

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 07-cv-00143-REB-PAC

DAVID ALLISON, doing business as **CHEAT CODE
CENTRAL**, a sole proprietorship,

Plaintiff,

v.

JEREMY N. WISE, an individual;
DAVID SHEPHERD, an individual; and
STUART WRIGHT, an individual,

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FIRST
AMENDED COMPLAINT [Docket # 29]**

Plaintiff David Allison ("Allison"), for his response to Defendant's Motion to Dismiss Plaintiff's First Amended Complaint (Docket No. 29),¹ states as follows:

I. INTRODUCTION

Wise seeks dismissal of the claims against him on the basis that (1) he is not subject to personal jurisdiction before this Court, and (2) under 28 U.S.C. §1391(b), this Court is not the proper venue for this action. Wise's Motion should be denied. First, Wise is subject to personal jurisdiction in Colorado because he committed torts in the

¹ By the filing of a First Amended Complaint on May 10, 2007 (Docket No. 26), Defendant's Motion to Dismiss Plaintiff's Initial Complaint, and Plaintiff's Response in Opposition to that Motion, were mooted. See Gotfredson v. Larsen LP, 432 F. Supp. 2d 1163, 1172 (D. Colo. 2006) ("A pleading that has been amended under Fed. R. Civ. P. 15(a) supersedes the pleading it modifies and remains in effect throughout the action unless it is subsequently modified."). Accordingly, this Response to Defendant's Motion to Dismiss the First Amended Complaint is directed toward the current operative pleading, the First Amended Complaint.

Colorado which have caused injury to Allison in this state. Second, venue of this action is proper in Colorado because a substantial part of the events giving rise to the claims and of the property that is the subject of the action is situated in this district.

II. FACTUAL BACKGROUND

Allison is a resident of Broomfield, Colorado. Allison operates a premier web site, located at *www.cheatcc.com*, which is devoted to “enhancing game experiences around the world,” which includes, among other things, my description of video game strategies, tips, hints, tricks, and “cheat” codes. See Declaration of David Allison (“Allison Dec.”), attached hereto as Exhibit A, at ¶ 2. These “cheat” codes allow video game players to access hidden video game features, and are not typically included as part of the instruction manuals that accompany video game purchases. Id.

Allison runs his business from his home. He performs all administration, maintenance and upkeep of his website from his home, including updating his copyrighted materials. Id. at ¶ 3. The servers which host *www.cheatcc.com* are located at In Flow, Inc., which is located in Denver, Colorado. Id. Allison began creating his original cheat codes in 1998, and published some of these early codes in 1999 in “The Ultimate Code Book.” Id. at ¶ 4. Allison has since invested years of time and effort to discover and publish cheat codes, hints and gaming strategies for the gaming community. Id. Allison publishes his expression of each particular cheat code, hint or strategy in narrative form on the *cheatcc.com* web site. Id. The *cheatcc.com* site includes Allison’s copyrighted expression for gaming hints, strategies and cheat codes for hundreds of video games on multiple platforms.

Allison has registered his copyrights in his expression of the hints, strategies and cheat codes with the United States Copyright Office. Id. at ¶ 5. Allison holds Copyright Reg. No. TX-5-116-5237, issued January 5, 2000, for “The Ultimate Code Book,” Copyright Reg. No. TX-6-162-180 issued May 12, 2005, for text and compilation of the *cheatcc.com* web site, and Copyright Reg. No. TX-6-516-407, issued January 29, 2007, for revised text and compilation of the website and additional website pages. Id. The copyrighted works in this case consist of (1) The Ultimate Code Book, (2) the *cheatcc.com* web site as of May 12, 2005, excluding third-party banner advertisements, and (3) additional and revised text and new pages added to the *cheatcc.com* web site as of January 29, 2007. Wise is a direct competitor of Allison. Wise owns and operates several web sites loosely referred to as the Lair Alliance Network, which is composed of at least the following domains: Cheatcore.net, Cheat-codes-for.com, Cheatedemon.com, Cheatmasters.com, Cheats2k.net, Playstation2-cheats.co.uk, Ps2replay.com, Xbox-cheat-codes.com, and Xtreme-cheats.com.

