UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 20-943 DMG (RAOx)** Date August 3, 2020

Title ***Incredible Features, Inc., et al. v. BackChina, LLC*** Page 1 of 6

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS—ORDER RE DEFENDANTS' MOTION TO DISMISS OR TRANSFER [19]

I.
FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Incredible Features, Inc., Jeffrey R. Werner, and Brian R. Wolff filed a Complaint against Defendant BackChina, LLC for copyright infringement on January 29, 2020. Complaint [Doc. # 1]. Plaintiffs allege that Defendant infringed its copyrights by posting several photographs to its website without obtaining permission from Plaintiffs to do so. *See id.* Defendant, a Texas corporation with a principal place of business in Texas, filed the instant Motion to Dismiss or Transfer ("MTDT") on March 2, 2020, arguing that the Court should dismiss or transfer this case to the United States District Court for the Southern District of Texas because this venue is either improper or inconvenient. [Doc. # 19.] Plaintiffs filed an Opposition to the MTDT [Doc # 30]. Defendant did not file a Reply by its deadline for doing so. [Doc. ## 26, 31.] For the following reasons, the Court **DENIES** the MTDT.

II.
DISCUSSION

Defendant first argues that the Court should dismiss this case because venue is improper in this district. In copyright cases, venue is proper "in the district in which the defendant or his agent resides or may be found." *Autodesk, Inc. v. Kobayashi + Zedda Architects Ltd.*, 191 F. Supp. 3d 1007, 1021 (N.D. Cal. 2016) (citing 28 U.S.C. § 1400(a)). According to the Ninth Circuit, this language means that venue in a copyright case is proper "in any judicial district in which the defendant would be amenable to personal jurisdiction if the district were a separate state." *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010). The Court therefore must conduct the well-established personal jurisdiction analysis to determine whether venue is proper in this district.

When faced with a motion to dismiss for lack of personal jurisdiction, the party claiming jurisdiction "bears the burden to establish jurisdictional facts." *In re Boon Glob. Ltd.*, 923 F.3d

643, 650 (9th Cir. 2019) (citing *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). That party can carry its burden by making a *prima facie* showing of jurisdictional facts in response to a motion to dismiss. *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010) (internal citation omitted).

Courts may have either general or specific jurisdiction over a defendant. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). There is no dispute in this case that the Court lacks general jurisdiction over Defendant. The MTDT therefore turns on whether the Court has specific jurisdiction over Defendant. The Ninth Circuit applies a three-part test to determine whether a district court may exercise specific jurisdiction over a non-resident defendant:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendants' forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.

In re W. States Wholesale Nat. Gas Antitrust Litig., 715 F.3d 716, 741-42 (9th Cir. 2013), *aff'd sub nom. Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015).

A. Purposeful Direction

Courts apply the purposeful direction test the copyright infringement actions like this case. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011). A defendant purposefully directs its conduct towards a forum if it has "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1069 (9th Cir. 2017).

There is no dispute that Defendant acted intentionally in posting to its website the pictures over which Plaintiffs claim ownership. Compl. at ¶¶ 37-65*; Mavrix Photo*, 647 F.3d at 1229 ("There is no question that it acted intentionally reposting the allegedly infringing photos of Ferguson and Duhamel.").

It also appears that Defendant expressly aimed its infringing conduct at this district. While the Ninth Circuit has historically "struggled with the question whether" copyright infringement "on a nationally accessible website is expressly aimed at any, or all, of the forums in which the website can be viewed," the court has determined that operating a website containing infringing material "in conjunction with 'something more'—conduct directly targeting the forum—is sufficient" to satisfy this prong of the purposeful direction test.[1] *Mavrix Photo*, 647 F.3d at 1229. To determine what constitutes "something more," courts look to factors "including the interactivity of the defendant's website; the geographic scope of the defendant's commercial ambitions; and whether the defendant 'individually targeted' a plaintiff known to be a forum resident." *Id.* (internal citations omitted).[2]

