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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11 IMAGELINE, INC.,

12 Plaintiff,

13 v.

14 DAVID HENDRICKS, et al.,

15 Defendants.

Case No. CV 09-1870 DSF (AGR_x)

**DEFENDANT'S NOTICE OF
MOTION AND MOTION TO
DISMISS FOR LACK OF
PERSONAL JURISDICTION
AND IMPROPER VENUE, OR,
IN THE ALTERNATIVE, TO
TRANSFER VENUE**

Date: July 27, 2009

Time: 1:30pm

Courtroom: 840

Judge: Dale S. Fischer

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21 TO PLAINTIFF IMAGELINE, INC. AND ITS ATTORNEYS OF RECORD:

22 PLEASE TAKE NOTICE that on July 27, 2009 at 1:30pm in the Courtroom
23 of the Honorable Dale S. Fischer of the above referenced court, located at 255 East
24 Temple Street, Los Angeles, California, 90012, Defendant David Hendricks will
25 move to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(2) and (3) on the
26 grounds that the court lacks personal jurisdiction and that venue is improper.

1 This Motion will be based on this Notice, the attached Memorandum of
2 Points and Authorities, the Declaration of Dave Hendricks, the files and records in
3 this action, argument of counsel, and upon such other and further matter adduced at
4 the hearing or of which the court takes judicial notice.

5 The Motion is made following the conference of counsel pursuant to
6 L.R. 7-3, which took place on June 10, 2009.

7 Respectfully submitted, and dated: June 22, 2009.

8 **BALASUBRAMANI LAW**

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10 By: /s/ Venkat Balasubramani
Venkat Balasubramani

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12 Attorneys for David Hendricks
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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **DEFENDANT’S MOTION TO DISMISS OR TRANSFER VENUE**

3
4 **I. INTRODUCTION**

5 Defendant David Hendricks¹ (“*Hendricks*”) respectfully requests the Court
6 to dismiss this lawsuit on the basis of lack of personal jurisdiction and improper
7 venue. Neither Hendricks nor Plaintiff Imageline, Inc. (“*Imageline*”) reside in the
8 State of California or in this judicial district. Hendricks is a sole proprietor located
9 in the State of Washington. Imageline is a Virginia corporation having its
10 principal place of business in Ashland, Virginia. Furthermore, Hendricks has not:

- 11 • Owned or leased real or personal property in the State of California;
12 • Owed or been required to pay taxes in the State of California;
13 • Maintained an office in the State of California;
14 • Maintained a registered agent for service in the State of California;
15 • Had employees in the State of California;
16 • Conducted print, radio, television, or any other advertising that was directed
17 to California residents; or
18 • Conducted promotions or sponsored events in the State of California.

19 The sole contacts purportedly supporting personal jurisdiction and venue are sales
20 of a small amount of allegedly infringing material fortuitously purchased by
21 California residents through a website operated by a third-party, eBay, Inc.

22 Mr. Hendricks has not directed his business activities to the State of
23 California, could not have reasonably anticipated being haled into court here, and
24 therefore this court lacks personal jurisdiction over Hendricks. Venue is similarly

25 ¹ Plaintiff has also named Freedom Vending, Inc. as a party. However, Freedom
26 Vending is not an incorporated legal entity, but rather a “d/b/a” used by Mr.
Hendricks, who is a sole proprietor.

1 improper because Hendricks has even less of a connection to this judicial district.
2 Under the statute governing venue in copyright actions, 28 U.S.C. § 1400(a), venue
3 lies only “in the district in which the defendant or his agent resides or may be
4 found.” Neither of those conditions are met.

5 Because personal jurisdiction and venue are improper, Imageline’s
6 Complaint should be dismissed. However, if the Court finds that personal
7 jurisdiction and venue are proper, the convenience of the parties and witnesses, the
8 disparity of means between the parties, and concerns of efficiency warrant a
9 transfer of the action to the Western District of Washington.