Like Allison, Wise displays hundreds of cheat codes, hints and strategies for a variety of gaming platforms on his web sites. Id. at ¶ 6. However, Wise has copied each of these codes from Allison’s copyrighted cheat codes, hints and strategies displayed on Allison’s *cheatcc.com* site. Id. The cheat codes which Wise has copied from *cheatcc.com* are nearly word-for-word copies to the cheat codes on *cheatcc.com*.

To copy content from a website, a user must first log on to the site. To do this a user types the domain name, such as *www.cheatcc.com*, into the user’s web browser. This action directs the user’s computer browser, via telephone lines over the Internet, to

the server which hosts the target web site. The user can then view, on his own computer screen, the web pages that are stored at the host server. If the user wants to copy material from the target website he must merely click “Edit” on his computer’s toolbar, then click “Select All”, and then “Copy.” The copying user may then “Paste” the content onto his own computer or his own server. Id. at ¶ 7.

On January 19 and 22, 2007, Allison notified Wise of his wholesale copying of Allison’s cheat codes from *cheatcc.com* site. Id. at ¶ 8. Wise refused to take down the copied content, and instead made minor, insignificant changes to Allison’s copyrighted material. Id. Wise continues to post material which is subject to Allison’s copyrights and which is copied directly from Allison’s *cheatcc.com* site. Id. Both Allison’s *cheatcc.com* site and each of Wise’s sites offer substantial banner, popup and interstitial third-party advertisements. Id. at ¶ 9. Wise profits from the display of Allison’s copyrighted material by generating revenue through these advertisements. Id. Thus, as a direct result of Wise’s unauthorized appropriation of Allison’s copyrighted material, Allison faces lost user traffic, revenue, and consumer goodwill. These losses are suffered in Colorado, where Allison resides and conducts business. Id.

III. STANDARD FOR DISMISSAL

Allison, as the plaintiff, bears the burden of establishing personal jurisdiction over Wise. However, prior to trial, a plaintiff need only make a *prima facie* showing of jurisdiction based on affidavits and other written materials. The allegations of the First Amended Complaint must be taken as true if they are not controverted by the defendant’s affidavits. If there are conflicting affidavits, all factual disputes must be

resolved in the plaintiff's favor. Federal Deposit Insurance Co. v. First Interstate Bank of Denver, N.A., 937 F. Supp. 1461, 1466 (D. Colo. 1996). Finally, in the preliminary stages of litigation, the burden of establishing personal jurisdiction over a defendant is "light." Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc., 205 F.3d 1244, 1247 (10th Cir. 2000). Allison meets this burden, and accordingly Wise's Motion to Dismiss must be denied.

IV. LEGAL ARGUMENT

Almost fifty years ago the United States Supreme Court noted that federal courts should be sensitive to changes in technology, communication and transportation when conducting a personal jurisdiction analysis. See Hanson v. Denckla, 357 U.S. 235, 250-52 (1958). The rapid proliferation of the Internet highlights this need for flexibility:

Cyberspace . . . is not some mystical incantation capable of warding off the jurisdiction of courts built from bricks and mortar. Just as our traditional notions of personal jurisdiction have proven adaptable to other changes in the national economy, so too are they adaptable to the transformations wrought by the Internet. In the last century, for example, courts held that, depending on the circumstances, transactions by mail and telephone could be the basis for personal jurisdiction notwithstanding the defendant's lack of physical presence in the forum. There is no logical reason why the same should not be true of transactions accomplished through the use of e-mail or interactive websites. Indeed, application of this precedent is quite natural since much communication over the Internet is still transmitted by ordinary telephone lines.

Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 510-11 (D.C. Cir. 2002) (footnotes omitted). See also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (holding that specific jurisdiction "may not be avoided merely because the defendant did not physically enter the forum State," since "it is an inescapable fact of modern commercial

life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted"); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292-94 (1980) (noting that the "limits imposed on state jurisdiction by the Due Process Clause . . . have been substantially relaxed over the years . . . largely attributable to a fundamental transformation in the American economy," and that "[a]s technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase") (quoting Hanson v. Denckla, 357 U.S. at 250-51)).

It is with these notions of flexibility, the obviated necessity for defendants to be present in the forum, and expansive jurisdiction over non-residents that the jurisdictional issues raised by Wise's Motion to Dismiss must be resolved.

A. Wise is Subject to the Personal Jurisdiction of this Court.

To establish personal jurisdiction over a non-resident defendant, a plaintiff must show that (1) the forum state (here, Colorado), would provide for such jurisdiction; and (2) the exercise of personal jurisdiction does not offend the Due Process Clause of the Fourteenth Amendment. Far West Capital, Inc. v. Towne, 46 F.3d 1071, 1074 (10th Cir. 1995); Intercon, 205 F.3d at 1247. Colorado's long-arm statute operates coextensively with the constitutional limits of Due Process. See Martinez v. Farmington Motors, Inc., 931 P.2d 546 (Colo. 1996); Wise v. Lindamood, 89 F. Supp. 2d 1187 (D. Colo. 1999); Gwynn v. Transcor America, Inc., 26 F. Supp. 2d 1256 (D. Colo. 1998). Thus, the jurisdictional inquiry may collapse into a single Due Process analysis. However, not all

courts skip the long-arm statute analysis, and as such it will be discussed here.

The Due Process clause permits exercise of jurisdiction over a nonresident defendant where there exists minimum contacts between the defendant and the forum state. Far West Capital, 46 F.3d at 1074. Minimum contacts may be satisfied in two ways, either by exercise of specific or of general jurisdiction. Allison asserts this Court has specific personal jurisdiction over Wise. Minimum contacts necessary for specific jurisdiction exist when: (1) a defendant purposely directs his activities at residents of the forum state or his activities cause important consequences in the state; (2) the cause of action arises directly out of the defendant's contact with the state or arise from the consequences of the defendant's activities within the state; and (3) the court's exercise of jurisdiction is reasonable and does not offend traditional notions of fair play and substantial justice. Id.; First Interstate Bank of Denver, 937 F. Supp. at 1468; Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1298 (10th Cir. 1999).

1. Colorado's Long-Arm Statute Provides a Basis for Jurisdiction.

In this case, Allison alleges the defendant Wise committed several torts, including that Wise infringed Allison's copyrights. Accordingly, this is a tort case. Copyright infringement is an intentional tort. Bucklew v. Hawkins, Ash, Baptie & Co., LLP, 329 F.3d 923, 931 (7th Cir. 2003); see also Porter v. United States, 473 F.2d 1329, 1337 (5th Cir. 1973) (infringement of copyright constitutes a tort); Turton v. United States, 212 F.2d 354, 354 (6th Cir. 1954) ("[A]n action for damages by reason of infringement of a copyright is likewise one sounding in tort"). The Colorado long-arm statute provides that any person, whether or not a resident of Colorado, who commits a

tortious act within the state, submits to the jurisdiction of the courts of the State for any cause of action arising from the tort. See Colo. Rev. Stat. § 13-1-124 (1)(b). Thus, the primary issue with respect to jurisdiction in tort actions is whether the act constituting the tortious conduct can be deemed to have occurred in the forum state.

