

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

**FILED**

JUL 23 2004

JAMES BONINI, Clerk  
COLUMBUS, OHIO

**Donald I. Bowers,** :  
 :  
**Plaintiff** : **Case No. C2-03-788**  
 :  
**v.** : **Judge Sargus**  
 :  
**Precision Jet Drive** : **Magistrate Judge Abel**  
 :  
**and** :  
 :  
**Kimball Riecki,**  
 :  
**Defendants**

**OPINION AND ORDER**

Plaintiff Donald I. Bowers filed this action alleging that Defendants Precision Jet Drive and Kimball Riecki engaged in patent infringement in violation of Title 35 of the United States Code and copyright infringement in violation of Title 17 of the United States Code. The Complaint alleges that this Court has personal jurisdiction over the Defendants by virtue of the fact that they conduct business in this judicial district and their acts of infringement allegedly occurred in this district.

This matter is before the Court on Defendants' combined motion to dismiss for lack of jurisdiction over the person; motion to dismiss for improper venue, or in the alternative for transfer to an appropriate venue; and motion to dismiss for insufficiency of process (Doc. 5). The matter has been fully briefed.

## I.

### Overview

Plaintiff Donald Bowers, an Ohio resident, owns a patent for a Drive Pump Preloader for Reducing Cavitation (the '176 patent). He also owns the copyright to a work identified as a Cavitation Reducer Installation Sheet. Complaint, ¶¶ 7-10. Plaintiff alleges in the Complaint that Defendants Precision Jet Drive and Kimball Riecki, California residents, are selling an infringing cavitation reducer and that they are distributing a copy of Plaintiff's copyrighted installation sheet with the infringing device. Complaint, ¶¶ 6, 16, and 19.

Defendants maintain that they do not have sufficient contacts with Ohio for this Court to exercise personal jurisdiction over them. The parties have not conducted any discovery regarding personal jurisdiction. Plaintiff's assertion of personal jurisdiction is based on the affidavits of Bowers and two Ohio residents who purchased a cavitation reducer from Precision Jet Drive's website. liability

Although Bower's affidavit asserts that in late 2001 he "was informed that Defendant, Mr. Rieki, was approaching dealers, who were dealers for the resale of my cavitation reducer, and soliciting sales of his cavitation reducer," (Donald I. Bowers' January 6, 2004 Affidavit, ¶ 9), he did not state where these contacts were made. Further, Plaintiff has offered no evidence, admissible or otherwise, that those contacts were made in Ohio.

Larry Janney and Karl Petrik, who are Ohio residents and friends or acquaintances of Bowers, purchased cavitation reducers from the Precision Jet Drive website. Janney bought one device in May 2001 for \$365. He sent the device and an accompanying installation sheet to Bowers. (Larry R. Janney's January 10, 2004 Affidavit, ¶¶ 2 and 5.) Petrik bought one device in

May 2000 for \$298.40. He also sent the device and an accompanying installation sheet to Bowers. (Karl E. Petrik's January 7, 2004 Affidavit, ¶¶ 2 and 5.)

The issue before the Court is whether Precision Jet Drive's website and these two sales are sufficient to establish that defendants subjected themselves to personal jurisdiction. In particular, the Court considers whether Defendants have transacted business in the State within the meaning of Ohio Revised Code § 2307.382(A) through these contacts.

#### **A. Summary of the Parties' Arguments**

##### **1. Defendants**

Defendants maintain that their activities were not purposefully directed to the forum state and Plaintiff's cause of action did not arise from or relate to Defendants' contacts with the forum. Defendants maintain that the exercise of jurisdiction over them would offend traditional notions of fair play and substantial justice because they will be burdened by defending an action so far from its place of business. Defendants also contend that Ohio's interest in adjudicating this dispute is low, and Plaintiff is unlikely to achieve convenient and effective relief because most of the allegedly infringing goods were sold and remain in California. Defendants assert that the interstate judicial system's interest in obtaining the most efficient resolution of controversies and California's greater interest in this matter also weigh against Ohio as the forum state.<sup>1</sup>