10 **II. FACTUAL BACKGROUND**

11 **A. David Hendricks**

12 David Hendricks is a resident of Sedro Wooley, Washington. (Declaration
13 of David Hendricks (“Hendricks Decl.”), ¶ 1.) He is a sole proprietor doing
14 business under several trade names, including Freedom Vending. (Hendricks
15 Decl., ¶ 2.) Hendricks engages artists as independent contractors to produce
16 computer vector images, commonly known as “clip art.” (Hendricks Decl., ¶ 3.)
17 Hendricks compiles the clip art into multi-image collections which he then
18 distributes through his own website and through the website operated by online
19 retailer eBay. (Hendricks Decl., ¶ 4.) Hendricks does not have any employees,
20 either in the State of Washington or elsewhere. (Hendricks Decl., ¶ 5.) He does
21 not have an office outside the State of Washington. (Hendricks Decl., ¶ 6.)
22 Hendricks does not advertise in magazines, newspapers or through television or
23 radio. (Hendricks Decl., ¶ 7.) He does not conduct events or sponsor promotions.
24 (Hendricks Decl., ¶ 8.) Hendricks has not owned or leased any real or personal
25 property in California, nor has he ever owed or been required to pay taxes in
26 California. (Hendricks Decl., ¶ 9.) Hendricks has never maintained a registered

1 agent for service in the State of California. (Hendricks Decl. ¶ 10.)

2 Of Hendricks’s total sales and revenues, an insignificant portion are to
3 residents of California. (Hendricks Decl., ¶ 13.) The portion of his sales and
4 revenues to residents of the Central District of California are even smaller.
5 (Hendricks Decl., ¶ 14.)

6 **B. Imageline and its allegations regarding infringement by Hendricks**

7 On March 18, 2009, Imageline filed the instant Complaint against David
8 Hendricks, Freedom Vending, Inc., and Does 1-10, alleging claims for: (1)
9 copyright infringement; and (2) alteration of copyright management information.

10 Imageline describes itself as a corporation “organized and existing under the
11 laws of the State of Virginia, having its principal place of business in Ashland,
12 Virginia.” (Complaint, ¶ 7.) It further describes itself as “a global leader
13 specializing in the creation, production, development and marketing” of clip art.
14 (Complaint, ¶ 2.)

15 Imageline claims that this Court has jurisdiction pursuant to 28 U.S.C. §
16 1331 and § 1338(a), and that venue is proper pursuant to 28 U.S.C. § 1391(b) and
17 § 1400(a). (Complaint, ¶ 5, 6.) While Imageline has not expressly stated in its
18 Complaint what acts support jurisdiction and venue, the only allegation that
19 arguably supports these claims is that Hendricks, through his use of the eBay
20 website, “has done business in and continues to do business in California through
21 sales and distribution of the Infringing Works in the State of California, among
22 other places.” (Complaint, ¶ 10.)

23 **III. DISCUSSION**

24 **A. Hendricks is not subject to personal jurisdiction**
25 **in the state of California**

26 In opposition to a defendant’s motion to dismiss for lack of personal

1 jurisdiction, the plaintiff bears the burden of establishing that jurisdiction is proper.
2 *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). Here, Imageline
3 cannot “simply rest on the bare allegations of its complaint,” but rather must
4 “come forward with facts, by affidavit or otherwise, supporting personal
5 jurisdiction.” *Amba Marketing Systems, Inc. v. Jobar Intern.*, 551 F.2d 784, 787
6 (9th Cir. 1977).

7 When no federal statute specifically confers personal jurisdiction, the district
8 court applies the law of the forum state. *CE Distrib., LLC v. New Sensor Corp.*,
9 380 F.3d 1107, 1110 (9th Cir. 2004). California’s long-arm statute permits
10 California courts to exercise jurisdiction on any basis consistent with the
11 Constitutions of California and the United States, i.e., to the limits of due process.
12 CAL. CODE. CIV. PROC. § 410.10; *see also Peterson v. Highland Music, Inc.*, 140
13 F.3d 1313, 1317 n. 2 (9th Cir. 1998). A court may exercise personal jurisdiction
14 over a non-resident defendant consistent with due process only if he or she has
15 “certain minimum contacts” with the forum state “such that the maintenance of the
16 suit does not offend traditional notions of fair play and substantial justice.” *Int’l*
17 *Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)
18 (internal quotations omitted). There are two forms of personal jurisdiction that a
19 forum state may exercise over a non-resident defendant – general jurisdiction and
20 personal jurisdiction. For the reasons stated below, Hendricks is subject to neither.

- 21 1. The Court lacks general jurisdiction because Hendricks’s contacts
22 with California do not “approximate physical presence”.

