

06-1458

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

KAREN DUDNIKOV, and  
MICHAEL MEADORS,

Plaintiffs-Appellants,

v.

CHALK & VERMILION FINE  
ARTS, INC., and SEVENARTS,  
LTD.,

Defendants-Appellees.

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On Appeal from the United States District Court  
for the District of Colorado

The Honorable Walker D. Miller  
District Judge

D.C. No. 05-CV-02505-WDM-MEH

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APPELLANTS' OPENING BRIEF

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ORAL ARGUMENT REQUESTED

Brief has attachments submitted in digital form.

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**PRIOR OR RELATED APPEALS**

There are no prior or related appeals.

## **STATEMENT OF JURISDICTION**

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. Plaintiffs' claims arose under the Copyright Act, 17 U.S.C. § 501, the Digital Millennium Copyright Act, 17 U.S.C. § 512, and the Declaratory Judgment Act, 28 U.S.C. § 2201. (Aplt. App. at 9, ¶ 4.) This Court has jurisdiction over the appeal under 28 U.S.C. § 1291. The district court entered a final order dismissing all claims against all parties on September 15, 2006 (Aplt. App. at 193) and plaintiffs filed a timely notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A) on October 16, 2006 (Aplt. App. at 194).

## **STATEMENT OF THE ISSUE**

Whether the district court erred in holding that it lacked personal jurisdiction over defendants in Colorado when defendants invoked the notice-and-takedown provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512(c) ("DMCA"), to intentionally interfere with plaintiffs' business in the state.

## **STATEMENT OF THE CASE**

Plaintiffs Karen Dudnikov and Michael Meadors, joint operators of a small Internet-based business in Colorado, filed this action against Chalk & Vermilion Fine Arts, Inc., and SevenArts, Ltd., claiming that defendants wrongfully invoked the notice-and-takedown provisions of the DMCA to interfere with plaintiffs' sale of fabric on the website eBay.com. (Aplt. App. at 10-14, ¶¶ 13-34.) Plaintiffs

sought a declaratory judgment establishing that their sale of licensed Betty Boop fabric does not infringe defendants' copyright in a print by the artist Erté, whose work is parodied in the fabric. (*Id.* at 14-15, ¶¶ 26-27; 20, ¶ 1.) Plaintiffs also sought injunctive relief to prevent defendants from further interfering with their business. (*Id.* at 20, ¶¶ 2-4.)

Defendants moved to dismiss for lack of personal jurisdiction and improper venue, arguing that they had no contacts with Colorado and had directed no activities toward the state. (*Id.* at 56-57, 60-63.) The magistrate judge recommended that the motion be denied, finding that defendants knew plaintiffs' business was located in Colorado and intended to harm plaintiffs there by using the DMCA to interfere with plaintiffs' eBay sales. (*Id.* at 113-120.) The district court, however, sustained defendants' objection to the magistrate judge's recommendation, analogizing defendants' intentional interference with plaintiffs' business to cease-and-desist letters, which courts in prior cases have concluded do not give rise to personal jurisdiction in the state to which the letter is sent. (*Id.* at 188-192.) Accordingly, the district court dismissed the case for lack of personal jurisdiction. (*Id.* at 192, 193.)

This appeal followed.



## STATEMENT OF THE FACTS

Plaintiffs Karen Dudnikov and Michael Meadors are a husband-and-wife team who run a small, unincorporated business out of their home in Hartsel, Colorado. (*Id.* at 8, ¶ 1; 9-10, ¶¶ 6-12.) Plaintiffs sell fabric and handmade fabric crafts such as aprons, blankets, pot holders, and placemats under the name “Tabber’s Temptations.” (*Id.* at 9, ¶ 6.) They derive the majority of their business income from selling their products on eBay.com, a virtual Internet marketplace on which members can sell goods and services in online auctions. (*Id.* at 9-10, ¶¶ 8-9; 73, ¶ 12.) Each of plaintiffs’ eBay auctions states plaintiffs’ address in Colorado and prominently notes that the auctioned item is located there. (*Id.* at 88, ¶ 2; 92-94.)

Many of the fabrics sold by plaintiffs on eBay contain pre-printed copyrighted designs of licensed cartoon characters and logos. (*Id.* at 10, ¶ 10.) The fabric at issue in this case depicts the cartoon character Betty Boop wearing various elegant-looking gowns. (*Id.* at 12, ¶ 18; 47.) King Features, the owner of intellectual property rights in the Betty Boop character, granted a license to the fabric company Shamash & Sons to manufacture the fabric. (*Id.* at 12, ¶ 19-21.) Plaintiffs then purchased the licensed fabric from a retail fabric store for the purpose of selling it on eBay. (*Id.* at 10, ¶¶ 10-11; 13, ¶ 28.) Neither King

Features nor Shamash & Sons has objected to plaintiffs' sale of the fabric, and neither is a party to this action.

Defendant SevenArts is a British corporation that owns the copyright in the works of Erté (*id.* at 2, ¶ 2; 66, ¶¶ 2-3), an artist famous for his creation of elegant art deco fashion designs. *See* Wikipedia, <http://en.wikipedia.org/wiki/Erte> (last visited Jan. 5, 2007). Defendant Chalk & Vermilion, a Delaware corporation with its principal place of business in Connecticut, is SevenArts's agent in the United States and is responsible for enforcing SevenArts's intellectual property rights here. (Aplt. App. at 9, ¶ 3; 43; 68, ¶¶ 2; 108.) Upon discovering plaintiffs' auctions of the Betty Boop fabric, Chalk & Vermilion without warning filed a notice of claimed infringement with eBay, stating under penalty of perjury that it had a good faith belief that plaintiffs' auction of the fabric infringed its intellectual property rights. (*Id.* at 12, ¶ 22; 13, ¶ 26; 22; 39-40.)

The basis of Chalk & Vermilion's claim of infringement was that one of the gowns Betty Boop is depicted as wearing in the fabric resembles a gown depicted in two of Erté's most famous works. (*Id.* at 13, ¶ 26.) One of the Erté works, *Symphony in Black*, depicts a tall, slender woman wearing an elegant black gown and holding a thin black dog on a leash. (*Id.* at 15, ¶ 40; 46.) The other, *Ebony and White*, depicts another woman in a white gown holding a white dog. (*Id.*) The gown worn by Betty Boop in the fabric is easily recognizable as the dress worn by

the women in Erté’s famous images, but Erté’s tall, slender woman is replaced with Betty Boop’s cartoonish form, and Erte’s elegant dog is replaced with Betty Boop’s small polka-dotted dog Pudgy. (*Id.* at 15, ¶ 40; 47.)<sup>1</sup>

Chalk & Vermilion is a member of eBay’s “Verified Rights Owner”—or “VeRO”—program. (*Id.* at 10-11, ¶¶ 13-15; 22.) eBay implemented the VeRO program to take advantage of the safe harbor from liability provided by the notice-and-takedown provisions of the DMCA. 17 U.S.C. § 512; *see Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1085 (C.D. Cal. 2001). Section 512 of the DMCA shields Internet Service Providers (“ISPs”) from liability for infringing materials posted by their users if they act expeditiously to remove allegedly infringing content upon receiving a notice of claimed infringement from a copyright owner, and if they have a policy providing for termination of the accounts of repeat infringers. 17 U.S.C. § 512(c)(1)(C), (i)(1)(A). When eBay receives a notice of claimed infringement from a VeRO member stating, under penalty of perjury, that the member has a good-faith belief that a particular auction on eBay’s system infringes its copyright, eBay automatically terminates the auction without any investigation into the validity of the claim. (*Id.* at 10-11, ¶¶ 13-14; 88 ¶ 1.) If the targeted eBay seller has a record of previous unresolved

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<sup>1</sup> The district court’s order incorrectly stated that plaintiffs were selling a *dress* on eBay. (Aplt. App. at 189.) In fact, plaintiffs were selling *fabric* that included a *depiction* of a dress, worn by Betty Boop. (*Id.* at 12, ¶ 18-22; 13, ¶ 26; 107.)

terminations, eBay also suspends the seller's account. (*Id.* at 11, ¶¶ 13-15; 89-90, ¶ 11.)

Chalk & Vermilion's notice of claimed infringement under eBay's VeRO program resulted in the automatic termination of two of plaintiffs' auctions for the Betty Boop Fabric, causing them to lose sales and threatening them with potential termination of their eBay-based business (and primary source of income). (*Id.* at 12, ¶ 25; 14-15, ¶ 36.) Believing the fabric was not infringing, plaintiffs contacted Chalk & Vermilion and SevenArts by email to request that the company withdraw its notice of claimed infringement. (*Id.* at 11-12, ¶ 16; 13, ¶ 27.) Chalk & Vermilion referred plaintiffs' requests to SevenArts, which refused to withdraw the notice. (*Id.* at 13, ¶ 27-31; 28.)

Plaintiffs submitted a counter notice to eBay contesting the validity of defendants' copyright claim. (*Id.* at 13, ¶ 32.) Pursuant to the DMCA, a subscriber who is targeted by a notice of claimed infringement can contest the notice with the ISP by sending a counter notice to the ISP stating that the subscriber has a good faith belief that the material was removed as a result of mistake or misidentification of the material. *Id.* § 512(g)(3). The ISP will continue to enjoy a safe harbor from liability if it notifies the party who filed the notice of claimed infringement that it will reinstate the removed material in ten business days unless it receives notice that there is a pending legal action to

restrain the subscriber from continuing to post the allegedly infringing material.

*Id.* § 512(g)(2). When SevenArts received the counter notice, it notified plaintiffs that it would file suit within ten days to block the counter notice from going into effect. (*Id.* at 14, ¶¶ 33-34; 44.)

Plaintiffs then filed suit pro se in the United States District Court for the District of Colorado, seeking a declaratory judgment that their resale of the Betty Boop fabric did not infringe defendants' copyrights, and injunctive relief preventing future interference with their sales. (*Id.* at 14-15, ¶¶ 36-37; 20, ¶¶ 1-4.) Defendants moved to dismiss for lack of personal jurisdiction and improper venue, arguing that they had no contacts with Colorado and had directed no activities toward the state. (*Id.* at 56-57, 60-63.) Plaintiffs responded that defendants' actions were purposefully directed at them in Colorado and that defendants knew that submitting a notice of claimed infringement to eBay would interfere with their business in the state. (*Id.* at 72-76.)