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<sup>1</sup> Defendants also argue that the Ohio long-arm statute extends jurisdiction only if venue and jurisdiction are proper in the courts of Ohio. Defendants contend that because venue is not proper in Ohio, Defendants' due process rights are violated. Defendants urge this Court to dismiss the patent infringement claim because the applicable venue statute provides that venue is proper in California, and a similar venue provision applies to Plaintiff's copyright infringement claim. Defendants argue that Plaintiff's reliance on the copyright general venue statute, 28 U.S.C. § 1391, is misplaced because Plaintiff's claims do not have a substantial connection to Ohio. Defendants argue that because plaintiff filed this action in an improper district, the Court should dismiss the case or, in the alternative, transfer it to California. Defendants further contend that because service of process was defective, the Court lacks

## 2. Plaintiff

Plaintiff maintains that Defendants' contacts are sufficient to give this Court personal jurisdiction over them.<sup>2</sup> Plaintiff argues that Defendants are subject to Ohio's long-arm statute because they regularly solicit business in the State. Plaintiff argues that the operation of an internet website can constitute purposeful availment of the privilege of acting in the forum state if the website is interactive "to a degree that reveals specifically intended interaction with residents of the state." *Bridgeport Music Inc., v. Still N the Water Publishing*, 327 F.3d 472, 483 (6th Cir. 2003). Plaintiff asserts that by maintaining an interactive internet website that pictures the infringing product and solicits dealer inquiries, Defendants have sufficient minimum contacts with the forum state. The website permits customers to place orders, and plaintiff alleges that two buyers in Ohio did so.

## II.

### Personal Jurisdiction

The party asserting that the Court has personal jurisdiction has the burden of proving it.

*Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991); *Weller v. Cromwell Oil Co.*, 504

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personal jurisdiction over the defendants and should dismiss the suit. Defendants maintain that because jurisdiction and venue are not proper, service is defective.

Because the Court disposes of the Motion on the basis of personal jurisdiction, it need not address these alternative arguments raised by Defendants.

<sup>2</sup> Plaintiff also argues that venue is proper in this in this district so that service was effective. Plaintiff asserts that venue is proper under 28 U.S.C. § 1400(a), the special venue provision of the Copyright Act, because the Defendant "may be found" in this district. According to Plaintiff, a defendant "may be found" in any district where the defendant has had sufficient contracts for personal jurisdiction. Plaintiff argues that, because this Court has jurisdiction of the copyright claim, the Court also has jurisdiction for the patent claim pursuant to Rule 18(a) of the Federal Rules of Civil Procedure.

F.2d 927 (6th Cir. 1974). If the defendant supports its Rule 12(b)(2) motion to dismiss by affidavit, plaintiff “by affidavit or otherwise must set forth specific facts showing that the court has jurisdiction.” *Weller*, 504 F.2d at 930. When presented with a properly supported Rule 12(b)(2) motion to dismiss, a court has the discretion to decide the motion on the briefs and affidavits or it may permit discovery and an evidentiary hearing. *Theunissen*, 935 F.2d 1458.

In the absence of a preliminary evidentiary hearing, the plaintiff need only make a *prima facie* showing of personal jurisdiction. *Theunissen*, 935 F.2d 1458; *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1168-69 (6th Cir. 1988). “Where a federal court’s subject matter jurisdiction over a case stems from the existence of a federal question, personal jurisdiction over a defendant exists ‘if the defendant is amenable to service of process under the [forum] state’s long-arm statute and if the exercise of personal jurisdiction would not deny the defendant[ ] due process.’” *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir. 2002) (citation omitted). A federal district court may exercise personal jurisdiction only if the requirements of both the state long-arm statute and constitutional due process are met. *See Calphalon Corp. v. Rowlette*, 228 F.3d 718, 721 (6<sup>th</sup> Cir. 2002); *Nationwide Mutual Ins. Co. v. Tryg International Ins. Co.*, 91 F.3d 790, 793 (6th Cir. 1996); *Reynolds v. International Amateur Athletic Fed’n*, 23 F.3d 1110, 1115 (6th Cir. 1994); *see also Goldstein v. Christiansen*, 70 Ohio St. 3d 232, 235, 638 N. E. 2d 542, 543 (1994) (“When determining whether a state court has personal jurisdiction over a nonresident defendant, the court is obligated to (1) determine whether the state’s ‘long-arm’ statute and the applicable Civil Rule confer personal jurisdiction, and if so, (2) whether granting jurisdiction under the statute and rule would deprive the defendant of the right to due process of law pursuant to the Fourteenth Amendment to the United States Constitution.”).