23 General jurisdiction exists where the business contacts with the forum state
24 are so substantial, continuous and systematic that they “approximate physical
25 presence.” *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086
26 (9th Cir. 2000). The types of contacts with a forum state determined by courts to

1 confirm general jurisdiction include, ownership of property, the maintenance of
2 bank accounts, having employees, soliciting business, or having a designated agent
3 in the state. *See Glencore Grain v. Shivnath Rai Harnarain*, 284 F.3d 1114, 1124-
4 25 (9th Cir. 2002). Conversely, “engaging in commerce with residents of the
5 forum state is not in and of itself the kind of activity that approximates physical
6 presence within the state’s borders.” *Bancroft & Masters, Inc.*, 223 F.3d at 1086.

7 Hendricks’s contacts with California do not approximate those necessary to
8 confer general jurisdiction. (*See generally* Hendricks Decl.) Like the defendant in
9 *Glencore Grain*, who the court found lacked the necessary contacts to support
10 general jurisdiction, Hendricks does not own property, maintain bank accounts,
11 have employees, solicit business, or have a designated agent in the state of
12 California. The only contacts that the defendant in *Glencore Grain* had with
13 California were the employment of an independent sales agent to distribute the
14 defendants’ products, and fifteen shipments into San Francisco. Here, Hendricks
15 has significantly less contacts than the defendant in *Glencore Grain*. Any contacts
16 in this case are the result of isolated and fortuitous sales via eBay, the location of
17 these sales are entirely out of Hendricks’s control. As in *Glencore Grain*, general
18 jurisdiction is improper.

19 2. The Court lacks specific jurisdiction because Hendricks has not
20 purposefully directed activity to California, and because the
21 exercise of jurisdiction would be unreasonable.

22 Courts in the Ninth Circuit use a three part test to determine whether specific
23 jurisdiction exists: (i) the nonresident defendant must purposefully direct his
24 activities or consummate some transaction with the forum or residents thereof; or
25 perform some act by which he purposefully avails himself of the privilege of
26 conducting activities in the forum, thereby invoking the benefits and protections of

1 its laws; (ii) the claim must be one which arises out of or relates to the defendant’s
2 forum-related activities; and (iii) the exercise of jurisdiction must comport with fair
3 play and substantial justice, i.e., it must be reasonable. *Boshcetto v. Hansing*, 539
4 F.3d at 1016. None of the three requirements has been met here.

5 a. *Hendricks has not purposefully directed activity to*
6 *the state of California.*

7 For claims sounding in tort, the purposeful direction or availment
8 requirement for specific jurisdiction is analyzed under the “effects” test derived
9 from *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). *Dole*
10 *Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002); *see also Menken v.*
11 *Emm*, 503 F.3d 1050, 1059 (9th Cir. 2007) (holding that where the “cause of action
12 arises primarily in tort . . . *Calder’s* ‘effects’ test is the proper framework”);
13 *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antise-mitisme*, 433 F.3d 1199,
14 1206 (9th Cir. 2006) (“ . . . in tort cases, we typically inquire whether a defendant
15 purposely directs his activities at the forum state, applying an ‘effects test’ . . .”).
16 A claim for copyright infringement sounds in tort. *Brayton Purcell LLP v.*
17 *Recordon & Recordon*, 361 F. Supp. 2d 1135, 1140 (N.D. Cal. 2007). *Calder’s*
18 effects test requires that the defendant allegedly have (1) committed an intentional
19 act, (2) expressly aimed at the forum state, (3) causing harm that the defendant
20 knows is likely to be suffered in the forum state. *Menken*, 503 F.3d at 1058.
21 While Imageline has alleged that Hendricks committed an intentional act, the
22 remaining requirements of *Calder’s* effects test are lacking.

23 (1) *Hendricks did not commit an intentional act “expressly*
24 *aimed” at California.*

25 The second prong of the *Calder* test, the requirement of “express aiming,” is
26 satisfied where the defendant is alleged to have engaged in wrongful conduct

1 targeted at a plaintiff whom the defendant knows to be a resident of the forum
2 state. *Calder*, 465 U.S. at 789. “Subsequent cases from [the Ninth] circuit bear
3 out the conclusion that ‘express aiming’ encompasses wrongful conduct
4 *individually targeting a known forum resident.*” *Bancroft & Masters, Inc.*, 223
5 F.3d at 1087 (emphasis added) (citing numerous cases using the “individual
6 targeting” standard). Here, Hendricks is alleged to have harmed Imageline, which
7 not a forum resident. There is no allegation that Hendricks committed any acts
8 expressly aimed at the State of California. Therefore, this prong of the test fails.