The magistrate judge recommended that defendants' motion be denied, concluding that defendants knew plaintiffs were located in Colorado and that the primary effect of their actions would be felt there. (*Id.* at 113-120.) The district judge, however, sustained defendants' objection to the recommendation, concluding that defendants' interference with plaintiffs' business was "closely akin to the cease and desist letters which were insufficient to create personal jurisdiction

simply by informing parties, including the claimed infringer, of suspected infringement.” (*Id.* at 188-192.) The court held that a finding of personal jurisdiction in response to defendants’ assertion of a copyright interest would “encourage forum shopping, decrease the likelihood of settlement and obstruct efficient resolution of controversies.” (*Id.* at 192.) It therefore concluded that personal jurisdiction over defendants in Colorado would not be consistent with the requirements of due process and dismissed the case for lack of jurisdiction. (*Id.* at 192-93.) Plaintiffs filed a timely notice of appeal. (*Id.* at 194.)

### **SUMMARY OF THE ARGUMENT**

A defendant is subject to specific personal jurisdiction in a forum if the defendant purposefully directed its activities at residents of the forum, the plaintiff’s claim arises out of the defendant’s activities, and the exercise of personal jurisdiction is reasonable. *Pro Axess, Inc. v. Orlux Distribution, Inc.*, 428 F.3d 1270, 1276-79 (10th Cir. 2005). The first requirement is satisfied in this case because defendants intentionally invoked eBay’s DMCA policies with the purpose of interfering with plaintiffs’ sales. The fact that the plaintiffs and the targeted goods were located in Colorado was plainly stated in the listings for the auctions that defendants terminated. The district court’s imposition of an additional requirement that plaintiffs must show defendants’ conduct to be “wrongful” is not supported by the law and would improperly merge the jurisdictional analysis with

an analysis of the merits. Moreover, even if such a requirement did exist, the district court should not have applied it here, where plaintiffs alleged that defendants engaged in wrongful conduct and have not been given any opportunity to prove the merits of their claims.

The second requirement for a finding of personal jurisdiction is also satisfied here because plaintiffs' injuries arose from defendants' purposeful targeting of plaintiffs in Colorado. The district court erred in relying on *Wise v. Lindamood*, 89 F. Supp. 2d 1187 (D. Colo. 1999), which held that a cease-and-desist letter cannot give rise to personal jurisdiction in the forum to which it is mailed. Defendants did not merely send a cease-and-desist letter; they invoked the DMCA to purposefully and directly interfere with plaintiffs' business. Given that defendants intended to—and did—cause harm to plaintiffs in Colorado, defendants should have predicted that they would be called to account for their actions in Colorado.

Finally, jurisdiction in Colorado is reasonable. Defendants would not be seriously inconvenienced by being forced to litigate there, and, in any case, their intentionally harmful actions toward plaintiffs in Colorado make it the most reasonable forum. Colorado has an interest in protecting its citizens and local businesses from interference by foreign corporations, and plaintiffs themselves have a strong interest in access to a convenient forum. The only alternative forums in which plaintiffs could seek relief are California, Connecticut, or Britain, none of

which has a significant relation to the controversy or is reasonably accessible for plaintiffs. Holding defendants immune from the consequences of their conduct in Colorado would thus effectively give them unchecked authority to interfere with plaintiffs' business, leaving plaintiffs with no reasonable recourse.

Fundamental fairness does not allow defendants to use due process as a shield to hide from the natural consequences of their conduct. Personal jurisdiction in Colorado is therefore proper.

### **STANDARD OF REVIEW**

This Court reviews the district court's dismissal for lack of personal jurisdiction de novo. *Benton v. Cameco Corp.*, 375 F.3d 1070, 1074 (10th Cir. 2004).

### **ARGUMENT**

A federal district court may exercise personal jurisdiction over a defendant consistent with due process only if the defendant has "certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quotation omitted). By requiring that defendants have "fair warning" that a particular activity may subject them to jurisdiction, *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985), the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their



primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit,” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

A court’s jurisdiction over a defendant can be either general or specific. *See United States v. Botefuhr*, 309 F.3d 1263, 1271-72 (10th Cir. 2002). General jurisdiction “is based upon continuous or systematic contacts between the defendant and the forum state” that justify jurisdiction over the defendant for any cause of action. *Id.* (quotation omitted). Specific jurisdiction is based on specific contacts the defendant has with the forum state that justify jurisdiction over the defendant only for claims arising from those specific contacts. *Id.* For purposes of this appeal, plaintiffs argue only that defendants are subject to specific jurisdiction in Colorado.

In determining whether a defendant has established minimum contacts with the forum state sufficient to establish specific jurisdiction, this Court uses a two-step inquiry. *Pro Axess*, 428 F.3d at 1276. First, the Court asks whether the defendant has minimum contacts with the forum state such that the defendant “should reasonably anticipate being haled into court there.” *Id.* at 1276 (quotation omitted). This question is itself divided into two subparts: (1) whether “the defendant purposefully directed its activities at residents of the forum,” *id.* at 1277 (quotation omitted), and (2) whether the plaintiff’s injuries arise out of the

defendant’s activities, *id.* at 1278-79. Second, the Court considers “whether the exercise of personal jurisdiction over the defendant offends traditional notions of fair play and substantial justice.” *Id.* at 1276-77. This element of the test is satisfied if jurisdiction “is reasonable in light of the circumstances surrounding the case.” *Id.* at 1279 (quotation omitted). For purposes of specific jurisdiction, “even a single purposeful contact may be sufficient to meet the minimum contact standard when the underlying proceeding is directly related to that contact.” *SEC v. Knowles*, 87 F.3d 413, 419 (10th Cir. 1996).

In this case, defendants purposefully directed their actions toward plaintiffs in Colorado, intending to injure them there. Defendants’ intentional act satisfies all elements of the personal jurisdiction test.<sup>2</sup>

**I. DEFENDANTS PURPOSEFULLY DIRECTED THEIR ACTIONS AT COLORADO.**

**A. Defendants Expressly Targeted Plaintiffs in Colorado and Intentionally Injured Them There.**

In *Calder v. Jones*, the Supreme Court held that personal jurisdiction was proper in California over an out-of-state reporter accused of libeling a California resident. 465 U.S. 783 (1984). The Court relied on the fact that the defendant’s

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<sup>2</sup> Plaintiffs alleged, and defendants have never disputed, that Chalk & Vermilion acted as SevenArts’ agent when it terminated plaintiffs’ eBay auctions. (Aplt. App. at 9, ¶ 3.) Personal jurisdiction over a defendant can arise based on “activities carried on in its behalf by those who are authorized to act for it.” *Int’l Shoe*, 325 U.S. at 316. The jurisdictional analysis for both defendants in this case is therefore identical.

actions “were expressly aimed at California” and that the primary effect of the defendant’s conduct would be felt there. *Id.* at 789-90. Following *Calder*’s “effects test,” courts have held that a defendant is subject to specific jurisdiction in a forum when the defendant has purposefully directed its conduct at the forum and caused harm to the plaintiff there. *See Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 420 (9th Cir. 1997).

Like the defendants in *Calder*, defendants in this case expressly targeted plaintiffs in Colorado and intentionally injured them in the state. Each auction listing targeted by defendants prominently stated near the top of the listing that the location of the goods was Hartsel, Colorado. (*Id.* at 88, ¶ 2; 92-94.) The listings also stated, in bold red type, plaintiffs’ business address in Colorado and, just below the address, a statement that “Colorado residents must pay sales tax on the winning amount.” (*Id.*) Defendants were trusted members of eBay’s VeRO program and, based on their previous participation in this program, knew that their sworn claim of infringement would cause the automatic termination of plaintiffs’ auctions. (*Id.* at 27-29.) In fact, defendants requested in their notice of claimed infringement to eBay that eBay “act expeditiously to remove or disable access to the . . . items claimed to be infringing.” (*Id.* at 39-40.)

As a direct result of defendants’ intentional conduct, plaintiffs lost sales and suffered injury to their reputation with eBay, putting them at risk of losing their

business and livelihood if eBay were to classify them as repeat infringers. Based on this evidence, the magistrate judge wrote that he could “only conclude that Defendants intended to stop a sale from occurring in Hartsel, Colorado” and knew that the primary effect of their actions would be felt there. (*Id.* at 117.)

Defendants nevertheless argued in the district court that, because they sent the notice of claimed infringement to eBay in *California*, their actions could not have been expressly aimed at plaintiffs in *Colorado*. (Aplt. App. at 130-31.) Regardless of where the notice was sent, however, defendants knew that the notice would have its primary effect in the plaintiffs’ state of residence. It was for this reason that the Supreme Court in *Calder* found personal jurisdiction proper in that case. *See Calder*, 465 U.S. at 789-790. Although the defendants in *Calder* were not personally responsible for circulating the article in California, “they knew that the brunt of that injury would be felt by [the plaintiff] in the state in which [the plaintiff] live[d] and work[ed].” *Id.* at 789-90. Under *Calder*, “[i]t is not required that a defendant be physically present within, or have physical contacts with, the forum, provided that his efforts are purposefully directed toward forum residents.” *Cybersell*, 130 F.3d at 417 (quotations omitted); *see also Burger King*, 471 U.S. at 476 (“So long as a commercial actor’s efforts are ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.”).

Moreover, if jurisdiction were lacking in Colorado, there would be no other reasonable forum in which to litigate the dispute. The forums where defendants' home offices are located, Connecticut and Britain, have no relationship to the claims at issue here. Nor should plaintiffs be forced to go to an inconvenient forum to defend themselves from harm deliberately caused to them in their home state. *See Calder*, 465 U.S. at 790 ("An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause[d] the injury in California."). California is also unrelated to the controversy. Although defendants sent their notice of claimed infringement to eBay there, plaintiffs have not alleged any wrongdoing on eBay's part for responding to the notice and, indeed, would be prohibited from doing so by the DMCA's limitations on liability for good-faith disabling of access to allegedly infringing materials. 17 U.S.C. § 517(g)(1). In any case, given that eBay is an Internet-based company, the fact that its corporate offices are located in California is entirely irrelevant to this case.