However, “to satisfy the statutory assertion of long arm jurisdiction . . . it is not necessary that both the tortious conduct constituting the cause and the injury constituting the effect take place in Colorado.” First Interstate Bank of Denver, 937 F. Supp. at 1469. It is sufficient that the injury occur in Colorado if the injury is direct, and not consequential or remote. See id. (allegations that out-of-state defendant sent false audit confirmations to Colorado resident causing injury in Colorado were sufficient to exercise jurisdiction in Colorado). Indeed, in Burt v. Board of Regents, 757 F.2d 242, 244-45 (10th Cir. 1985), the Tenth Circuit held that a Nebraska physician had sufficient minimum contacts with Colorado when he had mailed an allegedly defamatory letter, where the plaintiff was intending to establish a medical practice. The Burt court reasoned that jurisdiction existed and “no due process notions of fairness are violated by requiring one who intentionally libels another to answer for the truth of his statements in any state where the libel causes harm to the victim.” Id. at 245.

In this case, both the underlying actions constituting the tort, the acts of accessing and copying the protected material from *cheatcc.com*, and the injury occurred in Colorado. As noted above, Wise can remain in his home in Ohio at his computer, enter Allison’s domain name *www.cheatcc.com*, and thus access the server in Colorado that hosts Allison’s web site and copy its pages. See Maritz, Inc. v. Cybergold, Inc., 947

F. Supp 1328, 1330 (E.D. Mo. 1996) (Any internet user can access any website . . . by entering into the computer the internet address they are seeking. . . . Via telephone lines, the user is connected to the website, and the user can obtain any information that has been posted at the website for the user).

Although done more discreetly using the Internet's telephone lines as his accomplice, it is no different in effect than Wise traveling to Colorado and copying Allison's copyrighted material onto a CD, or making copies of the web site's text on a copier in Colorado. That the Internet allows this to be done from the comfort of Wise's home does not change the analysis: Wise had to access a server located in Colorado to copy the material. Thus, Wise effectively entered Colorado to commit the copyright infringement. See Bochan v. La Fontaine, 68 F. Supp.2d 692, 699 (E.D. Va. 1999) (holding out-of-state defendants' use of server in Virginia was integral to publication of alleged libelous statement thus making *prima facie* showing for jurisdiction in Virginia).

Not only did Wise "enter" Colorado to copy Allison's copyrighted web pages, albeit through cyberspace, but Allison, as a resident of Colorado, has been injured here. "When an injured party is an individual, it is reasonable to infer that the brunt of the injury will be felt in the state in which he or she resides." Hy Cite Corp. v. Badbusinessbureau.com, LLC, 297 F. Supp. 2d 1154, 1166 (W.D. Wis. 2004). This alone is enough to obtain jurisdiction. Because Wise has purposefully used Allison's Colorado server to copy web pages, causing damage to Allison in Colorado, exercise of

personal jurisdiction over Wise in Colorado is appropriate.²

The Tenth Circuit reached a similar result in Intercon, supra. In that case the defendant, a Delaware dial-up Internet service provider, mistakenly routed its customers' email message to the wrong domain name, thus errantly using plaintiff's mail server in Oklahoma instead of its own. On appeal, the Intercon Court found that defendant purposefully directed its conduct toward Oklahoma, because after it was on notice of its error, it continued to route its customers e-mails to the Oklahoma server. Id., 205 F.3d at 1247. That defendant had "purposefully availed itself of the Oklahoma server," causing damage to the plaintiff in Oklahoma, was "a substantial enough connection with Oklahoma to make exercise of jurisdiction reasonable." Id. at 1248.³

Like the defendant in Intercon, Wise has been notice that his conduct in accessing Allison's server for the purpose of displaying Allison's copyrighted content is wrongful. See Allison Dec. at ¶ 8. Wise, however, continues to purposefully access the Colorado server which hosts *www.cheatcc.com*, and copy Allison's copyrighted works stored there. Because he has committed torts against Allison in Colorado, by copying Allison's copyrighted material, Wise is subject to jurisdiction in Colorado.