9 (2) Hendricks did not knowingly cause Imageline to suffer
10 harm in California.

11 Even if the “express aiming” requirement were satisfied, Imageline has
12 suffered no harm in California. In the copyright context, courts have rejected the
13 notion that the situs of “damage to intellectual property is determinative of where
14 the alleged infringer is subject to personal jurisdiction.” *Goldberg v. Cameron*,
15 482 F. Supp. 2d 1136, 1146 (N.D. Cal. 2007). Rather, courts find this prong
16 satisfied where the plaintiff resides in the forum state and can argue that the injury
17 is caused in the forum state. *See, e.g., Metro-Goldwyn-Mayer Studios Inc. v.*
18 *Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1090 (C.D. Cal. 2003) (“Plaintiffs have
19 alleged that [defendant] intentionally . . . contributed to the infringement of
20 Plaintiff’s works, and that it did so with full knowledge that much of the harm . . .
21 would be suffered in California.”); *Columbia Pictures Television v. Krypton*
22 *Broadcasting of Birmingham, Inc.*, 106 F.3d 284, 289 (9th Cir. 1997), *overruled on*
23 *other grounds* by *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 118 S.Ct.
24 1279 140 L.Ed.2d 438 (1998) (finding jurisdiction appropriate where defendant
25 “infringed copyrights owned by [plaintiff], which, as [defendant] knew, had its
26 principal place of business in the Central District”). In all of these cases, the

1 common thread is that the defendant is alleged to have infringed on copyrighted
2 material of a plaintiff who “defendant knew . . . had its principal place of business
3 in the forum.” *Columbia Pictures*, 106 F.3d at 289. This critical element is
4 lacking here. Plaintiff – by its own admission – does not have its principal place of
5 business in California. Therefore, it could not have suffered any harm here; nor
6 could Hendricks have foreseen that Imageline would suffer any such harm here.

7 *b. Imageline’s claims do not arise out of any forum-related*
8 *activities of Hendricks.*

9 As discussed above, Hendricks has not engaged in the type of forum-related
10 activities upon which jurisdiction can be conferred. Those type of activities consist
11 of acts towards a forum resident that Hendricks would have known would cause
12 harm in California. Such activities do not exist in this case, given that Imageline is
13 a Virginia corporation.

14 *c. The exercise of jurisdiction over Hendricks is not reasonable.*

15 The third part of the personal jurisdiction analysis examines whether the
16 exercise of the jurisdiction would be reasonable. Courts consider seven factors
17 when making this determination: (1) the extent of the defendant’s purposeful
18 interjection into the forum state’s affairs; (2) the burden on the defendant of
19 defending in the forum; (3) the extent of conflict with the sovereignty of the
20 defendant’s state; (4) the forum state’s interest in adjudicating the dispute; (5) the
21 most efficient judicial resolution of the controversy; (6) the importance of the
22 forum to the plaintiffs interest in convenient and effective relief; and (7) the
23 existence of an alternative forum. *CE Distrib., LLC.*, 380 F.3d at 1112. These
24 factors weigh in favor of Hendricks.

25 The first factor has been discussed in detail above. Hendricks’s only
26 contact with California involved placing materials for sale on the eBay website that

1 were then purchased by a small number of California residents. Hendricks does
2 not purposely direct sales towards California; the materials are available to anyone
3 who uses eBay. Further, Hendricks does not live in California, does not operate a
4 California business, does not have California-based employees, does not have a
5 registered agent in the state, and does not advertise in the state. Hendricks, then,
6 can hardly be said to “purposefully interject” into California’s affairs – any of his
7 contacts with California were fortuitous.

8 Regarding the second factor, the burden on Hendricks of defending in
9 California is substantial. Hendricks operates a small business as a sole-proprietor.
10 Hendricks has no employees, and runs the entire business himself. Defending in
11 California would require Hendricks to travel out-of-state, an expensive and time-
12 consuming proposition given that he is the sole person running his business.
13 (Hendricks Decl. § 17.) This factor favors Hendricks.