Relying on *Calder*, the Ninth Circuit in circumstances strikingly similar to those here concluded that personal jurisdiction was proper over an out-of-state defendant. *Bancroft & Masters v. Augusta Nat'l Inc.*, 223 F.3d 1082 (9th Cir. 2000). In *Bancroft & Masters*, the defendant, Augusta National, held a federal trademark in the word "Masters." *Id.* at 1084. The plaintiff, California-based

Bancroft & Masters, registered the domain name “masters.com” for use as its business homepage. *Id.* at 1084-85. When Augusta National learned of Bancroft & Masters’ use of the domain name, it sent a letter to Network Solutions, Inc., a Virginia-based company responsible for registering the domain. *Id.* at 1085. The letter automatically triggered Network Solutions’ dispute-resolution process, requiring Bancroft & Masters to either obtain a declaratory judgment of its right to use the domain name or lose control of the domain until the dispute was resolved. *Id.* The Ninth Circuit held that, even though August National sent its letter to Virginia, its actions were expressly aimed at California and would have their primary impact on the plaintiff there. *Id.* at 1088. The court therefore concluded that personal jurisdiction in California was proper. *Id.*

Similarly, the Ninth Circuit in *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, held that personal jurisdiction was proper in California over two French organizations that filed suit and obtained a judgment against Yahoo! in French court. 433 F.3d 1199, 1205-11 (9th Cir. 2006). Although defendants filed their action in France, the court concluded that defendants’ actions intentionally targeted Yahoo! and that the primary effect of their actions would be felt at Yahoo!’s headquarters in California. *Id.* at 1211. And the court in *Metropolitan Life Insurance Co. v. Neaves*, 912 F.2d 1062 (9th Cir. 1990), upheld personal jurisdiction over an Alabama resident in California on the basis of a letter the

defendant sent to an insurance company representing that she was entitled to an insurance payment actually belonging to a California resident. The court considered the state to which the letter was sent to be irrelevant given that the defendant sent the letter with the purpose of defrauding the plaintiff in California. *Id.* at 1065.

This case is materially indistinguishable from *Bancroft & Masters, Yahoo!*, and *Neaves*. As in those cases, defendants communicated with a third party but, in doing so, intentionally targeted plaintiffs with the intent of causing them harm in the state. No principle of fairness prevents defendants from being haled into court in the state where the effect of their actions was primarily felt. As the magistrate judge observed, “to allow Defendants to employ eBay’s VeRO program as a means to knowingly harm Plaintiffs’ business without subjecting Defendants to jurisdiction for these actions where the harm occurred would ignore the intentional and apparent consequences of Defendants’ action.” (Aplt. App. at 117.) Due process, however, “may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.” *Burger King*, 471 U.S. at 474 (alteration omitted).<sup>3</sup>

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<sup>3</sup> Conversely, defendants’ intentional targeting of plaintiffs distinguishes this case from cases rejecting personal jurisdiction over a defendant based solely on the defendant’s operation of a website that is accessible from the plaintiff’s home state. *See Cybersell*, 130 F.3d 414. As the court in *Bancroft & Masters* observed, a defendant’s operation of a generally accessible website in itself does not show that

**B. Purposeful Direction Does Not Require an Independent Showing of Wrongfulness.**

The district court did not disagree with the magistrate judge’s conclusion that defendants intentionally targeted plaintiffs in Colorado. Nevertheless, it found personal jurisdiction lacking because it did not consider defendants’ actions to be “wrongful.” (Aplt. App. at 191-192.) Although this Court has never required an allegation of wrongfulness for a court to exercise personal jurisdiction, *see, e.g., Pro Axess*, 428 F.3d at 1276 (holding that personal jurisdiction is proper “if the defendant has purposefully directed his *activities* at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities” (quotation omitted, emphasis added)), the district court relied on the Ninth Circuit’s decision in *Bancroft & Masters* to adopt an independent wrongfulness requirement. (Aplt. App. at 190-91.) In reaching this result, the court misinterpreted and misapplied Ninth Circuit precedent.

To be sure, *Bancroft & Masters* does contain language suggesting that it relied on the defendant’s allegedly wrongful conduct. The en banc Ninth Circuit in

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the defendant expressly aimed its activities at and intended to injure the plaintiff. 223 F.3d at 1088. Similarly, courts have held that the typical online auction process on sites like eBay does not give rise to personal jurisdiction over the eBay seller in the purchaser’s home state. *See, e.g., Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746 (E.D. Mich. 2000). Courts examining these situations have noted that auction sales on eBay are “random” and “attenuated,” and that “the choice of [the] highest bidder is . . . beyond the control of the seller.” *Id.* at 749.



*Yahoo!*, 433 F.3d 1199, however, made clear that no such allegation is required. In *Yahoo!*, the plaintiff filed a lawsuit in its home state of California seeking a declaratory judgment that the First Amendment barred enforcement of the French court's order in the United States. *Id.* at 1201. In response, the defendants argued that, because they had "done no more than vindicate their rights under French law," an exertion of personal jurisdiction in California would violate due process. *Id.* at 1207. Like defendants here, the defendants in *Yahoo!* contended that "Calder requires that the actions expressly aimed at and causing harm in [the forum state] be tortious or otherwise wrongful." *Id.* at 1207.

The *Yahoo!* court agreed that many cases applying the *Calder* effects test, including *Bancroft & Masters* itself, involved allegedly wrongful conduct by the defendant. *Id.* at 1207-08. The court rejected, however, a per se requirement that wrongfulness must *always* be present. *Id.* at 1208. Rather, the court held that it must "evaluate all of a defendant's contacts with the forum state, whether or not those contacts involve wrongful activity by the defendant." *Id.* at 1207. Given that the defendants had intentionally filed suit against Yahoo! for the purpose of affecting Yahoo! in its home state of California, the court concluded that personal jurisdiction in California was consistent with due process. *Id.* at 1211.

As the court in *Yahoo!* noted, a requirement of wrongfulness would lead to anomalous results because, "if an allegedly wrongful act were the basis for

jurisdiction, a holding on the merits that the act was not wrongful would deprive the court of jurisdiction.” *Id.* at 1208. In effect, the question of jurisdiction would merge with the merits of the underlying cause of action. If the district court in *Calder*, for example, had found that the plaintiff failed to satisfy all the elements of a claim for libel, the court would have had to dismiss the case for lack of jurisdiction. Similarly, if the district court in *Burger King* concluded that the franchise agreement at issue in that case had not been breached, it would have immediately lost jurisdiction over the case. Under the district court’s rule, courts therefore could not determine that they have jurisdiction to hear the case until they have already made a determination on the merits.

Even if such a finding were required, a court could not make it in the context of a motion to dismiss. The court in *Bancroft & Masters*, on which the district court primarily relied, did not simply *assume* that the defendant’s actions were justified. Although two of the panel members, in a concurring opinion, suggested that they were skeptical about the plaintiffs’ claims, they nevertheless concurred in the opinion allowing the case to go forward, noting in dicta that “[j]urisdiction in California would be ripe for challenge if *following the development of trial* it should appear that Augusta National acted reasonably and in good faith to protect its trademark against an infringer.” *Bancroft & Masters*, 223 F.3d at 1089 (Sneed, J., concurring) (emphasis added).

Here, plaintiffs included extensive allegations tending to show that the fabric at issue is a parody of Erté's prints that is protected by the doctrine of copyright fair use and by the First Amendment. (Aplt. App. at 15-19, ¶¶ 38-58.) Moreover, plaintiffs expressly alleged in their complaint that defendants' explanation for their conduct—that they were merely innocently protecting their copyright—was “simply a smoke-screen attempt to justify unwarranted interference in the lawful sale of an item.” (*Id.* at 20, ¶ 60.) Without the benefit of any evidence on the merits and in the context of a motion to dismiss, the district court had no basis on which to conclude that the defendants' actions were “innocent” or “lawful,” or that they had only an “incidental impact in another jurisdiction.” (*Id.* at 191.)<sup>4</sup>

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<sup>4</sup> Although it is premature at this stage of the case to argue the merits of plaintiffs' claims, parody and satire are protected forms of expression under the doctrine of copyright fair use and the First Amendment. *See, e.g., Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968 (10th Cir. 1996). Betty Boop, herself a parody of singer Helen Kane, is a cartoon character known for her irreverent and comical portrayal of female sexuality. *See* Wikipedia, [http://en.wikipedia.org/wiki/Betty\\_Boop](http://en.wikipedia.org/wiki/Betty_Boop) (last visited Jan. 5, 2007). (Aplt. App. at 18-19, ¶¶ 49-57.) As such, she is often depicted in roles parodying famous women from film, literature, and popular culture. (Aplt. App. at 18-19, ¶¶ 50-56.) One popular image presented by plaintiffs to the district court, for example, depicts Betty Boop with her dress blowing up over a subway grate, spoofing Marilyn Monroe's famous scene in the *Seven Year Itch*. (*Id.* at 19, ¶ 54.) Other images in the record show Betty Boop taking the role of a dancer in a poster by Toulouse Lautrec, of Venus in Botticelli's *The Birth of Venus*, and of other cultural icons like Rosie the Riveter, Sheena Queen of the Jungle, and the Coppertone Girl from Coppertone's famous advertisement. (*Id.* at 18-19, ¶¶ 50-56; 48-55.) The overall effect of combining Erte's elegant woman and dog with the cartoon image of Betty Boop and Pudgy is to poke fun at the self-important elegance of Erte's female image, a message that is a protected form of First Amendment expression.

Nor does the fact that plaintiffs seek only declaratory and injunctive relief rather than damages mean, as the district court seemed to think, that the defendants' conduct was justified. (Aplt. App. at 189.) The plaintiffs in both *Bancroft & Masters* and *Yahoo!* limited their claims to declaratory relief but, nevertheless, the courts found personal jurisdiction in those cases to be proper. If defendants here are found to have interfered with plaintiffs' business based on an invalid claim of right, thereby injuring plaintiffs, their conduct would be wrongful. *See Yahoo!*, 433 F.3d at 1211 (noting that the defendants' actions "cast a shadow on the legality of Yahoo!'s [] policy"). Although plaintiffs did not include it in their claims for relief, defendants' conduct may even give rise to monetary damages under the DMCA's statutory remedy for misrepresentation of copyright infringement, 17 U.S.C. § 512(f), or under a theory of tort liability such as intentional interference with contract. *Bancroft & Masters*, 223 F.3d at 1089 (Sneed, J., concurring) (speculating that the plaintiff's declaratory judgment action may state a claim for the tort of conversion).

In sum, defendants subjected themselves to personal jurisdiction in Colorado when they intentionally harmed plaintiffs there. Regardless of whether their actions were independently tortious or otherwise wrongful, fairness demands that they be held to account in Colorado for damages they intentionally caused there.

## II. PLAINTIFFS' CLAIMS ARISE FROM DEFENDANTS' FORUM-RELATED ACTIVITIES.

The next question in the specific jurisdiction test asks whether there is a nexus between the defendant's contacts with the state and the plaintiff's injuries. *Pro Axess*, 428 F.3d at 1278-79. To give rise to personal jurisdiction, the plaintiff's claim must "arise[] out of or result[] from actions by the defendant himself that create a substantial connection with the forum state." *Id.* at 1277 (quotation omitted).

