' allegations are factually unsupported,<sup>3</sup> it is "intuitively apparent" that GoSMS.com was available to, and therefore used by, residents of New York, the Court finds that for the purposes of this motion it must regard plaintiffs' allegations on this point as true.

<sup>3</sup> The Court will not consider evidence that one of plaintiffs' attorneys used the GoSMS.com service from a computer in New York. See Elbex Video Kabushiki Kaisha v. Taiwan Regular Elect. Co., 93 Civ. 6160, 1995 WL 224774, at \*2- \*3 (S.D.N.Y. Apr. 14, 1997) (declining to find jurisdiction on the grounds that the only basis for jurisdiction was manufactured by the plaintiff).

## DISCUSSION

### I. Defendants' Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to Fed.R.Civ.P. 12(b)(2)

Personal jurisdiction in federal court is determined by looking to the law of the forum state, in this case New York. When the defendant is a non-domiciliary, the Court determines whether personal jurisdiction is appropriate under either New York's "doing business" test under N.Y. C.P.L.R. 301 or under the long-arm statute, N.Y. C.P.L.R. 302(a) (McKinney's 1990) ("CPLR"). See Carell v. The Schubert Org., Inc., 104 F.Supp.2d 236, 268 (S.D. N.Y.2000). If the Court determines that jurisdiction is appropriate, it must then decide whether the exercise of jurisdiction comports with due process. See Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 240 (2d Cir.1999).

Plaintiffs assert that this Court has jurisdiction over defendants under either CPLR 301 or 302. Because the Court finds that jurisdiction is proper under CPLR 302(a)(3)(ii), it does not discuss the remaining provisions.

#### A. CPLR 302(a)(3)(ii)

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CPLR 302(a)(3)(ii) confers jurisdiction when plaintiffs' claims arise out of an out of state tortious act that caused injury within New York and when the defendants "expect or should reasonably expect the act to have consequences in the state and derive substantial revenue from interstate or international commerce." CPLR 302(a)(3)(ii). Defendants dispute that they have committed a tortious act without the state, that plaintiffs suffered harm in New York, that defendants should have expected GoSMS.com's service to have consequences in New York and that they derive substantial revenue from interstate or international commerce.

### 1. Tortious Act Committed Outside New York

In cases involving the posting of infringing material on an internet web site courts have held that the tort occurs where the web site is created and/or maintained, usually where the server supporting the web site is located, not where the internet web site can be seen, because that would be literally anywhere the internet can be accessed. See Telebyte, Inc. v. Kendaco, Inc., 105 F.Supp.2d 131, 134 (E.D.N.Y.2000); Citigroup, Inc. v. City Holding Co., 97 F.Supp.2d 549, 567 (S.D.N.Y.2000). Here, plaintiffs do not dispute that defendants' servers are located in California and Israel, therefore defendants committed the tortious act in either California, Israel or in both locations, but not in New York.

### 2. Harm Within New York

\*4 Plaintiffs claim that New York residents, who are among plaintiffs' customers and potential customers, have been confused and deceived by defendants' use of plaintiffs' trademarked and copyrighted content, (Compl.¶ 21, 39, 59, 63, 67). These allegations are sufficient to allege harm within the state under 302(a)(3)(ii). See Telebyte, Inc., 105 F.Supp.2d at 135-36; Citigroup, Inc., 97 F.Supp.2d at 568; American Network, Inc. v. Access America/Connect Atlanta, Inc., 975 F.Supp. 494, 497 (S.D.N.Y.1997).

### 3. Reasonable Expectation of Consequences in New York

Plaintiffs also allege sufficient facts for the Court to find that defendants reasonably should have expected the transmittal of trademark and copyright infringing content via the GoSMS.com service to have consequences in New York for the purposes of CPLR 302(a)(3)(ii).

In Kernan v. Kurz-Hastings, Inc., 175 F.3d 236 (2d

Cir.1999), the Court of Appeals for the Second Circuit held that an agreement between a Japanese producer and an American distributor to distribute the Japanese defendant's product worldwide, except for seventeen specified Asian countries, combined with its "general knowledge" that the American defendant would sell the product in the United States was sufficient to find that the Japanese defendant attempted to indirectly serve the New York market, even though the agreement did not specify New York. See id. at 242. Similarly, in a case involving trademark infringement on an internet web site, where the out-of-state defendant maintained a web site promoting its business, the district court found that 302(a)(3)(ii)'s foreseeability requirement was satisfied because the defendant claimed it could offer its services "across the U.S." and had signed up six New York subscribers. American Network, Inc., 975 F.Supp. at 499.

With respect to the geographical limitations on the GoSMS.com service, the GoSMS.com web site includes a Frequently Asked Questions section with the following exchanges:

I'm traveling abroad with my mobile. Will I still be able to receive information? E-mail?

If you are traveling in the US, you will be able to receive information and your e-mail to your phone.

Why can't users abroad use this service? My friend in England wants to.

Currently our service is limited to those countries in which we are currently operating. We are now working to enable users from other countries to receive our messages. (Potenza Decl. Ex. G at 1-2 .)

Defendants also admitted during oral argument that the use of the GoSMS.com service by mobile telephone is limited to "California, Israel, [and] parts of Europe." (Tr. at 10:1-2.) The GoSMS.com service is therefore both available in the United States and geographically limited with respect to the worldwide market. In terms of direct contact with the state of New York, plaintiffs allege that GoSMS.com transmitted infringing content to New York residents. Under the standard set forth in Kernan and American Network, the Court finds that plaintiffs have alleged sufficient facts to conclude that defendants indirectly sought to serve the New York market and thus that it was reasonable for defendants to expect that their infringement of plaintiffs' content would have consequences in New York.