Regarding the "geographic scope" inquiry, the *Mavrix Photo* court determined that the "most salient" consideration in its analysis was that the defendant used the "copyrighted photos as part of its exploitation of the California market for its own commercial gain" by displaying "advertisements [that] targeted California residents," which "indicate[d] that [the defendant] knows—either actually or constructively—about its California user base, and that it exploits that base for commercial gain by selling space on its website for advertisements." *Id.* at 1229-30. Here, as in *Mavrix Photo*, at least some of the advertising on Defendant's website is targeted at Los Angeles readers. Plaintiffs allege that Defendant's website "features banner advertisements for a real estate agent and one for a home building business both of which are located in the Central District and target residents of the Central District." Compl. at ¶ 41. Under *Mavrix Photo*, these advertisements demonstrate at least constructive knowledge of a readership based in the Central District. Based on that knowledge of, and ability to profit from, the website's Los Angeles-based readership, Defendant "can be said to have 'expressly aimed' at" this judicial district. *Mavrix Photo*, 647 F.3d at 1231.

[1] Defendant appears to suggest that *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 420 (9th Cir. 1997), comes to a different conclusion than *Mavrix Photo* about whether the contents of a website can satisfy the second purposeful direction prong. That argument is unpersuasive for two reasons. First, *Mavrix Photo* expressly cites to *Cybersell* as an example of the circuit's "struggle" to clarify the area of the law before setting out and explaining a specific standard for courts to apply moving forward. The Court therefore reads *Mavrix Photo* to harmonize and clarify the language from several previous decisions, including *Cybersell*. Second, the internet of 1997 (when *Cybersell* was decided) is not the internet of 2020. The ability to target certain audiences through web advertising has improved by leaps and bounds since 1997, making a company's use of advertising that relates to a specific area more persuasive evidence of that company's desire to drum up business (or in this case, readership) in that area. Accordingly, to the extent that *Cybersell* and *Mavrix Photo* conflict, the Court concludes that *Mavrix Photo* is the more applicable and persuasive analog.

[2] While the final factor may no longer be relevant after the Supreme Court's ruling in *Walden v. Fiore*, that decision does not appear to disturb courts' ability to examine a defendant's purposeful direction using the first two factors. 571 U.S. 277, 285 (2014) (the "minimum contacts analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there.).

Other courts in this circuit have interpreted *Mavrix Photo* to mean that allegations similar to Plaintiffs' are sufficient to satisfy this prong of the purposeful direction analysis. *See, e.g.*, *AirWair Int'l Ltd. v. Schultz*, 73 F. Supp. 3d 1225, 1234 (N.D. Cal. 2014); *DFSB Kollective Co. v. Bourne*, 897 F. Supp. 2d 871, 874 (N.D. Cal. 2012) ("If plaintiffs were able to show that defendant . . . either actually or constructively knew about his California user base, *Mavrix* would control and personal jurisdiction would be proper in this case."); *Michael Grecco Prods., Inc. v. NetEase Info. Tech. Corp.*, 2018 WL 6443082, at *4 (C.D. Cal. Sept. 24, 2018) (same) (cited by Defendant). Plaintiff has therefore satisfied the "expressly aimed" prong.

Finally, it was foreseeable that the harm that Defendant allegedly caused would be felt in this district, where Plaintiffs reside and do business. While Defendant does not expressly address this prong, the Ninth Circuit has indicated that Plaintiffs' allegations are sufficient. *Mavrix Photo*, 647 F.3d at 1231-32 (holding that foreseeable copyright harm would be felt in plaintiff's principal place of business and where plaintiff's main audience was located).

In sum, Plaintiffs' allegations are sufficient to show that Defendant purposefully directed its actions at the Central District of California for the purposes of the copyright venue analysis.

B. Relatedness

Plaintiffs' copyright claim also arises out of and relates to Defendant's forum-related activities. In examining this factor, courts look to whether the plaintiff would have suffered the complained-of injury "but for" the defendant's forum-related conduct. *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998). As discussed above, Plaintiffs have alleged, and Defendant admits, that it advertises and displays third-party advertisements targeted at the Los Angeles market. Compl. at ¶ 41; Jin Decl. at 11 [Doc. # 19-1]. In other words, Defendant targets readers in this district, and monetizes its readership in this district, while displaying allegedly infringing material on its website for its readers to view. Because that is the cause of Plaintiffs' alleged injury, Plaintiffs have satisfied the relatedness prong.