In this case, it was defendants' notice of claimed infringement that injured plaintiffs' business in Colorado. Thus, the same action by defendants that constitutes their connection with the forum also caused plaintiffs' injuries there. In such a case, the defendants' minimum contacts with the state also fulfill the nexus requirement. *See Pro Axess*, 428 F.3d at 1278-79 (holding the nexus requirement satisfied by the defendants' purposeful contacts with the state). Indeed, such a connection with a state "is a classic polar case for specific jurisdiction described in *International Shoe*, in which there are very few contacts but in which those few contacts are directly related to the suit." *Yahoo!*, 433 F.3d at 1210.

The district court, however, analogized this case to *Wise v. Lindamood*, 89 F. Supp. 2d 1187, which held that a cease-and-desist letter based on a claim of copyright infringement, standing alone, could not serve as the basis for personal jurisdiction in the state to which the letter is sent. (Aplt. App. at 190.) The court

in *Wise* held that the defendant's act of sending two cease-and-desist letters to the plaintiff in Colorado did not "give rise" to the plaintiff's subsequent suit for a declaratory judgment under the meaning of the specific jurisdiction test, because the actual controversy was the plaintiff's alleged copyright infringement, not the defendant's act of sending the letters. *Id.* at 1191. Citing *Wise*, defendants in this case argued in the district court that the underlying action giving rise to the lawsuit was plaintiffs' alleged infringement of defendants' copyright in the Erté prints, not their own decision to interfere with plaintiffs' auctions. (Aplt. App. at 131-33.)<sup>5</sup>

When applied to the facts before it, the court's decision in *Wise* is at least arguably correct. A typical cease-and-desist letter asserts a general claim of right without causing any concrete effects on the recipient. Until the defendant takes some further action that causes harm to the plaintiff, the primary controversy is the plaintiff's own alleged infringement. *Wise*, 89 F. Supp. 2d at 1191. But unlike the cease-and-desist letters at issue in *Wise*, defendants' notice of infringement caused

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<sup>5</sup> Defendants and the district court also relied on the Federal Circuit's decision in *Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355 (Fed. Cir. 1998). But the court in *Red Wing Shoe* expressly held that, in many cases, a cease-and-desist letter *could* give rise to a suit for declaratory relief. *Id.* at 1360. As the court noted, if the rights owner "casts its net of cease-and-desist letters too widely and entangles some non-infringing products, a plaintiff may have little recourse other than a declaratory judgment action to disentangle its non-infringing business." *Id.* Instead, the court held that personal jurisdiction based "solely" on a cease-and-desist letter would not comport with the independent requirement of fundamental fairness. *Id.* at 1360-61. As discussed Section III, *infra*, *Red Wing Shoe*'s analysis of the fairness requirement is inapposite to the facts of this case.

eBay to automatically terminate the targeted auctions, as defendants knew it would. Thus, plaintiffs' claims do not arise from a general dispute over copyright; they arise from defendants' specific action of sending the notice of claimed infringement that was intended to—and did—disrupt their business in Colorado. The fact that defendants' harmful actions were motivated by plaintiffs' alleged infringement does not shield defendants from personal jurisdiction in the state any more than they would be shielded from personal jurisdiction if, motivated by a claim of copyright infringement, they had physically broken into plaintiffs' home in Colorado and stolen the allegedly infringing goods.

Once again, *Bancroft & Masters* is highly analogous to this case. The Ninth Circuit there held that the plaintiff's claims arose from the defendants' act of sending a letter to its domain-name registrar. 223 F.3d at 1088. Like defendants here, the defendant in *Augusta National* moved to dismiss for lack of personal jurisdiction, arguing that its letter was a purely defensive effort aimed at protecting its trademark against alleged infringement. *Id.* at 1087. Although the underlying question in the case was whether plaintiff's use of the domain name infringed defendants' trademark in the word "Masters," the court held that the case arose principally out of Augusta National's letter, which automatically triggered Network Solutions' dispute-resolution policy and thereby threatened plaintiff with loss of its domain name. *Id.* at 1088. The court distinguished cases concerning

“only cease-and-desist letters,” noting that the defendants’ letter “did more than warn or threaten.” *Id.* at 1089. Rather, under the domain-name registrar’s procedures, the letter “operated automatically to prevent [Bancroft & Masters] from using its website.” *Id.* Because the defendant’s letter was the direct cause of the plaintiff’s injury, the court found personal jurisdiction to be proper. *Id.* It is just as proper in this case.

### **III. PERSONAL JURISDICTION IN COLORADO IS REASONABLE.**

Finally, “if the defendant’s actions create sufficient minimum contacts, [the court] must then consider whether the exercise of personal jurisdiction over the defendant offends traditional notions of fair play and substantial justice.” *Pro Axxess*, 428 F.3d at 1276-77 (quotation omitted). This standard is satisfied when “a district court’s exercise of personal jurisdiction over a defendant with minimum contacts is reasonable in light of the circumstances surrounding the case.” *Id.* at 1279 (quotation omitted). This Court examines several factors in making this determination:

- (1) the burden on the defendant,
- (2) the forum state’s interest in resolving the dispute,
- (3) the plaintiff’s interest in receiving convenient and effective relief,
- (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and
- (5) the shared interest of the several states in furthering fundamental social policies.

*Id.* at 1279-80 (quotation omitted).



A defendant's burden of showing unfairness is heightened when its contacts with the forum are strong. *Id.* at 1280. When, as here, a defendant has purposefully directed its activities at the forum, "it must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id.* (quotation and alteration omitted). Defendants cannot make that showing.

**A. The Burden on Defendants of Litigating in the Forum**

SevenArts is a British corporation, and its burden of litigating in this country is therefore a relevant consideration to the question of reasonableness. *See id.* at 1280. The burdens that SevenArts would face, however, are no more than those rejected by this Court in *Pro Axess* in holding that the District of Utah had jurisdiction over a corporation headquartered in France. *Id.* The Court in *Pro Axess* first noted that the French company's president had traveled to New York and thus had "demonstrated his ability to journey to the United States." *Id.* Similarly, defendants in this case admitted that SevenArts' president maintains a vacation home in Florida and, indeed, both affidavits filed by the president in the district court were signed by him in that state. (Aplt. App. at 66, 137, 183.) Second, the Court in *Pro Axess* noted that the French company owned a subsidiary in California, "minimizing concerns about the burden that litigating in Utah might place on them." *Pro Axess*, 428 F.3d at 1280. Here, as already explained,

SevenArts maintains Chalk & Vermilion as its United States agent. Moreover, plaintiffs submitted evidence that SevenArts is itself registered to do business in New York, and defendants admitted in the district court that SevenArts maintains an affiliated New York office (which they characterized as “nominal”). (Aplt. App. at 181, 183.) Finally, the court in *Pro Axxess* noted that the defendant regularly conducted business in English, *Pro Axxess*, 428 F.3d at 1280, a fact that is, of course, equally true for SevenArts, a British corporation.

More fundamentally, defendants’ decision to utilize the DMCA’s notice-and-takedown procedures to intentionally shut down plaintiffs’ auctions in Colorado demonstrates that forcing them to litigate there would not be unfair. Prior to Congress’ enactment of the DMCA, copyright owners could directly interfere with online content only by obtaining an injunction, and, because an online auction does not subject the seller to jurisdiction in the purchaser’s state, *see, e.g., Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746 (E.D. Mich. 2000), they would most likely have had to go to the seller’s home state to obtain any relief. By giving Internet service providers like eBay a strong incentive to comply with notices of claimed infringement, the DMCA created a way for copyright owners to quickly and cheaply obtain what, in practice, often amounts to the equivalent of a temporary injunction without the need to go to court. *See Perfect 10, Inc. v. CC Bill, LLC*, 340 F. Supp. 2d 1077, 1086-88 (C.D. Cal. 2004).

Copyright owners will be in no worse of a position if they are forced to defend themselves in the target's home state than they would have been had they filed their own action for injunctive relief in that state. Thus, when a defendant does choose to invoke the DMCA process, there is nothing unfair about requiring it to defend its decision in the state where the impact of its decision is most strongly felt.

Congress fully realized that notices of claimed infringement may give rise to a lawsuit by the target for wrongful termination and, in fact, created a cause of action for abuse of the DMCA system. 17 U.S.C. § 512(f). Congress also evidently expected that at least some of the litigation resulting from notices of claimed infringement would arise in the target's home state, because it required a party filing a counter notice to affirmatively submit to personal jurisdiction there. 17 U.S.C. § 512(g)(3)(D). Under Congress' scheme, if copyright owners object to litigating in a particular forum, they can easily avoid this problem by refraining from terminating auctions of sellers who are physically based in that forum. eBay auctions display the location of the auctioned items, so defendants can easily "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

For these reasons, the burden on the defendant does not present a compelling case against a finding of personal jurisdiction in Colorado.

**B. The Forum’s Interest in Adjudicating the Dispute**

“States have an important interest in providing a forum in which their residents can seek redress for injuries caused by out-of-state actors.” *Pro Axess*, 428 F.3d at 1280 (quotation omitted). In this case, Colorado thus has a strong interest in providing a forum for plaintiffs, who are citizens of the state. *See Burger King*, 471 U.S. at 473 (“A State generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.” (quotation omitted)); *OpenLCR.com, Inc. v. Rates Tech., Inc.*, 112 F. Supp. 2d 1223, 1229 (D. Colo. 2000) (recognizing “Colorado’s manifest interest in preventing harm to one of its residents caused by bad-faith enforcement of patent rights” (quotation omitted)). Moreover, Colorado has an interest in protecting local businesses from interference by foreign corporations. *Pro Axess*, 428 F.3d at 1280 (holding that Utah has an interest in providing a forum for a Utah corporation with its principal place of business in Utah). This factor therefore weighs strongly in plaintiffs’ favor.

**C. Plaintiffs’ Interest in Convenient and Effective Relief**

This factor “hinges on whether the Plaintiff may receive convenient and effective relief in another forum.” *Id.* at 1281. As Colorado citizens, plaintiffs

have a strong interest in litigating the case in Colorado. *See McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957). If personal jurisdiction is held to be improper there, defendants have already stated their intention to file suit against plaintiffs, who would then risk being haled into court in an inconvenient forum. *See id.* (noting that individual forum residents with moderate resources would be put at a severe disadvantage if forced to litigate in a foreign jurisdiction).