14 The third factor is neutral, as there is no apparent conflict between the
15 sovereignty of California and Washington.

16 Regarding factor four, Imageline (the plaintiff) is not a California
17 corporation, and it does not have its principal place of business in California.
18 Therefore, California has little to no interest in protecting Imageline, a foreign
19 corporation. If anything, California would have an interest in not hearing a dispute
20 which has no local impact between two non-residents. This factor favors
21 Hendricks as well.

22 The fifth factor concerns the efficiency of the forum. “In evaluating this
23 factor, [courts look] primarily at where the witnesses and the evidence are likely to
24 be located.” *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1489 (9th Cir.
25 1993). In this case, California is not the forum able to provide the most efficient
26 resolution to the controversy. Neither Hendricks nor Imageline are California

1 residents. Hendricks and employees of Imageline are the most likely and
2 important witnesses, and the relevant evidence will most likely be found in either
3 Washington or Virginia. Hendricks’s counsel is based in Washington. While
4 Imageline’s counsel is in California, this fact is clearly outweighed by the above.
5 Thus, this factor tilts in Hendricks’s favor.

6 The convenience and effectiveness of relief for the plaintiff comprise the
7 sixth factor. “[I]n this circuit, the plaintiff’s convenience is not of paramount
8 importance.” *Dole Food Co.*, 303 F.3d at 1116. While it may be more convenient
9 for Imageline to have this dispute adjudicated in California, due to the fact that its
10 counsel is found here, it is hard to see how resolution of the case in California
11 would be any more effective than in Washington. Given the weight accorded this
12 factor by Ninth Circuit courts, it is largely without import.

13 The seventh and final factor is the availability of an alternate forum.
14 Imageline bears the burden of proving the unavailability of an alternative forum.
15 *Core-Vent Corp.*, 11 F.3d at 1490. Imageline cannot meet its burden in this regard.
16 It cannot be disputed that, because Hendricks resides in Washington, the State of
17 Washington provides an alternative forum for this dispute. Weighing all of these
18 seven considerations, the balance of factors clearly favors Hendricks.

19 As demonstrated above, this court can assert neither general nor specific
20 personal jurisdiction over Hendricks. However, even assuming personal
21 jurisdiction is appropriate in the State of California, venue is not proper.

22 **B. Venue is not proper in this judicial district under 28 U.S.C. § 1400(a)**

23 The venue of a suit for infringement of copyright is not determined by the
24 general provision governing suits in the federal district courts. Rather, copyright
25 actions are subject to the venue provision set forth in the Copyright Act. 28 U.S.C.
26 § 1400(a); *Lumiere v. Mae Edna Wilder, Inc.*, 261 U.S. 174, 176, 43 S.Ct. 312, 67

1 L.Ed. 596 (1923).

2 28 U.S.C. 1400(a) provides that “[c]ivil actions, suits, or proceedings arising
3 under any Act of Congress relating to copyrights or exclusive rights in mask works
4 or designs may be instituted in the district in which the defendant or his agent
5 resides or may be found.” In a copyright action the “test for venue . . . is not
6 whether the works were copied and displayed in the forum.” *Brackett v. Hilton*
7 *Hotels Corp.*, Civ. No. 08-02100 WHA, 2008 U.S. Dist. LEXIS 88143, at *6 (N.D.
8 Cal. June 30, 2008). Rather, the Ninth Circuit has “interpreted the [copyright]
9 statute to mean that venue is proper in any judicial district in which the defendant
10 would be amenable to personal jurisdiction *if the district were a separate state.*”
11 *Goldberg v. Cameron*, 482 F. Supp. 2d at 1143 (emphasis added) (citing *Columbia*
12 *Pictures*, 106 F.3d at 288). Courts have rejected attempts by a plaintiff to argue
13 venue using a state-wide jurisdictional analysis. *Milwaukee Concrete Studios, Ltd.*
14 *v. Fjeld Manuf. Co.*, 8 F.3d 441, 446 (7th Cir. 1993) (“It is not sufficient that
15 [defendant] would be subject to personal jurisdiction under the . . . long-arm statute
16 by virtue of contacts with another district in [the] state.”) Thus, for purposes of
17 venue, the focus is on whether Hendricks would be subject to personal jurisdiction
18 in the Central District of California. “The court uses basically the same procedure
19 to decide a motion to dismiss for improper venue as it does for deciding a motion
20 to dismiss for lack of personal jurisdiction.” *Hudye Soil Services, Inc. v. Tyler*, 46
21 F. Supp. 2d 1157, 1161 (D. Kan. 1999); *see also Brayton Purcell LLP*, 361 F.
22 Supp. 2d at 1138.