### 4. Substantial Revenue From Interstate or International Commerce

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\*5 The requirement that the defendant derive substantial revenue from interstate or international commerce is designed to preclude the exercise of jurisdiction over “non-domiciliaries whose business operations are of a local character.” Bensusan Restaurant Corp. v. King, 126 F.3d 25, 29 (2d Cir.1997) (citation omitted). Thus, in Telebyte, Inc., the court found that the Washington state defendant’s business was “local” in nature when out of the defendant’s 1552 accounts, only nine were billed to addresses outside of the state of Washington. See 105 F.Supp.2d at 136. In this case, however, at oral argument, defendants admitted that GoSMS.com has earned \$60,000 in revenue from its operations in Europe and Israel. (Tr. at 16:6-7.) Although the amount is not large, the Court recognizes that it is common for internet companies to be viewed as extremely successful despite the fact that they operate at a great loss. The important fact in this analysis is that GoSMS.com’s operations are international and in no way limited to California.

GoSMS.com’s representations at oral argument and on their web site with respect to the geographical limitations of its service and plaintiffs’ allegations with respect to New York users are sufficient for the Court to conclude that defendants reasonably could have expected their infringement of plaintiffs’ content to have consequences in New York. The revenue derived from the defendants’ international operations ensures that defendants’ business is not local in nature, thus the Court finds that exercising personal jurisdiction over defendants pursuant to CPLR 302(a)(3)(ii) is not beyond the intended reach of the statute.

## B. Minimum Contacts

For the exercise of jurisdiction to comport with due process, the Court must find that the plaintiffs’ claims arises out of defendants’ contacts with the state, that defendants “purposefully availed,” Hanson v. Denckla, 357 U.S. 235, 253 (1958), themselves of the privilege of conducting activities within the forum state, and that defendants could “reasonably anticipate being haled into court there.” World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). The Court also must consider “whether the assertion of jurisdiction ‘comports with “traditional notions of fair play and substantial justice”-that is, whether it is reasonable under the circumstances of a particular case.” ’ Kernan, 175 F.3d at 243 (quoting Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir.1996) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945))).

The first part of the due process inquiry is satisfied by the same factors discussed regarding CPLR 302(a)(3)(ii). See Kernan, 175 F.3d at 243. Plaintiffs’ claims arise out of

defendants’ contacts with New York state, namely, plaintiffs’ allegation that defendants have transmitted infringing content to New York users. Advertisizing the GoSMS.com service as available nationally and transmitting infringing content to New York constitutes purposeful availment of the privilege of doing business in New York and provides a basis for defendants to reasonably expect they would be haled into court in New York for the infringing conduct.

\*6 Once the Court establishes that the defendants have minimum contacts with the state of New York, it is the defendants’ burden to “present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985). Defendants have not identified any such factors. As the district court noted in American Network, also involving infringement via an internet web site, New York has a “clear interest in adjudicating [a] dispute” involving harm to its residents, which includes one of the plaintiffs, the New York Times, “caused in part by confusion among New York residents.” American Network, Inc., 975 F.Supp. at 500. The Court is not aware of any countervailing reasons to refrain from asserting jurisdiction over defendants.

By virtue of the Court’s finding that GoSMS.com-CA is subject to personal jurisdiction in New York, venue is also proper. See 28 U.S.C. § 1391(c).

## II. Defendants Sagi and Spinks’ Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted Pursuant to Fed.R.Civ.P. 12(b)(6)

Under Rule 12(b)(6), a complaint will be dismissed if there is a “failure to state a claim upon which relief can be granted.” Fed.R.Civ.P. 12(b)(6). The Court must read the complaint generously accepting the truth of and drawing all reasonable inferences from well-pleaded factual allegations. See Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir.1993). “A court should only dismiss a suit under Rule 12(b)(6) if ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’ ” Valmonte v. Bane, 18 F.3d 992, 998 (2d Cir.1994) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

Plaintiffs allege in their complaint that Sagi was the manager of GoSMS.com, and that Spinks was the Director and that “[b]y virtue of [his/her] position and, upon information and belief [his/her] shareholdings, [he/she] is one of the individuals that controls the affairs of GoSMS.com and is personally involved in the infringing conduct alleged herein.” (Compl.¶¶ 18, 19.) Without allegations of acts of infringement, supervision or control over the direct infringers, or contribution to the infringement, the Court finds that plaintiffs’ allegations

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are insufficient to plead either direct copyright or trademark infringement or either contributory infringement or vicarious liability. See Carell v. The Shubert Org., Inc., 104 F.Supp.2d 236, 271 (S.D.N.Y.2000). The Court therefore grants defendants Sagi and Spinks' motion to dismiss pursuant to Rule 12(b)(6), thus rendering their motion to dismiss for improper venue moot.

## CONCLUSION

Defendants' motion to dismiss pursuant to Fed.R.Civ.P.

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12(b)(2) is denied with leave to renew at the end of discovery; defendants Sagi and Spinks' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is granted and their motion to dismiss for improper venue is denied as moot; and defendant GoSMS.com-CA's motion to dismiss for improper venue is denied.

Parallel Citations

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