Aside from its impact on plaintiffs, such a holding would give copyright owners the power to shut down auctions, websites, and a wide range of other Internet-based content under the DMCA with impunity, putting the entire burden on the targets to litigate their innocence in a foreign jurisdiction. Although Congress, in enacting the DMCA, expressed concern about providing convenient relief to copyright owners, it also expressed concern about the possibility of wrongful termination of non-infringing content. S. Rep. No. 105-190, at 21 (May 11, 1998). Thus, the Senate Committee Report for the DMCA notes that the notice-and-takedown provisions were designed to “balance the need for rapid response to potential infringement with the end-users’ legitimate interests in not having material removed without recourse.” *Id.*

Granting copyright owners immunity from the effects of their actions in the target’s home jurisdiction would significantly upset this balance. Although the target would still have the option of filing a counter notice, this procedure, as the

magistrate judge correctly observed, does not provide complete protection from abuse of the DMCA's takedown procedures. As the magistrate judge wrote, even after a counter notice is filed, "a copyright owner could prevent a seller from listing any allegedly infringing products and, through repeated take downs, could potentially have the seller suspended from eBay, without ever seeking an adjudication on the merits of the alleged infringement." (Aplt. App. at 116.) Or, alternatively, the copyright owner could attempt to establish jurisdiction in its home forum after the counter notice is filed, making it difficult or impossible for typical eBay sellers to defend themselves.

In this case, for example, defendants threatened to terminate auctions of plaintiffs' fabric even after plaintiffs had filed a counter notice, and to file suit to prevent the counter notice from going into effect. Thus, plaintiffs had little choice but to seek declaratory and injunctive relief in Colorado to protect their rights. Plaintiffs proceeded pro se in the district court and, like many small eBay sellers, could not have afforded to pursue the litigation in a remote jurisdiction. The burden of pursuing the litigation in Connecticut, and especially in Britain, would be "so overwhelming as to practically foreclose pursuit of the lawsuit." *Pro Access*, 428 F.3d at 1281. In these circumstances, this factor strongly favors plaintiffs and weighs heavily in the balance of fairness factors. *Id.*

**D. The Interstate Judicial System’s Interest in Obtaining Efficient Resolution of the Controversy**

The fourth factor asks “whether the forum state is the most efficient place to litigate the dispute.” *Id.* (quotation omitted). This inquiry requires examination of “the location of witnesses, where the wrong underlying the lawsuit occurred, what forum’s substantive law governs the case, and whether jurisdiction is necessary to avoid piecemeal litigation.” *Id.* (quotation omitted). Plaintiffs in this case sought a declaratory judgment that their sale of licensed Betty Boop fabric did not infringe defendants’ copyright. This is largely a question of law, and one that does not heavily depend on witnesses and other forms of evidence. Moreover, because Chalk & Vermilion, not SevenArts, was responsible for terminating plaintiffs’ auctions, many of the relevant witnesses may be in the United States. In any case, considerations regarding witnesses and evidence are unlikely to “become so substantial as to achieve constitutional magnitude.” *Burger King*, 471 U.S. at 483.

The district court nevertheless held that the interest of efficient resolution of controversies counseled against finding personal jurisdiction in Colorado, because it thought “allowing a party to impose jurisdiction on a nonresident for simply asserting infringement of the parties’ protected rights will encourage forum shopping, decrease the likelihood of settlement and obstruct efficient resolution of controversies.” (Aplt. App. at 192.) The cases relied on by the court for this proposition, however, hold only that a defendant “should not subject itself to

personal jurisdiction in a forum *solely* by informing a party who happens to be located there of suspected infringement.” *Red Wing Shoe*, 148 F.3d at 1361 (emphasis added). As previously discussed, defendants in this case did not solely inform plaintiffs of their rights; they took affirmative action to harm plaintiffs’ business in Colorado.

Moreover, the district court’s holding that allowing personal jurisdiction would discourage settlement makes no sense in the context of this case. Unlike a cease-and-desist letter, a notice of claimed infringement is not a settlement device—it is a hostile act that causes direct harm to the target’s business. There is no opportunity between the filing of the notice and termination of the auction during which the parties can reach an informal resolution of their dispute. In this case, defendants made no attempt to resolve the controversy with plaintiffs prior to terminating their eBay auctions. Instead, as the magistrate judge observed, defendants “notified a third party, eBay, knowing that this action would directly harm Plaintiffs’ business through the take down of the listing and the black mark against Plaintiffs’ business on eBay.” (Aplt. App. at 116.) Even after plaintiffs filed their counter notice, defendants would not discuss the possibility of settlement, instead insisting that they would file suit within ten days to block the counter notice from going into effect. (Id. at 14, 33-34; 44.) In these circumstances, defendants’ action resembles simple coercion more than a



settlement device. Thus, rather than encouraging settlement, the district court's decision merely ensures that plaintiffs will either have to seek relief in an inconvenient forum or forego relief entirely.

**E. The States' Interest in Furthering Fundamental Substantive Social Policies**

The fifth factor of the reasonableness inquiry “focuses on whether the exercise of personal jurisdiction by the forum affects the substantive social policy interests of other states or foreign nations.” *Pro Axess*, 428 F.3d at 1281 (quotation omitted). Relevant facts include “whether one of the parties is a citizen of the foreign nation, whether the foreign nation’s law governs the dispute, and whether the foreign nation’s citizen chose to conduct business with a forum resident.” *Id.* at 1098 (quotation omitted). Here, the dispute is governed by United States copyright law, not British law. Moreover, SevenArts took action through its agent in the United States. Accordingly, jurisdiction in Colorado would not affect Britain’s policy interests.

\* \* \*

Defendants thus cannot show that any of the five factors tilt in their favor, much less make a *compelling* showing of unfairness. Given that defendants intentionally directed their actions at plaintiffs in Colorado—actions that had the direct effect of harming plaintiffs’ business in the state, principles of fairness do not preclude them from being held to account for their actions there.

## **CONCLUSION**

The decision of the district court dismissing this action for lack of personal jurisdiction should be reversed and the case remanded for proceedings on the merits of appellants' action for declaratory and injunctive relief.

## **STATEMENT REGARDING ORAL ARGUMENT**

Appellants request oral argument. The case raises a question of first impression that is of critical and growing importance to Internet commerce and communications. The court would benefit from oral argument on the legal, technological, and policy issues involved in the case.

Respectfully submitted,

/s/  
\_\_\_\_\_  
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January 10, 2007

## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a fourteen-point proportional typeface, Times New Roman. As calculated by my word processing software (Microsoft Word 2002), the brief contains 8,583 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/  
Gregory A. Beck

**CERTIFICATE OF SERVICE**

I certify that on January 10, 2007, I caused to be mailed two copies of the foregoing Appellants' Opening Brief and one copy of Appellant's Appendix by first-class U.S. Mail, postage prepaid, to the following:

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An identical electronic copy was filed with the Clerk on the same date and provided to Mr. Sandberg via email.

/s/ \_\_\_\_\_  
Gregory A. Beck

**CERTIFICATION OF DIGITAL SUBMISSIONS**

I certify that (1) all required privacy redactions have been made and every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and (2) this electronic document has been scanned for viruses with the most recent version of Symantec AntiVirus, version 10.0.1, last updated on January 6, 2007, and, according to the program, is free of viruses.

/s/  
Gregory A. Beck

17 U.S.C.A. § 512

**Effective: August 05, 1999**

UNITED STATES CODE ANNOTATED  
TITLE 17. COPYRIGHTS  
CHAPTER 5--COPYRIGHT INFRINGEMENT AND REMEDIES  
→ § 512. Limitations on liability relating to material online

**(a) Transitory digital network communications.**--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if--

- (1) the transmission of the material was initiated by or at the direction of a person other than the service provider;
- (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
- (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;
- (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and
- (5) the material is transmitted through the system or network without modification of its content.

**(b) System caching.**--

**(1) Limitation on liability.**--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which--

- (A) the material is made available online by a person other than the service provider;
- (B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and
- (C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A),

if the conditions set forth in paragraph (2) are met.

**(2) Conditions.**--The conditions referred to in paragraph (1) are that--

- (A) the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person

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described in paragraph (1)(A);

**(B)** the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;

**(C)** the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology--

**(i)** does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;

**(ii)** is consistent with generally accepted industry standard communications protocols; and

**(iii)** does not extract information from the provider's system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

**(D)** if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and

**(E)** if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if--

**(i)** the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

**(ii)** the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

**(c) Information residing on systems or networks at direction of users.--**

**(1) In general.--**A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider--

**(A)(i)** does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

**(ii)** in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

**(iii)** upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the

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material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

**(2) Designated agent.**--The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

**(3) Elements of notification.**--

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

**(B)(i)** Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

**(ii)** In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of



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notification that substantially complies with all the provisions of subparagraph (A).

**(d) Information location tools.**--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider--

(1)(A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

**(e) Limitation on liability of nonprofit educational institutions.**--(1) When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of subsections (a) and (b) such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution, if--

(A) such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;

(B) the institution has not, within the preceding 3-year period, received more than two notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and

(C) the institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.

(2) For the purposes of this subsection, the limitations on injunctive relief contained in subsections (j)(2) and (j)(3), but not those in (j)(1), shall apply.

**(f) Misrepresentations.**--Any person who knowingly materially misrepresents under this section--

(1) that material or activity is infringing, or

(2) that material or activity was removed or disabled by mistake or misidentification,

shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it

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**(g) Replacement of removed or disabled material and limitation on other liability.--**

**(1) No liability for taking down generally.--**Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

**(2) Exception.--**Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider--

**(A)** takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

**(B)** upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

**(C)** replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

**(3) Contents of counter notification.--**To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following:

**(A)** A physical or electronic signature of the subscriber.

**(B)** Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.

**(C)** A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

**(D)** The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

**(4) Limitation on other liability.--**A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).

**(h) Subpoena to identify infringer.--**

**(1) Request.--**A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.

**(2) Contents of request.--**The request may be made by filing with the clerk--

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(A) a copy of a notification described in subsection (c)(3)(A);

(B) a proposed subpoena; and

(C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.

**(3) Contents of subpoena.**--The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider.

**(4) Basis for granting subpoena.**--If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.

**(5) Actions of service provider receiving subpoena.**--Upon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service provider shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.

**(6) Rules applicable to subpoena.**--Unless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum.

**(i) Conditions for eligibility.**--

**(1) Accommodation of technology.**--The limitations on liability established by this section shall apply to a service provider only if the service provider--

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.