C. Fair Play and Substantial Justice

Since Plaintiffs have satisfied the first two specific jurisdiction prongs, the burden shifts to Defendant to establish that exercising personal jurisdiction in this forum would offend traditional notions of fair play and substantial justice. *Washington Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 672 (9th Cir. 2012). Defendant merely concludes that litigating in this district would create an impermissible burden because its offices, personnel, and documents are all located in the Southern District of Texas. MTDT at 6-7. It also concludes that the Southern District of Texas has an interest in overseeing this action because Defendant is located there. But this district also has an interest in overseeing the action as the alleged harm took place in this

district and the photographers that took the copyrighted photos reside and do business here. *Mavrix Photo*, 647 F.3d at 1231 (finding personal jurisdiction to be proper in the district encompassing the plaintiffs' main place of business). And while it may be burdensome for Defendant to litigate in this District, the same can be said for Plaintiffs if the Court forces them to litigate in the Southern District of Texas. Courts are loath to transfer or dismiss cases on venue grounds if the result would be to merely shift the inconvenience from one party to another, rather than eliminate inconvenience altogether. *See Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). Because that would appear to be the result of the Court's dismissal of this action for improper venue, Defendant's argument is unpersuasive.

Accordingly, Defendant is subject to the personal jurisdiction of the Central District of California for purposes of 28 U.S.C. section 1400(a), and venue is proper in this district under that statute. The Court therefore declines to dismiss the action for improper venue.

D. Section 1404 Venue Transfer

Defendant alternatively requests that the Court transfer the case to the Southern District of Texas on convenience grounds under 28 U.S.C. section 1404. MTDT at 7-8. To obtain a convenience transfer under section 1404, a defendant must "make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." *Decker Coal*, 805 F.2d at 843. In considering whether to transfer a case, courts examine both private and public factors, including "(1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000).

The first factor is neutral given that there are no agreements between the parties in this case. The second factor is also neutral because federal courts in this district and the Southern District of Texas undoubtedly have enough familiarity with federal copyright law to effectively oversee this action. Regarding the third factor, a plaintiff's choice of forum is generally given "great weight." *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987); *Carolina Cas. Co. v. Data Broad. Corp.*, 158 F. Supp. 2d 1044, 1048 (N.D. Cal. 2001). Defendant argues, however, that the Court should give less deference to Plaintiffs' choice of forum because the Central District "lacks a significant connection to the activities alleged in the complaint." MTDT at 8-9. As explained above, however, Defendant has sufficient related contacts with this district for the Court to have personal jurisdiction over it. Moreover, as Plaintiffs argue, the allegedly infringed works were taken in this district by photographers who reside here. *See* Opp. at 16-17; *Mavrix*

Photo, Inc. v. GG Digital, Inc., 2012 WL 12887834, at *3 (C.D. Cal. 2012) (cited by Defendant) ("[T]he photographs in question were taken in either Florida or the Bahamas. . . . Therefore, the contacts relating to Plaintiff's cause of action arose primarily in New York, Florida, and the Bahamas . . . .").

As for the sixth through eighth factors—those pertaining to the cost of litigation, access to evidence, and ability to compel witnesses to appear—it appears that litigating in this district would be more economical and convenient for Plaintiffs and less for Defendant. The reverse would be true if the Court transferred the case to the Southern District of Texas. As discussed above, courts should not order a transfer when doing so would merely shift the burdens of litigation from one party to another. *Decker Coal*, 805 F.2d at 843; *Amini Innovation Corp. v. JS Imports, Inc.*, 497 F. Supp. 2d 1093, 1110 (C.D. Cal. 2007) (collecting cases). These factors therefore do not support a transfer to the Southern District of Texas.

Since Defendant has not demonstrated that any reasons overcome the "great weight" afforded to Plaintiff's choice to litigate in the Central District of California, the Court declines to transfer the case under section 1404.

III.
CONCLUSION

In light of the foregoing, the Court **DENIES** Defendant's **MTDT** in its entirety. Defendant shall file its Answer by **August 18, 2020**.

IT IS SO ORDERED.