The Ohio Supreme Court has concluded that the Ohio long-arm jurisdiction is not as expansive as the constitutional limits of due process. *Cole v. Mileti*, 133 F.3d 433, 436 (6th Cir. 1998) (citing *Goldstein*, 638 N.E. 2d 545 at n.1). Although Ohio’s long-arm statute “does not extend to the constitutional limits of the Due Process Clause, [the] central inquiry is whether minimum contacts are satisfied so as not to offend ‘traditional notions of fair play and substantial justice.’” *Calphalon*, 228 F.3d at 721 (citing *Cole*, 133 F.3d at 436). When jurisdiction is founded on the long-arm statute, the asserted cause of action must arise from at least one of the nine criteria listed in the statute. See Ohio Rev. Code § 2307.382(A)(1)-(9); *Berning v. BBC, Inc.*, 575 F.Supp. 1354, 1356 (S.D. Ohio 1983). These criteria include such factors as transacting business in Ohio, contracting to supply goods or services in Ohio, causing tortious injury in Ohio, and having a real property interest in Ohio. Ohio Rev. Code § 2307.382(A)(1)-(9).

**A. Jurisdiction Under Ohio’s Long-Arm Statute**

Plaintiff argues that the Court may properly exercise specific jurisdiction over Defendants in the context of this case based on their contacts with the State of Ohio. Plaintiff maintains that Defendants are subject to jurisdiction under the state’s long-arm statute because Defendants transact and solicit business in Ohio and/or caused tortious injury in the State. In that regard, Ohio Revised Code § 2307.382 creates a limited basis for the exercise of personal jurisdiction when the litigation is based on one of the acts set forth in the statute. Plaintiff alleges personal jurisdiction under sections 1, 2, and 4 of Ohio’s long-arm statute, which provide:

- (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person’s:
  - (1) Transacting any business in this state;
  - (2) Contracting to supply services or goods in this state; . . .

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

Ohio Rev. Code § 2307.382(A). As the Sixth Circuit has noted, determining whether a defendant transacted business for the purposes of Ohio's long-arm statute is a two-step inquiry:

Under *Southern Machine Co. v. Mohasco Industries*, 401 F.2d 374 (6th Cir.1968), business is transacted in a state when obligations created or operations set in motion by the defendant have a realistic impact on the commerce of that state. *Id.* at 382. Similarly, a defendant has purposefully availed himself of the opportunity of acting there if he should reasonably have foreseen that the transaction would have consequences in the state. *Id.*

*PTG Logistics, LLC v. Bickel's Snack Foods, Inc.* 196 F. Supp. 2d 593, 599 (S.D. Ohio, 2002).

Accordingly, the Court proceeds with an analysis to assess whether the exercise of specific personal jurisdiction is proper under the long-arm statute and whether it would comport with Defendants' due process rights

#### **B. Due Process**

The constitutional touchstone in any jurisdictional analysis is whether the non-resident defendant established such minimum contacts with the forum state that the exercise of jurisdiction would comport with "traditional notions of fair play and substantial justice."

*International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); *Theunissen*, 935 F.2d at 1459. The Sixth Circuit applies a three-part test to ensure compliance with due process in the exercise of specific personal jurisdiction:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the

defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.

*Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968); *see also In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 226 (6th Cir. 1972); *National Can Corp. v. K Beverage Co.*, 674 F.2d 1134, 1137-38 (6th Cir. 1982).

Purposeful Availment of the Forum State. In the first step of the analysis, the Court considers whether Defendants purposely availed themselves of the privilege of conducting activities in the forum state so as to invoke the benefits and protections of its laws. In most cases, the Court employs a common sense inquiry as to “whether the defendant has transacted business within the forum state in the usual, commercial sense of ‘doing business.’” *American Greetings*, 839 F.2d at 1169. The inquiry is designed to consider whether a defendant has become involved with the forum through actions freely and intentionally done which have effects in the forum state. *In-Flight Devices Corp.*, 466 F.2d at 226.