**(2) Definition.**--As used in this subsection, the term "standard technical measures" means technical measures that are used by copyright owners to identify or protect copyrighted works and--

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

**(j) Injunctions.**--The following rules shall apply in the case of any application for an injunction under [section 502](#) against a service provider that is not subject to monetary remedies under this section:

**(1) Scope of relief.**--(A) With respect to conduct other than that which qualifies for the limitation on remedies set

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forth in subsection (a), the court may grant injunctive relief with respect to a service provider only in one or more of the following forms:

(i) An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider's system or network.

(ii) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(iii) Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.

(B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms:

(i) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is using the provider's service to engage in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(ii) An order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States.

(2) **Considerations.**--The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider--

(A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;

(B) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;

(C) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations; and

(D) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

(3) **Notice and ex parte orders.**--Injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to appear are provided, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network.

(k) **Definitions.**--

(1) **Service provider.**--(A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph

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(A).

**(2) Monetary relief.**--As used in this section, the term "monetary relief" means damages, costs, attorneys' fees, and any other form of monetary payment.

**(l) Other defenses not affected.**--The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense.

**(m) Protection of privacy.**--Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on--

**(1)** a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or

**(2)** a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

**(n) Construction.**--Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

Current through P.L. 109-450 (excluding P.L. 109-415, 109-417, 109-432, 109-435, 109-444) approved 12-22-06.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 05-cv-02505-WDM-MEH

KAREN DUDNIKOV and  
MICHAEL MEADORS,

Plaintiffs,

v.

CHALK & VERMILION FINE ARTS, INC., and  
SEVENARTS, LTD.,

Defendants.

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**RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS**

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**Entered by Michael E. Hegarty, United States Magistrate Judge.**

Before the Court is Defendants' Motion to Dismiss Complaint for Lack of Personal Jurisdiction and Improper Venue [Docket #4]. Pursuant to 28 U.S.C. § 636(b)(1)(A) and D.C. COLO. L.Civ.R 72.1.C, the matter has been referred to this Court for recommendation. The matter is fully briefed, and oral argument would not materially assist the Court in its adjudication. For the reasons set forth below, the Court recommends that Defendants' Motion to Dismiss be **denied**.

**I. Introduction**

Plaintiffs filed a declaratory judgment action asserting that their actions in selling their product on eBay do not infringe upon the copyrights of Defendant SevenArts, LTD.<sup>1</sup> Defendants filed the instant Motion to Dismiss arguing that no personal jurisdiction, either generally or specifically, exists over Defendants in the State of Colorado, and that venue is, therefore, improper in the District of

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<sup>1</sup> The Court construes Plaintiffs' *pro se* pleadings liberally. *Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183, 1187 (10th Cir. 2003).

Colorado.

## **II. Facts<sup>2</sup>**

Plaintiffs manufacture and/or purchase, and sell or resell, various collectibles, fabric, and hand-made fabric crafts, such as aprons, blankets, pot holders, fabric, and place mats under the business name Tabber's Creations. The fabric used by Plaintiffs, either in making these items or in reselling the raw fabric, often contains copyrighted designs. Plaintiffs sell their products on eBay under the username "tabberone." Due to Plaintiffs' high volume of sales on eBay, they are listed as "power sellers." They have received over 6,000 feedback messages in the past year and over 13,000 positive feedback messages since 1998. Not surprisingly, Plaintiffs claim that substantially all of their business income is derived from sales on eBay. Each item listing includes the location of the item, Hartsel, Colorado. Plaintiffs' username on eBay links to a page about the seller that links to Plaintiffs' website, [www.tabberone.com](http://www.tabberone.com). The first page of Plaintiffs' website states that all Colorado residents must pay sales tax and includes the contact information for Plaintiff Karen Dudnikov in Hartsel, Colorado.

Defendant SevenArts, LTD is a British company and the copyright owner of certain designs by the artist Erte. The instant action concerns a dress designed by Erte. Cartoon character Betty Boop has been depicted wearing dresses that Defendants allege infringe on Erte's copyrighted designs. Plaintiffs purchased fabric, manufactured by a third party, which contains these depictions of Betty Boop in the allegedly infringing dresses. Plaintiffs then listed this fabric for sale on eBay.

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<sup>2</sup>These facts were obtained primarily from Plaintiffs' Complaint. Some of the information, which is not material to the Court's decision, was taken from eBay's internet web page. All well-pleaded factual allegations must be taken as true and viewed in the light most favorable to the non-moving party. *Nelson v. State Farm Mut. Auto. Ins. Co.*, 419 F.3d 1117, 1119 (10th Cir. 2005).

Defendants argue that Plaintiffs have therefore sold products that infringe copyrights owned by SevenArts.

Defendant Chalk & Vermilion Fine Arts, Inc. (“Chalk & Vermilion”), is the agent of SevenArts in the United States and is responsible for enforcing the copyrights owned by Defendant SevenArts. The instant controversy arose when Chalk & Vermilion stopped Plaintiffs’ sale on eBay of the allegedly infringing Betty Boop design.

Pursuant to the requirements of the Digital Millennium Copyright Act (“DMCA”) 17 U.S.C. § 512 *et seq.*, eBay has implemented its Verified Rights Owner (“VeRO”) Program whereby a copyright owner may inform eBay of an infringing item that is listed on eBay. Under VeRO, a copyright owner may submit a Notice of Claimed Infringement (“NOCI”) to eBay. The copyright owner, or its authorized agent, must state under penalty of perjury that it has a good faith belief that a listing on eBay infringes its copyright or trademark. After receiving the NOCI, eBay will “take down” the listing from its website and notify the seller of its removal.

Once the listing is removed from eBay, the seller may challenge the takedown by contacting the copyright owner and filing a Counter Notice with eBay contesting the takedown. If the copyright owner does not respond to the Counter Notice, the seller may re-list the item. However, the copyright owner may continue to have the listing removed each time the item is re-listed. In fact, Defendant Chalk & Vermilion allegedly threatened to take down any future listings by Plaintiffs of the allegedly infringing item. eBay considers a takedown to be a black mark against the seller. eBay records all NOCIs that are submitted against a seller, and repeated take downs could result in the seller’s account being permanently suspended. Thus, Plaintiffs claim that they are damaged by Defendants filing a NOCI in the following manner: (1) loss of revenue from the takedown of an



allegedly legitimate listing; and (2) the accumulation of black marks against them as a seller that could result in their business being banned from eBay.

In this case, Defendant Chalk & Vermilion, as the agent of Defendant SevenArts, filed a NOCI with eBay regarding Plaintiffs' sale of the allegedly infringing Betty Boop fabric, which resulted in this listing being taken down from eBay. Plaintiffs contested the take down and contacted Defendant Chalk & Vermilion directly via email. Based on Defendant Chalk & Vermilion's refusal to remove the NOCI, Plaintiffs filed this declaratory judgment action to establish whether this sale, and future sales of this fabric, infringed on Defendant SevenArt's copyright.

After Plaintiffs filed this declaratory judgment action, Defendants filed a Motion to Dismiss based on lack of personal jurisdiction, both generally and specifically, over the Defendants. Defendants argue that neither Defendant has any contacts with the State of Colorado, that they directed no activities toward Colorado, that this lawsuit does not relate to any of the Defendants' activities, and that any action in this state was initiated by Plaintiffs. In response, Plaintiffs contend that Defendants' actions were purposefully directed at Plaintiffs who Defendants knew, or reasonably should have known, were residents of Colorado, that Defendants knew that submitting a NOCI to eBay would injure a seller in Colorado, and that Defendant Chalk & Vermilion's website is sufficiently active under the *Zippo* analysis to support general jurisdiction in Colorado.

### **III. Discussion**

#### **A. Legal Standard for Motion to Dismiss based on Personal Jurisdiction**

To withstand a Motion to Dismiss based on lack of personal jurisdiction, Plaintiffs need only establish a *prima facie* case of personal jurisdiction based on a preponderance of the evidence. *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995). In determining whether Plaintiffs have

established a *prima facie* case of personal jurisdiction over Defendants, the Court must resolve all factual disputes and construe all reasonable factual inferences in favor of the Plaintiffs. *Id.*

As a court of limited jurisdiction, this Court may only exercise jurisdiction over the non-resident Defendants if (1) the long-arm statute of Colorado permits personal jurisdiction in this case; and (2) the exercise of personal jurisdiction over the Defendants in Colorado comports with the Due Process Clause of the United States Constitution. *Benton v. Cameco Corp.*, 375 F.3d 1070, 1075 (10th Cir. 2004). The Supreme Court of Colorado interprets Colorado's long-arm statute "to confer the maximum jurisdiction permitted by the due process clauses of the United States and Colorado constitutions." *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187 (Colo. 2005). Thus, a due process analysis of jurisdiction in this case will also satisfy Colorado's long-arm statute.

Due process first requires that the defendant have "minimum contacts" with the forum state. *International Shoe Co. v. Washington*, 326 U.S. 310 316 (1945).<sup>3</sup> Such a requirement protects a defendant from "being subject to the binding judgment of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citation omitted). The defendant must have "fair warning that a particular activity may subject [him] to jurisdiction." *Id.* Thus, a defendant can "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Minimum contacts may be established either generally or specifically:

Depending on the level of contact, personal jurisdiction may be either specific, in

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<sup>3</sup> Minimum contacts for SevenArts are analyzed based on the conduct of Chalk & Vermilion because contacts may be based on "activities carried on in its behalf by those who are authorized to act for it." *Int'l Shoe Co.*, 325 U.S. at 316.

which case personal jurisdiction is based on specific activities or contacts the defendant has with the forum state, or it may be general, in which case jurisdiction is based upon “continuous or systematic contacts” between the defendant and the forum state. Under either theory of jurisdiction, the defendant’s contacts must be substantial enough so that exercising personal jurisdiction “does not offend traditional notions of fair play and substantial justice.”

*United States v. Botefuhr*, 309 F.3d 1263, 1271-72 (10th Cir. 2002) (citations omitted). Because Plaintiffs allege both general and specific jurisdiction, the Court will analyze each under the appropriate standard.

### **B. General Jurisdiction**

Plaintiffs argue that Defendants are subject to general jurisdiction in Colorado based on the operation of Defendant Chalk & Vermillion’s website. Specifically, Plaintiffs contend that, through Defendants’ website, they were invited to submit their contact information and ask questions. Plaintiffs allege that a friend sought information through this website pretending to be located in Wisconsin. Defendant Chalk & Vermillion responded to the request for information and appeared willing to establish a business relationship with Plaintiffs’ friend, allegedly in Wisconsin. Plaintiffs argue that this establishes a willingness by the Defendants to create a business relationship in any state based on contacts through their website. In turn, Defendants first point out that they maintain no contacts with the State of Colorado, aside from their website, which can be accessed in Colorado. In addition, the contact alleged by Plaintiffs was with a prospective purchaser in Wisconsin, not Colorado, and Plaintiffs, through their agent, initiated the contact. Moreover, Defendants argue that only existing customers can transact business through its website.