² Wise argues that anytime an individual visits a web site, the individual's web browser copies the web content to his computer, and that thus the conduct of visiting a web site can not give rise to specific jurisdiction. See Motion, at 9. There is a distinct difference between viewing a web page, thus creating a "cached" file of its pages, which would appear to be fair use of the content, and intentionally copying another's web pages for the express purpose of posting on your own server. The later conduct confers specific jurisdiction, especially when the actor knows his conduct will result in injury in the forum state.

³ Wise directs his jurisdictional analysis on the situs of his website servers and on the interactivity of his websites. However, in this tort case it is the location of Allison and of Allison's servers which host *www.cheatcc.com* which is important. Thus cases which address their jurisdictional inquiry on the defendant's web site are inapposite. See, e.g. Soma Med., 196 F.3d 1292.

2. The Exercise of Personal Jurisdiction Comports With Due Process.

It is likewise reasonable and fair to allow Allison to bring suit against Wise in Colorado. The gist of reasonableness or fair play and substantial justice is whether the defendant's contact with the forum state would lead to a reasonable expectation that he may be haled into court there. World-Wide Volkswagen Corp., 444 U.S. at 297.

Whether exercise of jurisdiction over cases involving intentional torts, such as copyright infringement, comports with due process is based on the "effects" test articulated in Calder v. Jones, 465 U.S. 783, 788-90 (1984). In Calder, the Supreme Court "held that where a defendant's intentional, and allegedly tortious actions taken outside the forum state are expressly directed at causing a harmful effect within the forum state, a sufficient nexus exists between the defendant and the state so as to satisfy due process." See Broadview Fin., Inc. v. Entech Mgmt. Servs. Corp., 859 F. Supp. 444, 449 (D. Colo. 1994) (citing Calder, 465 U.S. at 789-90).⁴ "The express aiming requirement under the effects test insures that personal jurisdiction comports with traditional due process principles." Hy Cite Corp. v. Badbusinessbureau.com, LLC, 297 F. Supp. 2d 1154, 1165 (W.D. Wis. 2004). The effects test does not supplant traditional due process analysis; rather, it is a means of evaluating defendant's relevant contacts. Id. (citing Wallace v. Herron, 778 F.2d 391, 395 (7th Cir. 1985)).

Indeed, in Broadview Financial, the court held that because the defendant's acts

⁴ As discussed above, by copying Allison's protected material that resides in Colorado, Wise's actions likewise occurred in Colorado. However, even if the Court finds otherwise, Calder provides the sufficient nexus to exercise personal jurisdiction.

were aimed at Colorado, and because he was aware they would cause injury in Colorado, he “must have reasonably anticipated being haled into court in Colorado where an injury would be incurred” as a result of his actions. Broadview, 859 F. Supp. at 449. Here, Wise could not have reasonably anticipated anything different.

Moreover, the court must also consider the following factors in deciding whether the exercise of jurisdiction is reasonable: (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 substantive social policies. See Intercon, 205 F.3d at 1250.

Colorado has an interest in resolving this case and determining whether a Colorado resident's copyrights have been infringed. Colorado likewise has a “manifest interest” in providing a forum in which its residents can seek redress for intentional injuries caused by out-of-state actors. See id. Allison, too has a strong interest in seeing this dispute resolved in Colorado. He is a sole proprietor who would be burdened by being forced to litigate in other than his home forum, which is the state where his witnesses and proof are located. And, finally, Wise, who availed himself into this jurisdiction by commission of a tort here, has not made any showing that it will be burdensome for him to defend here.

Given the federal courts' stated sensitivity to advances in technology, communication and transportation when conducting a personal jurisdiction analysis, the balance of these considerations does not strongly weigh in favor of Wise, and therefore

Allison's choice of forum should not be disturbed. Wise, 89 F. Supp. at 1191 (citing William A. Smith Contracting Co., Inc. v. Travelers Indem. Co., 467 F.2d 662, 664 (10th Cir. 1972) ("Plaintiff's choice of forum should rarely be disturbed")). Accordingly, Wise's Motion to Dismiss should be denied.