23 As set forth in Section A, above, Hendricks lacks contacts with the State of
24 California of the type and sufficiency with which to warrant the assertion of either
25 general or specific personal jurisdiction over him. For jurisdictional (and in this
26 case venue) purposes, his purposeful contacts with the Central District of

1 California are even less than with the state as a whole. Hendricks has not directed
2 any relevant actions to the Central District of California. Hendricks does not have
3 any offices or employees there. His contacts with the Central District of California
4 are even more attenuated, and the assertion of personal jurisdiction over him
5 (assuming the Central District was a separate state) would be even more
6 unreasonable. Accordingly, venue is not proper in this judicial district.

7 **C. The Court should exercise its discretion to transfer this lawsuit**

8 To support a motion for transfer, the moving party must establish: (1) that
9 venue is proper in the transferee district; (2) that the transferee district is one where
10 the action might have been brought; and (3) that the transfer will serve the
11 convenience of the parties and witnesses and will promote the interests of justice.
12 *Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp.*, 820 F. Supp. 503, 506
13 (C.D. Cal. 1992). Because Hendricks resides in the Western District of
14 Washington, there is no dispute that venue is proper there and the action could
15 have been brought there. The relevant focus therefore is on the third factor.

16 In determining the convenience of the parties and witnesses and the interests
17 of justice, a court may consider a number of factors including: (1) the plaintiff's
18 choice of forum; (2) the convenience of the parties; (3) the convenience of the
19 witnesses; (4) ease of access to the evidence; (5) familiarity of each forum with the
20 applicable law; (6) feasibility of consolidation of other claims; (7) any local
21 interest in the controversy; and (8) the relative court congestion and time of trial in
22 each forum. *Id.* Factors five (familiarity with the issue), six (consolidation with
23 other claims), and eight (relative congestion) do not appear to weigh in either
24 direction. Accordingly, Hendricks focuses on the remaining factors.

25 1. Imageline's choice of forum is entitled to less deference.

26 Typically a plaintiff's choice of forum is entitled to deference. However,

1 less deference is given where the plaintiff has not chosen its home forum – *i.e.*,
2 where the lawsuit involves a non-resident plaintiff. *Lueck v. Sundstrand Corp.*,
3 236 F.3d 1137, 1143 (9th Cir. 2001). Here, Imageline is not a California resident.
4 Indeed, it appears to have no connection whatsoever to this forum other than that
5 its attorneys can be found here. Accordingly, Imageline as plaintiff is not entitled
6 to the same degree of deference as it typically would be.

7 2. The convenience of the witnesses and the parties favors a transfer.

8 The convenience of the witnesses and the parties favors a transfer.
9 Hendricks (the principal witness on the defense side and one of the parties) puts
10 forth evidence that it would significantly inconvenience him to travel to this forum
11 to testify and participate in defense of this lawsuit. (Hendricks Decl., ¶ 17.) Given
12 that plaintiff has no countervailing interest in prosecuting this lawsuit in this
13 forum, this factor favors a transfer. Imageline may argue that it is more convenient
14 for it to prosecute this action in this district since its counsel is located here, but
15 convenience of counsel is not a consideration in determining whether to transfer an
16 action. *See E & J Gallo Winery v. F. & P. S.P.A.*, 899 F. Supp. 465, 466 (N.D.
17 Cal. 1994).

18 3. The ease of access to evidence favors a transfer.

19 The ease of access to evidence favors a transfer. Courts do not weigh this
20 factor heavily, given the modern conveniences that have resulted in the easy
21 transfer of documents across jurisdictions. Nevertheless, in copyright cases, given
22 that “the bulk of evidence usually comes from the accused infringer,” this factor
23 typically weighs in favor of a transfer to the district where the alleged infringer is
24 located. *See AEC One Stop Group, Inc. v. CD Listening Bar, Inc.*, 326 F. Supp. 2d
25 525, 530 (S.D.N.Y. 2004).