General jurisdiction, which allows the Court to exercise jurisdiction over a defendant for any claim, requires the defendant to have continuous and substantial connection to the forum state.

*International Shoe Co.*, 326 U.S. at 320. A defendant's website can constitute a substantial connection depending on whether the website is passive or active. See *Soma Med. International v. Standard Chtd. Bank*, 196 F.3d 1292, 1296-97 (10th Cir. 1999). The Tenth Circuit has cited with approval the sliding scale set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), for evaluating whether a website is sufficiently active to constitute a substantial connection. On one end of the spectrum is the passive website which merely provides information about the defendant. On the other end is the active website whereby a defendant enters transactions over the internet and encourages the active and repeated transmission of information through its website. Upon this spectrum, a defendant's website should be evaluated such that "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." *Id.* at 1124.

Here, Defendant Chalk & Vermillion's website falls in the middle of this spectrum. A visitor can initiate contact with Chalk & Vermillion through the website but cannot conduct business. Only registered customers, those with whom Chalk & Vermillion has a previous business relationship, conduct transactions through the website. Plaintiffs' ability to use Defendant's website is limited to that of a visitor, one who can only initiate contact but not conduct business. Such limited use is consistent with a passive website and cannot subject Defendant to general jurisdiction. See *Scherer v. Curators of the Univ. of Mo.*, 152 F. Supp. 2d 1278, 1284 (D. Kan. 2001) (holding that "a passive Web site that does little more than make information available to those who are interested . . . is insufficient to subject a non-resident defendant to general jurisdiction) (quotations and citations omitted). Thus, the Court finds that Defendant Chalk & Vermilion's website does not constitute a substantial connection to the State of Colorado for visitors of the website.

Plaintiff also sets forth a number of arguments that are premised solely on contact initiated by themselves to indicate that Defendants are accessible from Colorado. However, “[u]nilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.” *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). For this reason, Plaintiffs’ ability to locate Defendants through a search engine or to bait Defendant Chalk & Vermilion into communicating with a friend allegedly in Wisconsin does not establish a substantial connection between Defendants and the State of Colorado. Plaintiffs must show more than just a willingness by Defendants to consider a business relationship in any state. They must establish a continuing substantial contact with the State of Colorado, which plaintiffs fail to do. The Court, therefore, concludes that general jurisdiction does not exist over Defendants in the State of Colorado.

### **C. Specific Jurisdiction**

Plaintiffs argue that Defendants’ action in taking down their eBay auction was purposefully directed toward the State of Colorado in that (1) Defendants knew the harm that would result from their actions; and (2) Defendants knew that Plaintiffs were residents of the State of Colorado. Specifically, Plaintiffs contend that Defendants were aware that eBay’s VeRO program allowed them to take down Plaintiffs’ listing. Defendants knew that eBay maintains a record of these take downs and that repeat infringers could be suspended from eBay. Moreover, Defendants knew that Plaintiffs conduct a substantial amount of business on eBay and that their business is located in Hartsel, Colorado.

In response, Defendants argue that the underlying action in this case is Plaintiffs’ sale of infringing material, not their submission of an NOCI. In addition, the take down resulted from its

communication with eBay, not Plaintiffs. The take down, and any future suspension, are actions that were or will be undertaken by eBay, not Defendants. All contact with Plaintiffs was initiated by Plaintiffs and, even then, was for the purpose of notifying Plaintiffs that they were listing material that infringed on Defendant SevenArt's copyright in Erte's designs. Moreover, Defendants argue that Plaintiffs do not and cannot allege that Defendants actually read the statement on the listing indicating that Plaintiffs were located in Colorado.

Specific jurisdiction, which allows the Court to exercise jurisdiction over a defendant only for the claims at issue, requires the defendant to have "purposefully directed" his activities toward the forum state. *Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 456 (10th Cir. 1996). The claims at issue must also "arise out of or relate to the defendant's contacts with the forum." *Id.* Nonetheless, "even a single purposeful contact may be sufficient to meet the minimum contact standard when the underlying proceeding is directly related to that contact." *SEC v. Knowles*, 87 F.3d 413, 419 (10th Cir. 1996). While some courts have concluded that a typical eBay sales transaction does not establish sufficient minimum contacts, these courts have also recognized the potential for minimum contacts if other factors are present. *See Action Tapes, Inc. v. Ebert*, No. 05-1239, 2006 U.S. Dist. LEXIS 4958 (N.D. Tex. Feb. 9, 2006) (citing cases). It appears that no Court has yet addressed whether the submission of a NOCI, and the accompanying take down of a seller's auction listing, presents sufficient additional factors to establish minimum contacts.

To determine whether Defendants' activities were directed to the forum state, the Court must first consider what underlying actions give rise to this lawsuit. Defendants focus on Plaintiffs' alleged infringement; whereas Plaintiffs focus on Defendants' submission of a NOCI to eBay and subsequent contacts with Plaintiffs. Because only Defendants' activities can subject Defendants to this Court's

jurisdiction, the Court must consider the following: (1) Does Defendants' submission of a NOCI constitute an underlying action of this lawsuit? (2) If so, is this action expressly aimed at the State of Colorado? (3) If so, does jurisdiction over Defendants based on this activity comport with notions of fair play and substantial justice?

*(1) Does Defendants' submission of a NOCI constitute an underlying action of this lawsuit?*

The submission of a NOCI to eBay produced two results: (1) Defendant Chalk & Vermillion obtained the protection of SevenArt's copyright against allegedly infringing material; and (2) Plaintiffs received a black mark from eBay as a seller of infringing materials. Defendants argue that this action has no relation to a declaratory judgment action because "steps taken by a copyright holder to protect itself do not subject the copyright holder to personal jurisdiction." *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1361 (Fed. Cir. 1998); *see also Wise v. Lindamood*, 89 F. Supp. 2d 1187, 1189 (D. Colo. 1999). Plaintiffs distinguish these cases on the basis that the plaintiffs in these cases filed declaratory judgment actions after receiving only cease and desist letters. Plaintiffs argue that Defendants took direct action against Plaintiffs that harmed Plaintiffs' business by filing a NOCI with eBay, which stopped Plaintiffs' sale of the fabric at issue. The Court agrees with Plaintiffs' distinction. While Defendants' actions were undertaken to protect SevenArts' copyright, their actions went beyond simple notification and constituted an affirmative action against Plaintiffs' business that resulted in harm to Plaintiffs. In *Wise*, Chief Judge Lewis T. Babcock pointed out that allowing cease and desist letters to serve as the basis for jurisdiction "would decrease the likelihood of settlements in cases of alleged infringement because the party that believes its exclusive trademark, copyright, or patent is being infringed will not first seek to settle a dispute through less adversarial channels than

the court system.” *Wise*, 89 F. Supp. 2d at 1191. In this case, no such incentive exists. Under eBay’s VeRO Program, a copyright owner could prevent a seller from listing any allegedly infringing products and, through repeated take downs, could potentially have the seller suspended from eBay, without ever seeking an adjudication on the merits of the alleged infringement.

In fact, Defendants in this case did not send a notification of infringement to Plaintiffs intending to encourage settlement. Rather, Defendants notified a third party, eBay, knowing that this action would directly harm Plaintiffs’ business through the take down of the listing and the black mark against Plaintiffs’ business on eBay. In essence, Defendants went beyond simply informing Plaintiffs that they should cease and desist from any alleged infringement and effectively precluded Plaintiffs from selling these items. Whether Defendants were justified in harming Plaintiffs’ business by taking down this listing, and would be justified in stopping future listings, can be resolved by this declaratory judgment action. Based on the harm caused by Defendants’ actions, the Court believes that Defendants’ action in sending a NOCI to eBay constitutes an underlying action of this lawsuit.

*(2) Was Defendants’ action expressly aimed at the State of Colorado?*

Defendants argue that its action was aimed at eBay, not Plaintiffs; thus, their actions occurred outside the State of Colorado and were not expressly aimed at Plaintiffs in Colorado. Defendants further contend that they had no knowledge or intent to cause harm in the State of Colorado. As Defendants point out, “the mere foreseeability of causing injury in another state” does not support specific jurisdiction. *Calder v. Jones*, 465 U.S. 783, 789 (1984). Plaintiffs argue that Defendants’ action rises above mere foreseeability and are, instead, expressly aimed at Plaintiffs. Defendants knew that their actions would have an effect in the State of Colorado and should, therefore, “reasonably anticipate being haled into court there.” *World-Wide Volkswagen Corp.*, 444 U.S. at 297.



Taking Plaintiffs' well-pled allegations as true and resolving all factual inferences in favor of the non-moving party requires the Court accept as true the fact that Defendants knew Plaintiffs' business was located in Colorado. These allegations are not merely conclusory, because eBay's listing of the allegedly infringing item stated that the item was located in Hartsel, Colorado. Even if Defendants did not follow the link to Plaintiffs' website, they knew from the same page that listed the allegedly infringing item that the item was being sold in Hartsel, Colorado. Based on this information, the Court can only conclude that Defendants intended to stop a sale from occurring in Hartsel, Colorado. Thus, Defendants' actions were not aimed at eBay to simply inform eBay of the alleged infringement, but rather, were aimed at Plaintiffs to preclude the sale of an allegedly infringing item. Under the "effects" test in *Calder*, Defendants knew that the primary effect of their action would be felt in Colorado. See *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (finding that the defendant's letter to a non-resident domain name company challenging a California resident's use of a domain name was expressly aimed at California because the effects of the letter were primarily felt in California).

Moreover, to allow Defendants to employ eBay's VeRO program as a means to knowingly harm Plaintiffs' business without subjecting Defendants to jurisdiction for these actions where the harm occurred would ignore the intentional and apparent consequences of Defendants' action. As the Supreme Court concluded in *Calder*, "An individual injured in [Colorado] need not go to [Connecticut] to seek redress from persons who, though remaining in [Connecticut], knowingly cause the injury in [Colorado]." 465 U.S. at 790. Hence, the Court believes that Defendants' action in sending a NOCI to eBay satisfies the minimum contacts required for a finding of specific jurisdiction because this lawsuit would redress the harm caused by Defendants' action and Defendants' action

was expressly aimed at stopping a sale in Hartsel, Colorado.