3. Alternatively, Allison Requests that the Court Allow him to Conduct Limited Discovery Regarding Personal Jurisdiction over Wise.

If the Court deems that Wise is not subject to personal jurisdiction in Colorado, then Allison requests the opportunity to take limited discovery on personal jurisdiction issues. Tenth Circuit law directs that "when a defendant moves to dismiss for lack of jurisdiction, either party should be allowed discovery on the factual issues raised by that motion." Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033, 1035 (10th Cir. 1975); see also Far West Capital, 46 F.3d at 1077 n.5 (citing Wyatt v. Kaplan, 686 F.2d 276, 283 (5th Cir. 1982) ("When a defendant challenges personal jurisdiction, courts generally permit depositions confined to the issues raised in the motion to dismiss")). Should the Court be inclined to grant Wise's Motion, Allison alternatively requests leave to conduct such discovery on, at a minimum, the following topics:

- a. The number of Colorado residents that are users of Wise's sites;
- b. The number of monthly hits to the Wise's web sites from Colorado residents, and the resulting revenue;
- c. Third-party banner and interstitial advertising purchases made by Colorado residents on Wise's web sites that result in income to Wise;
- d. The nature and amount of business conducted by Wise in Colorado; and
- e. Any other facts tending to support personal jurisdiction over Wise

B. The District of Colorado Is a Proper Venue for this Action.

Finally, Wise contends venue of this case is improper under 28 U.S.C. §

1391(b)(2), and argues that a substantial part of the events giving rise to the claims did not occur in Colorado. Wise is wrong on this point, as “the propriety of venue for copyright claims is governed by 28 U.S.C. § 1400, the specific venue provision for copyright claims.” Kimball v. Countrywide Merchant Servs., 74 U.S.P.Q.2d 1316,1320 (E.D. Pa. 2005). That provision provides that:

Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights or exclusive rights in mask works or designs may be instituted in the district in which the defendant or his agent resides or may be found.

It is well-settled that “[a] defendant ‘may be found’ in any district in which he is subject to personal jurisdiction.” Kimball, 74 U.S.P.Q.2d at 1320. Indeed, the same facts in this case control Wise’s request for dismissal based on improper venue as his request for dismissal based on lack of personal jurisdiction. See N. Amer. Philips Corp. v. Am. Vending Sales, Inc., 35 F.3d 1576, 1577 (Fed. Cir. 1994) (finding venue issues are subsumed in personal jurisdiction analysis, and venue lies *ipso facto* if court has personal jurisdiction). As discussed above, because Wise is subject to personal jurisdiction in Colorado, the District of Colorado is a proper venue.

Moreover, with regard to Allison’s non-copyright tort claims, Wise fails to address the second part of 28 U.S.C. § 1391(b)(2), which provides that venue is proper in the district where a substantial part of the property that is the subject of the action is located. See Verizon Online Servs., Inc. v. Ralsky, 203 F. Supp. 2d 601, 623 (E.D. Va. 2002) (finding venue proper in district where computer e-mail servers were located, despite fact that defendant’s conduct in sending spam e-mails originated out-of-state); see also Int’l Truck & Engine Corp. v. Quintana, 259 F. Supp. 2d 553, 558 (N.D. Tex.

2003) (finding venue proper in district from which infringed trademark was accessible on the internet). Because a substantial part of the property, in this case the servers housing Allison's copyrighted material, is situated in this district, and consequently venue is proper in the District of Colorado. See Allison Dec. at ¶ 3.

V. CONCLUSION

Accordingly, for the reasons set forth above, Plaintiff respectfully requests that the Court deny Defendant's Motion to Dismiss Plaintiff's First Amended Complaint, or alternatively, grant Allison leave to conduct limited discovery on the jurisdictional issues raised by the Motion to Dismiss.

Respectfully submitted this 23rd day of May, 2007.

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on May 23, 2007, I electronically filed the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following persons at the given email addresses:

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