1 4. The absence of local interest in the controversy favors a transfer.

2 The local interest factor also favors a transfer. In this case, the Central
3 District of California has no local interest in the controversy. As set forth above,
4 Imageline is not located in this state. Accordingly, the typical local interest – of
5 ensuring that the laws are enforced to protect local residents – is not present here.
6 If anything, the local interest counsels against hearing a dispute between two non-
7 resident parties which will have little if any effect on local affairs. Accordingly,
8 this factor strongly weight in favor of a transfer.

9 Finally, courts consider the “disparity of means” between the parties when
10 making a determination of venue. *See Popular Leasing USA, Inc. v. Terra*
11 *Excavating, Inc.*, No. 4:04-CV-1625 CAS, 2005 U.S. Dist. LEXIS 32267, at *23
12 (E.D. Mo. Jun. 28, 2005); *AEC One Stop Group, Inc.*, 326 F. Supp. 2d at 531;
13 *Wells’ Dairy Inc. v. Estate of Richardson*, 89 F. Supp. 2d 1042, 1056 (N.D. Iowa
14 2000). When both parties are corporations, this factor is given little weight. *AEC*
15 *One Stop Group, Inc.*, 326 F. Supp. 2d at 531. However, in the instant case,
16 Hendricks is a sole proprietor of a small business with no employees, while
17 Imageline is a corporation – “a global leader specializing in the creation,
18 production, development and marketing” of clip art. (Complaint, ¶ 2.) Further,
19 Imageline is being assisted in this litigation (and numerous other suits instigated by
20 Imageline throughout the country) by the Software & Information Industry
21 Association, the largest association of software and content owners in the United
22 States. (Hendricks Decl., ¶¶ 19, 20.) A clear disparity of means exists between
23 Hendricks and Imageline.

24 Weighing all relevant factors, the Central District of California is not the
25 proper venue for this action. Hendricks respectfully submits that the action should
26 be transferred to Western District of Washington, which is the proper venue.

1 **IV. CONCLUSION**

2 As set forth above, Hendricks has not purposefully directed his actions to the
3 State of California. Accordingly, he is not subject to personal jurisdiction in this
4 state. Stray sales of allegedly infringing product via eBay are insufficient to
5 subject him to jurisdiction here. These contacts have not caused any harm to the
6 State of California or its residents. Even assuming Hendricks is subject to
7 jurisdiction, venue is improper in this judicial district. Under the venue rules
8 applicable to copyright claims, venue is proper only in the “district where [a]
9 defendant . . . resides or may be found.” Hendricks does not reside in this judicial
10 district and may not “be found” here for purposes of the venue analysis. His
11 connections with this judicial district are even more attenuated than his
12 connections to the State of California. Accordingly, venue is improper. Finally,
13 even assuming personal jurisdiction and venue are proper, this action should be
14 transferred to the Western District of Washington, where the bulk of the relevant
15 witnesses are located. None of the parties are located in this judicial district, and
16 none of the relevant witnesses will be located here. There is no local interest in
17 adjudicating this dispute in this district. Adjudicating the lawsuit in this judicial
18 district would result in a needless expenditure of resources. For the reasons set
19 forth herein, Hendricks respectfully requests that the Court grant his Motion and
20 dismiss or transfer this lawsuit.

21 Respectfully submitted, and dated: June 22, 2009.

22 **BALASUBRAMANI LAW**

23 By: /s/ Venkat Balasubramani
24 Venkat Balasubramani

25 Attorneys for David Hendricks

CERTIFICATE OF SERVICE

1
2 The undersigned hereby certifies that on June 22, 2009, I caused the
3 foregoing Motion to Dismiss or Transfer (along with the accompanying
4 Declaration of Dave Hendricks and the Proposed Order) to be filed via the
5 CM/ECF system and served on opposing counsel via electronic notification.

6 I declare under penalty of perjury under the laws of the United States and the
7 State of California that the foregoing is true and correct and that this declaration
8 was executed on June 22, 2009 at Seattle, Washington.

9
10 */s/ Venkat Balasubramani*
11 Venkat Balasubramani
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