*(3) Does jurisdiction over Defendants based on this activity comport with notions of fair play and substantial justice?*

Once Plaintiffs have established that Defendants' s action constitutes a sufficient minimum contact with the State of Colorado, Plaintiffs must also establish that haling Defendants into court in the State of Colorado is consistent with notion of fair play and substantial justice. *Pro Axess, Inc. v. Orlux Distrib.*, 428 F.3d 1270, 1279 (10th Cir. 2005). To that end, the Court must consider the following factors:

- (1) the burden on the defendant,
- (2) the forum state's interest in resolving the dispute,
- (3) the plaintiff's interest in receiving convenient and effective relief,
- (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and
- (5) the shared interest of the several state in furthering fundamental social policies.

*OMI Holdings v. Royal Ins. Co. Of Can.*, 149 F.3d 1086, 1095 (10th Cir. 1998) (citing *Asahi Metal Industry Co. v. Superior Court of Cal.*, 480 U.S. 102, 109 (1987)).

Here, Defendants are burdened in that their only relevant connection to the State of Colorado is their decision to stop the sale of an allegedly infringing item in Colorado. Nevertheless, the forum state has significant interest in protecting the business interests of its citizens and providing a forum for the same. Thus, as long as Defendants have sufficient minimum contacts, which the Court concludes they do, notions of fair play are not offended by exercising jurisdiction in the forum in which the harm occurred. *See Bancroft & Masters, Inc.*, 223 F.3d 1082.

A copyright owner using eBay's VeRO program has notice of where the allegedly infringing item is located before he stops the sale. He can do more than simply notify the seller of alleged infringement – he has the ability to have the listing removed from eBay and the seller marked as selling infringing items. Before undertaking any action to interfere with a sale, the copyright owner

knows, by the location of the item, in which forum he is ending a sale. In this case, Defendants knew before submitting a NOCI to eBay that this listing was in Hartsel, Colorado, and that their actions would harm a seller in Hartsel, Colorado. They also knew, or reasonably should have known, that “tabberone,” Plaintiffs’ seller name, was listed as a “power seller,” had over 5,000 current listings, and had received over 13,000 positive feedback messages in the past. Knowing the volume of Plaintiffs’ business on eBay, the harm caused by the black mark from a NOCI, and the location of Plaintiffs’ business in Hartsel, Colorado, Defendants must reasonably anticipate being haled into court in the State of Colorado. *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

#### **D. Proper Venue**

Defendants argue that venue is improper in the State of Colorado because they are not subject to personal jurisdiction in this state. Based on the Court’s conclusion that specific personal jurisdiction exists over Defendants in this case, the Court also finds that venue is proper. *See North American Phillips Corp. v. American Vending Sales*, 35 F.3d 1576, 1577 n.1 (Fed. Cir. 1996).

#### **IV. Conclusion**

Accordingly, for the reasons stated above, the Court RECOMMENDS that Defendants’ Motion to Dismiss Complaint for Lack of Personal Jurisdiction and Improper Venue [Filed February 9, 2006; Docket #4] be **denied**. Plaintiffs have established *prima facie* proof of specific jurisdiction in that Defendants knew that their actions would result in harm directly to Plaintiff’s business in the State of Colorado and intended this harm to occur. Under Fed. R. Civ. P 72, the parties shall have ten (10) days after service of this Recommendation to serve and file any written objections in order

to obtain reconsideration by the District Judge to whom this case is assigned.<sup>4</sup>

Dated at Denver, Colorado this 15th day of May, 2006.

BY THE COURT:

s/ Michael E. Hegarty  
Michael E. Hegarty  
United States Magistrate Judge

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<sup>4</sup> The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive, or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a *de novo* determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within ten (10) days after being served with a copy of this Recommendation may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991); *Niehaus v. Kansas Bar Ass'n*, 793 F.2d 1159, 1164 (10th Cir. 1986).

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge Walker D. Miller

Civil Action No. 05-cv-02505-WDM-OES

KAREN DUDINIKOV, et al.,

Plaintiff(s),

v.

CHALK & VERMILLION FINE ARTS, INC., et al.

Defendant(s).

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**ORDER ON RECOMMENDATION OF MAGISTRATE JUDGE**

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This matter is before me on the recommendation of Magistrate Judge Michael E. Hegarty, issued May 15, 2006, that Defendants' Motion to Dismiss Complaint for Lack of Personal Jurisdiction and Improper Venue (docket no. 7) be denied. Defendants filed a timely objection to the recommendation, Plaintiffs responded and Defendants filed their reply. Accordingly, Defendants are entitled to *de novo* review.

I have reviewed *de novo* the permanent portions of the record, including the parties' pleadings, the magistrate judge's recommendation and the parties' briefs concerning Defendants' objections. I conclude that Defendants' objections should be sustained and the recommendation modified as hereafter set forth.

Defendants had moved for dismissal because of the lack of personal jurisdiction over the Defendants as non-residents. Although Judge Hegarty recommends that I find that Defendants are not subject to general jurisdiction, he concluded that Plaintiffs

presented “*prima facie* proof of specific jurisdiction in that Defendants knew that their actions would result in harm directly to plaintiff’s business in the state of Colorado and intended this harm to occur.” Mag. Rec, p. 14. For substantially the same reasons set forth in the recommendation, I accept Judge Hegarty’s recommendation that this court does not have general jurisdiction over the Defendants. However, for the reasons hereafter stated, I reject Judge Hegarty’s conclusion that specific jurisdiction existed and modify the recommended decision to grant the motion to dismiss (docket no. 7).

The Recommendation presents the factual background which may be briefly summarized. Plaintiffs offered a dress for sale on e-Bay which Defendants assert infringes on copyrighted material controlled by them. Pursuant to the Digital Millennium Copyright Act (DMCA), Defendants gave a Notice of Claimed Infringement (NOCI) to e-Bay. See 17 U.S.C. § 512(c)(1)(C). To avoid possible liability e-Bay removed the dress from its website. *Id.* Plaintiffs ultimately filed a counter notice with e-Bay. See 17 U.S.C. § 512(g)(3)(D). Plaintiffs claim harm from loss of revenue because of e-Bay’s withdrawal of the image and an ultimate threat of being prohibited from placing items on the website. Complaint, ¶ 25. However, the sole relief sought in Plaintiffs’ complaint is a declaratory judgment that the fabrics in question do not infringe on Defendants’ copyright together with injunctive relief against Defendants.

Under these circumstances Magistrate Judge Hegarty concluded that specific jurisdiction over Defendants existed because Defendants’ NOCI activities were purposefully directed to the foreign state where they knew Plaintiffs operated which allegedly caused harm to Plaintiffs. He concluded that the alleged injuries arose out of

or related to the NOCI. See *Benton v. Cameco Corp.*, 375 F.3d 1070, 1075 (10th Cir. 2004).

In making his decision, Magistrate Judge Hegarty principally relied on *Calder v. Jones*, 465 U.S. 783, 789 (1984), a case determining that Florida residents writing and publishing an alleged libelous story concerning the California activities of California residents was sufficient to establish jurisdiction because their “alleged wrongdoing [was] intentionally directed at a California resident . . . .” 465 U.S. at 790.

Judge Hegarty also sought to distinguish two cases of copyright protection upon which Defendants rely, *Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355 (Fed. Cir. 1998); *Wise v. Lindamood*, 89 F. Supp. 2d 1187 (D. Colo. 1999). Plaintiffs argued, and Judge Hegarty accepted, that those two cases dealt only with cease and desist letters with no direct impact while the filing of a NOCI with e-Bay effectively stopped Plaintiffs’ sale of the fabric at issue.

I disagree with this reasoning and conclude that *Calder* and its progeny are inapposite to this case. Rather, the reasoning of *Red Wing Shoe Co.* and *Wise* should be applied to deny the existence of specific jurisdiction.

*Calder* specifically holds that where allegedly wrongful conduct is directed at the forum resident concerning forum activities specific jurisdiction is appropriate. Yet there has been some dispute as to the reach of *Calder*. We know that *Calder* does not stand for the simple proposition “that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction.” *Bancroft & Masters, Inc. v. Augusta Natonal Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). There must be “something more.”

*Id.* See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (foreseeability alone insufficient for personal jurisdiction under the due process clause). The Ninth Circuit succinctly summarizes what the “something more” should be, namely, “express aiming” at the forum state, a requirement satisfied “when a defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.” 223 F.3d at 1087 (emphasis added). I emphasize “wrongful conduct” to make plain that innocent or lawful activity that has an incidental impact in another jurisdiction cannot alone be a basis for “hailing someone into court even if the impact may be foreseeable.” *Worldwide Volkswagen Corp.*, 444 U.S. at 297. Here, the alleged harm to Plaintiffs is the consequence of Defendants exercising a statutorily conferred right to remedy a claimed copyright infringement. The statutory purpose is to protect the holder of a copyright and provide a mechanism for resolution short of court action. See *Perfect 10, Inc. v. CC Biell, LLC*, 340 F. Supp. 2d 1077 (C.D. Cal. 2004) (DCMCA enacted to preserve copyright enforcement on internet and provide immunity to service providers). Even assuming Defendants could foresee that sending a NOCI may cause Plaintiffs to act or fail to act in Colorado, it was not the consequence of a wrongful act in the circumstances. Accordingly, *Calder* is not a basis for specific jurisdiction.

I also view the NOCI, the lawful act undertaken to protect copyrights owned by the party, as closely akin to the cease and desist letters which were insufficient to create personal jurisdiction simply by informing parties, including the claimed infringer, of suspected infringement. *Red Wing Shoe Co., Inc.* 148 F.3d at 1361. My colleague,



Chief Judge Babcock, carefully examined this issue, including a review of several related decisions, and concluded that the vast majority of courts reach the same result. *Wise*, 89 F. Supp. 2d at 1192. As Judge Babcock points out, allowing a party to impose jurisdiction on a non-resident for simply asserting infringement of the parties' protected rights will encourage forum shopping, decrease the likelihood of settlement and obstruct efficient resolution of controversies. *Id.* at 1191-2.

Accordingly, it is ordered:

1. The recommendation of Magistrate Judge Hegarty, issued May 15, 2006, is accepted in part, rejected in part and modified as provided herein.
2. Defendants' motion to dismiss (Docket No. 7) is granted because this court has neither general or special jurisdiction over the Defendants, and this case is dismissed without prejudice.
3. Defendants may have their costs.

DATED at Denver, Colorado, on September 14, 2006.

BY THE COURT:

s/ Walker D. Miller  
United States District Judge