Personal Jurisidiction Widened for Internet Sales

The Tenth Circuit has released a decision in *Dudnikov v. Chalk & Vermillion Fine Arts, Inc.*, that widens the scope of personal jurisdiction for Internet sales to include the location of the seller. Plaintiffs sold products on eBay from their home in Colorado. Defendants objected to the use of their images on fabrics in a particular auction and contacted eBay in California, successfully persuading eBay to suspend plaintiffs' auction. The suspension allegedly had adverse consequences for plaintiffs' business, which was indicated on eBay to be located in Colorado, and future dealings with the auction site. By email, defendants also sent a letter threatening plaintiffs with suit in federal court if they tried to repost their products for auction. However, plaintiffs first initiated a lawsuit in Colorado seeking a declaratory judgment that their products did not infringe defendants' copyrights and alleging that the defendants acted tortiously in contacting eBay to have their auctions removed. The District Court dismissed the complaint for lack of personal jurisdiction, and the Tenth Circuit reversed.

The Tenth Circuit held that "when a company uses the DMCA to take down products from eBay on grounds of copyright infringement, the company can be sued in the state where the target resides." The copyright holders were based in Connecticut and the United Kingdom, with no connection to Colorado except for the email sent to plaintiffs, who they knew were in Colorado. They claimed that Colorado wasn't the proper jurisdiction for the lawsuit. However, the circuit court found otherwise, noting that it was clear that the sellers were in Colorado and the take-down notice clearly impacted people in Colorado, adapting the standard test for personal jurisdiction. Accepting the allegations at the pleading stage, the court concluded that the defendants engaged in wrongful acts that were purposefully directed at the state of Colorado. The harm to the plaintiffs was foreseeable, and the claims in the litigation arose out of that harm. Finally, the court concluded that requiring the defendants to appear in Colorado District Court did not offend traditional notions of fair play and substantial justice. Accordingly, the law suit was allowed to continue, at least through the pleading stage.

RIAA Loses Default Judgments

The large number of lawsuits filed by the Recording Industry Association of America (RIAA) has been the source of much attention. There have been two recent lawsuits where the RIAA has been unable to obtain default judgment. In *Interscope v. Rodriguez* and *Atlantic Records v. Brennan*, the RIAA failed to obtain a default judgment, even though the defendant did not mount a legal defense.

In the latter case, Judge Arterton criticized the RIAA's boilerplate complaint for not adequately stating a claim upon which relief may be granted. Like the former case, "the court was faced with a similar motion for default judgment by recording industry plaintiffs against an unresponsive defendant. Notably, the complaint in Rodriguez was nearly identical to the one filed by Plaintiffs in this case, particularly in the respect that gives this Court pause. Rather than provide '[f]actual allegations' sufficient to make their claims for relief more than mere conjecture, Plaintiffs' allegations of infringement lack any factual grounding whatsoever, and rely instead on their 'inform[ation] and belie[f]' that Mr. Brennan willfully violated their exclusive rights."

The complaint merely alleged that the defendant violated the copyrights by "making available for distribution to others" copyrighted material on its server. In reaching the decision, Judge Arterton criticized the "nonexistent factual record" of the complaint, saying being merely "informed and believed" that the defendant committed copyright infringement by making materials available was not sufficient. The judge in particular criticized the argument that merely making files available on Kazaa equates to copyright infringement. "At least one aspect of Plaintiffs" distribution claim is problematic, however, namely the allegation of infringement based on 'mak[ing] the Copyrighted Recordings available for distribution to others,'" wrote Judge Arterton in the ruling. She also questioned the constitutionality of the statutory damages sought and whether plainitff was engaging in anticompetitive behavior with its legal campaign.

Bauer is a partner with the law firm of Lackenback Siegel and Online Editor of The SciTech Lawyer. *He can be reached at rbauer@LSLLP.com.*

FTC Acts on Improper Patent Holdups

In the past, the FTC has taken action against Dell and Rambus due to their failure to disclose essential patents while participating in a standards-setting process. Building on that authority, the FTC has announced a proposed consent order in circumstances where a company had disclosed it patents and committed to licensing them, but its successor-in-interest later attempted to enforce the patents on terms more onerous than the licensing commitment.

In the early 1990s, the IEEE developed the very successful fast ethernet standard, which is now used in virtually every personal computer. During the process, National Semiconductor Corporation disclosed its patents and indicated that, if its technology was chosen for inclusion in the standard, it would license the technology for a one-time fee of $1,000. Based on National's licensing assurance, and following its normal balloting and voting procedures, IEEE incorporated its technology into the standard, which was published in final form in 1995.

The patents were subsequently assigned "subject to any existing licenses that [National] may have granted" and it was provided that "[e]xisting licenses shall include . . . [p]atents that may be encumbered under standards such as an IEEE standard . . . ." Nevertheless, the assignee of the patents attempted to repudiate the $1,000 licensing term contained in National's letter of assurance to the IEEE. They sent a letter to the IEEE that purported to "supersede" any previous licensing assurances by National, and promised to make available to any party a nonexclusive license "on a non-discriminatory basis and on reasonable terms and conditions including its then current royalty rates." Infringement actions were taken, and threatened against several parties.

An interesting and controversial aspect of the FTC's proposed action is its sole reliance on section 5 of the FTC Act, which is intended to protect consumers from anticompetitive behavior rather than the businesses that participated in the IEEE standards process for fast ethernet. A consent order has been prepared and published for public comments, in which the assignee of the patents agrees to severe constraints in its enforcement of the patents.

Legislative Activity: FISA Stalls and FOIA Reformed

As of the writing of this column, Congress remains deadlocked over legislation extending the Federal Intelligence Surveillance Act. At the heart of the dispute is a proposal to give telecommunications companies immunity for allegedly illegally providing private information of its customers to federal agencies. Largely unnoticed however, and of larger practical importance, is a reform of the Freedom of Information Act (FOIA), the main tool for those seeking information from governmental agencies. The OPEN Government Act of 2007 was passed in December 2007 and made many useful reforms to the FOIA process. It established the Office of Government Information Services, which is responsible for a tracking system for FOIA requests, helping to resolve conflicts between agencies and requesters, and penalizing agencies that don't process FOIA requests on time. The legislation also imposes greater reporting requirements to let Congress and the public know more about how agencies handle requests. The legislation also allows for the award of attorneys' fees when a lawsuit is necessary to force an agency to act or change its position on a FOIA request, and makes it clear that requesters can get government records maintained by private contractors and not just the agencies themselves. ◆