Plaintiff asserts that Defendants purposefully directed their actions towards residents of Ohio. Specifically, Plaintiff argues that Defendants purposefully availed themselves and created a continuing obligation in Ohio by selling two cavitation reducers to Ohio buyers who placed their orders using the Precision Jet Drive website. Plaintiff also maintains that Defendants approached dealers and solicited sales of the cavitation reducer.<sup>3</sup>

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<sup>3</sup> Complicating matters, however, is the odd fact that both of the orders placed with Precision Jet Drive were done so by people familiar with the Plaintiff. The nature of the relationship between Plaintiff and affiants is unclear, although it is peculiar that both affiants placed the order for cavitation reducers and then sent them to the Plaintiff. Further, Plaintiff does not identify who informed him that Defendant was approaching dealers or any other specifics.



Plaintiff relies heavily on the argument that Defendants' internet website provides the basis for the exercise of personal jurisdiction. In determining whether personal jurisdiction exists over an out-of-state defendant where minimum contacts are asserted based on internet usage, the Court employs a sliding-scale approach to determine the nature and quality of the commercial activities conducted by a defendant over the internet. In *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), cited with approval by the Sixth Circuit in *Neogen Corporation v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890 (6th Cir. 20002), the court discussed the advent of internet commerce and a continuum for analyzing personal jurisdiction:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. *E.g. CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir.1996). At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. *E.g. Bensusan Restaurant Corp., v. King*, 937 F. Supp. 295 (S.D.N.Y.1996). The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. *E.g. Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo.1996).

*Zippo*, F. Supp. at 1124.; see also *Bath & Body Works, Inc. v. Wal-Mart Stores, Inc.*, No. C2-99-1190, 2000 WL 1810478 (S.D. Ohio Sept. 12, 2000).

As stated above, in the middle of the spectrum, a defendant's website allows a user to exchange information with a host computer. In that case, the exercise of jurisdiction is determined by the level of interactivity as well as the commercial nature of the exchange of

information that occurs on the website. Here, the affidavits of Karl E. Petrik and Larry R. Janney indicate that the Defendants' website is somewhat interactive because they each ordered a cavitation reducer from it. The website does more than merely advertise on the internet to an extent that its activities are more than passive. At the same time, however, Defendants have not entered into any long-term contracts with Ohio residents that require repeated transmission of computer files over the internet. Because of the nature of the website, the Court concludes that Defendants' website may properly be described as interactive in terms of the sliding-scale approach developed in the *Zippo* line of cases.

In similar commercial-internet cases, courts have found several factors significant in assessing whether jurisdiction is proper. For instance, courts are more likely to find an internet site more active when out of state defendants have had continued communications via email or other electronic means after first being contacted by a prospective customer or if the internet host provides consumers with passwords for constant access to the website. *See, e.g., Edwards v. Erdey, et al.*, 770 N.E. 2d 672, 675 (2001)(noting that defendants responded to plaintiff's inquiring by email the same day and exchanged a series of emails to schedule surgery); *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890-891 (6th Cir. 2002)(finding purposeful availment when defendant provides buyers with passwords to access website on a regular basis). In the Sixth Circuit, however, maintenance of a website in and of itself, does not constitute the purposeful availment to the forum state in the Sixth Circuit. *Neogen Corp.*, 282 F. 3d at 890. "The level of contact with a state that occurs simply from the fact of a website's availability on the Internet is therefore an 'attenuated' contact that falls short of purposeful availment." *Id.* (citing *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 300 (S.D.N.Y. 1996).

Plaintiff has not presented any facts establishing that Defendants created a continuing relationship or obligation in Ohio. Other than its internet website, Defendants have no continuing interactions within the State. Here, the only evidence that Defendants transacted business in Ohio is their website, which is accessible to Ohio residents to purchase the alleged infringing device over the internet, and two purchases by Ohio residents using the website. Both purchases were made by friends or acquaintances of Bowers, and both purchasers sent their purchases directly to Bowers. These facts are simply insufficient to establish that Precision Jet Drive and Kimball Riecki transacted business in Ohio within the meaning of Ohio Revised Code § 2307.382(A)(1).

Claim Arising from Activities in the Forum State. The “arising from” requirement is satisfied when the operative facts of the controversy arise from the defendant’s contacts with the state. *See Southern Machine*, 401 F.2d at 384. Defendants’ contacts are directly related to the patent and copyright claims asserted by Plaintiff. Therefore, Plaintiff’s claims arise from activities in the forum state.

Substantial Connection with the Forum State. The Court cannot find that the exercise of jurisdiction over Defendants would be reasonable under the circumstance. As noted, the third part of the analysis requires inquiry into whether a defendant’s conduct establishes a “substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.” *Southern Machine*, 401 F.2d at 381. The Court considers whether the Defendants’ conduct relates to the forum in a way that they should have reasonably anticipated being haled into court. *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

When considering whether exercising personal jurisdiction over a defendant would be reasonable, *i.e.*, whether it would “comport with traditional notions of fair play and substantial justice,” a court must consider several factors. *Reynolds*, 23 F.3d at 1117 (quoting *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987)). These factors include, “the burden on the defendant, the interest of the forum state, the plaintiff’s interest in obtaining relief, and the interest of other states in securing the most efficient resolution of controversies.” *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169-70 (6th Cir.1988) (citing *Asahi Metal*, 480 U.S. at 113).

Ohio has a strong interest in discouraging patent and copyright infringement within the state and in seeing that its residents’ property interests are protected. The Court is cognizant that the concept of reasonableness in the context of asserting jurisdiction serves in part to protect a non-resident defendant against the burdens of litigating in a distant or inconvenient forum. *World-Wide Volkswagen*, 444 U.S. at 291. At the same time, the Court recognizes that Plaintiff, an Ohio resident, will, by operation of this decision, be forced to seek its remedy in an equally distant and inconvenient forum. The Court is not insensitive to this paradox.

Jurisprudence in the complex area of personal jurisdiction arising in the commercial-internet age continues to evolve. The analysis in this case, however, simply compels the conclusion that exercising personal jurisdiction over these particular Defendants would not be reasonable. To do so under the circumstances presented here would violate notions of due process when such jurisdiction is based on Defendants’ maintenance of the website and *de minimus* contacts with Ohio residents for the purchase of two allegedly infringing products over the internet.

### III.

The Complaint indicates that both Defendants Precision Jet Drive and Riekki reside in Brea, California, which is located in the Central District of California, Southern Division. *See* 28 U.S.C. § 84. Because jurisdiction is lacking, the Court may transfer this action to a court in which the action could have been brought at the time it was filed pursuant to 28 U.S.C. § 1631.<sup>4</sup> Defendants have requested that this Court transfer the case to California. Plaintiff has not taken a position with respect to the request for a transfer.

Defendants reside in California and have a place of business in Brea, California. Plaintiff could have brought the action in a California court under principles of general jurisdiction arising from Defendants' "systematic and continuous" contact with California. The Court determines, in the interest of justice, that it will transfer the action to the United States District Court for the Central District of California. 28 U.S.C. § 1631; *see also* 28 U.S.C. § 1406 ("The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.")


### IV.

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<sup>4</sup> 28 U.S.C. § 1631 provides in full:

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

The Court therefore concludes that exercising personal jurisdiction over Defendants would not be reasonable. The Court does not, of course, pass on the substantive issue of whether Defendants have infringed Plaintiff's patented or copyrighted works. The Court's decision relates exclusively to personal jurisdiction over Defendants. Because Plaintiff has not made a prima facie showing of jurisdiction, the Court need not consider whether venue or service of process were proper. Defendants' combined motion to dismiss for lack of jurisdiction over the person; motion to dismiss for improper venue, or in the alternative for transfer to an appropriate venue; and motion to dismiss for insufficiency of process (Doc. 5) is **GRANTED** to the extent of this Order. The Complaint indicates This action is hereby **TRANSFERRED** to the United States District Court for the Central District of California, Southern Division.

  
7-23-2004  
**EDMUND A. SARGUS, JR.**  
**UNITED STATES DISTRICT JUDGE**