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09-1739-cv
Penguin Grp. (USA) Inc. v. Am. Buddha

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2010

(Argued: January 7, 2010 Question Certified: June 15, 2010

Certified Question Answered: March 24, 2011

Decided: May 12, 2011)

Docket No. 09-1739-cv

UNITED STATES COURT OF APPEALS
FILED
MAY 12 2011
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

PENGUIN GROUP (USA) INC.,

Plaintiff-Appellant,

- v -

AMERICAN BUDDHA,

Defendant-Appellee.

Before: SACK, KATZMANN, and CHIN,* Circuit Judges.

Appeal by the plaintiff from an order of the United States District Court for the Southern District of New York (Gerard E. Lynch, Judge) dismissing this action for lack of personal jurisdiction over the defendant. In answer to a question we certified to the New York Court of Appeals, see Penguin Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30, 42 (2d Cir. 2010), that court has concluded that "[i]n copyright infringement cases involving the uploading of a copyrighted printed literary

* The Honorable Denny Chin, who was at the time of argument a United States District Judge for the Southern District of New York sitting by designation, is now a member of this Court.

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work onto the Internet, . . . the situs of injury for purposes of determining long-arm jurisdiction under [the relevant section of New York's long-arm-jurisdiction statute is] . . . the location of the copyright holder," Penguin Grp. (USA) Inc. v. Am. Buddha, 16 N.Y.3d 295, 301-02, --- N.E.2d ---, ---, --- N.Y.S.2d ---, --- (2011). In light of this response by the Court of Appeals, the judgment of the district court is now:

Vacated and Remanded.

RICHARD DANNAY, Cowan, Liebowitz & Latman, P.C. (Thomas Kjellberg, of counsel), New York, N.Y., for Plaintiff-Appellant.

CHARLES CARREON, Online Media Law, PLLC, Tucson, Ariz., for Defendant-Appellee.

PER CURIAM:

This appeal, which returns to us after the New York Court of Appeals responded to a question we certified to that Court, concerns the limits of New York's "long-arm" jurisdiction over out-of-state defendants in copyright infringement actions. We assume the readers' familiarity with the facts and procedural history as set forth in our previous opinion in this case. See Penguin Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30, 32-34 (2d Cir. 2010) ("Am. Buddha II"). We rehearse them here only insofar as we think necessary to explain our final resolution of this appeal.

The defendant American Buddha is an Oregon not-for-profit corporation with its principal place of business in Arizona that maintains a website known as the Ralph Nader

Library.[2] The website "provides access to classical literature and other works . . . , including [four] works published in print format by Plaintiff-Appellant Penguin Group (USA) Inc. [("Penguin")]."[3] Am. Buddha II, 609 F.3d at 33 (internal quotation marks omitted). Having learned of the existence of American Buddha's website and its contents, Penguin filed suit against American Buddha in the United States District Court for the Southern District of New York, alleging that American Buddha's posting of the four Penguin books on the Internet violated Penguin's copyrights in works that it had published.[4] American Buddha moved to dismiss the complaint pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, "contending that it has done nothing that would make it amenable to suit in New York." Penguin Grp. (USA) Inc. v. Am. Buddha, No. 09-cv-528, 2009 WL 1069158, at *1, 2009 U.S. Dist. LEXIS 34032, at *1 (S.D.N.Y. Apr. 21, 2009) ("Am. Buddha I"). The district court

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[2] The Ralph Nader Library is not affiliated with well known consumer advocate Ralph Nader. See Penguin Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30, 33 (2d Cir. 2010).

[3] Penguin alleges that American Buddha has posted the following four books in their entirety on www.naderlibrary.com, thereby infringing Penguin's copyrights in the printed works: Upton Sinclair, Oil!; Sinclair Lewis, It Can't Happen Here; Apuleius, The Golden Ass (E.J. Kenney trans.); and Lucretius, On the Nature of the Universe (R.E. Latham trans.). Penguin Grp. (USA) Inc. v. Am. Buddha, No. 09-cv-528, 2009 WL 1069158, at *1, 2009 U.S. Dist. LEXIS 34032, at *2 (S.D.N.Y. Apr. 21, 2009).

[4] Subject matter jurisdiction was premised on the federal courts' "original and exclusive" jurisdiction over actions alleging copyright infringement pursuant to 17 U.S.C. § 501. Compl. ¶ 4; see 28 U.S.C. § 1338(a).

agreed, ruling, as we later characterized it, that the "situs of the injury" was "where the book[s in which Penguin holds the copyrights were] electronically copied -- presumably in Arizona or Oregon, where American Buddha and its computer servers were located -- and not New York, where Penguin was headquartered." Am. Buddha II, 609 F.3d at 32; see also Am. Buddha I, 2009 WL 1069158, at *4, 2009 U.S. Dist. LEXIS 34032, at *13. This appeal followed.

Concluding that resolution of the issues raised on appeal "require[d] analysis of state law and policy considerations that this Court is ill-suited to make," Am. Buddha II, 609 F.3d at 32, we certified a question to the New York Court of Appeals, which that Court has now answered.

The district court's dismissal of Penguin's complaint rested on its interpretation of New York's long-arm statute, N.Y. C.P.L.R. 302(a)(3)(ii). It provides, in pertinent part:

> [A] court may exercise personal jurisdiction over any non-domiciliary . . . who . . . commits a tortious act without the state causing injury to person or property within the state, . . . if he . . . expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . .

N.Y. C.P.L.R. 302(a)(3)(ii). To establish jurisdiction under this provision, a plaintiff must demonstrate that:

> (1) the defendant's tortious act was committed outside New York, (2) the cause of action arose from that act, (3) the tortious act caused an injury to a person or property in New York, (4) the defendant expected or

> should reasonably have expected that his or her action would have consequences in New York, and (5) the defendant derives substantial revenue from interstate or international commerce.

Am. Buddha II, 609 F.3d at 35 (citing LaMarca v. Pak-Mor Mfg. Co., 95 N.Y.2d 210, 214, 735 N.E.2d 883, 886, 713 N.Y.S.2d 304, 307 (2000)).

In this case, the applicability vel non of the long-arm statute turns on the third requirement: the situs of Penguin's injury. For the district court to find that the long-arm statute conferred jurisdiction on courts in New York, Penguin was required to show that it suffered injury "within the state." After examining two competing lines of New York cases, the district court reasoned that "[b]ecause Penguin pleaded infringement only by American Buddha, and not by any individual who downloaded material from American Buddha's site, . . . business was lost through the copying of the copyrighted works by American Buddha and not through their placement on the Internet." Id. at 37 (characterizing the district court's analysis in Am. Buddha I). The district court therefore concluded that Penguin's business was lost -- and its injury suffered -- "where the books were uploaded -- Oregon or Arizona -- not where they were downloaded and used, which could have been anywhere that the Internet is available, including New York." Id. (same).

On appeal to this Court, we decided that resolution of the appeal "require[d] a determination of how the New York State Legislature intended to weigh the breadth of protection to New

Yorkers whose copyrights have allegedly been infringed against the burden on non-resident alleged infringers whose connection to New York may be remote and who may reasonably have failed to foresee that their actions would have consequences in New York." Id. at 32; see also id. at 37-41 (reviewing the legislative history of the relevant long-arm provisions and New York cases interpreting them).

We therefore certified the following question to the New York Court of Appeals:[5] "In copyright infringement cases, is the situs of injury for purposes of determining long-arm jurisdiction under N.Y. C.P.L.R. § 302(a)(3)(ii) the location of the infringing action or the residence or location of the principal place of business of the copyright holder?" Id. at 32.

On March 24, 2011, the Court of Appeals answered a "narrow[ed] and reformulate[d]" version of our question. Penguin Grp. (USA) Inc. v. Am. Buddha, 16 N.Y.3d 295, 301, --- N.E.2d ---, ---, --- N.Y.S.2d ---, --- (2011) ("Am. Buddha III"). The Court rephrased our question as follows: "In copyright infringement cases involving the uploading of a copyrighted printed literary work onto the Internet, is the situs of injury for purposes of determining long-arm jurisdiction under N.Y. C.P.L.R. § 302(a)(3)(ii) the location of the infringing action or the residence or location of the principal place of business of

[5] The district court does not have statutory authority to ask the New York Court of Appeals for its views on unsettled and important issues of New York law. We do. See N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a).

the copyright holder?" Id. at 301-02, --- N.E.2d at ---, --- N.Y.S.2d at --- (emphasis added).[6] The Court concluded that "a New York copyright owner alleging infringement sustains an in-state injury pursuant to CPLR 302(a)(3)(ii) when its printed literary work is uploaded without permission onto the Internet for public access." Id. at 304, --- N.E.2d at ---, --- N.Y.S.2d at ---.

The New York Court of Appeals observed that "the Internet itself plays an important role in the jurisdictional analysis in the specific context of this case." Id. at 304, --- N.E.2d at ---, --- N.Y.S.2d at ---. "[T]he alleged injury in this case involves online infringement that is dispersed throughout the country and perhaps the world." Id. at 305, --- N.E.2d at ---, --- N.Y.S.2d at ---. The Court therefore concluded that "it is illogical to extend" the traditional tort approach that "equate[s] a plaintiff's injury with the place where its business is lost or threatened" to the context of "online copyright infringement cases where the place of uploading is inconsequential and it is difficult, if not impossible, to correlate lost sales to a particular geographic area." Id. at 305, --- N.E.2d at ---, --- N.Y.S.2d at ---.

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[6] The Court of Appeals emphasized that it was not "necessary [for it] to address whether a New York copyright holder sustains an in-state injury pursuant to CPLR 302(a)(3)(ii) in a copyright infringement case that does not allege digital piracy and, therefore, express[ed] no opinion on that question." Am. Buddha III, 16 N.Y.3d at 307 n.5, --- N.E.2d at --- n.5, --- N.Y.S.2d at --- n.5.

The Court also identified the right of a copyright holder "'to exclude others from using his property'" as a "critical factor that tips the balance in favor of identifying New York as the situs of injury." Id. at 305, --- N.E.2d at ---, --- N.Y.S.2d at --- (quoting eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392 (2006)). In light of this right and the "undisputed" fact that "American Buddha's Web sites are accessible by any New Yorker with an Internet connection," the Court viewed the "absence of any evidence of the actual downloading of Penguin's four works by users in New York" as "not fatal to a finding that the alleged injury occurred in New York." Id. at 306, --- N.E.2d at ---, --- N.Y.S.2d at ---.

The Court of Appeals rejected American Buddha's assertion that its decision would "open a Pandora's box allowing any nondomiciliary accused of digital copyright infringement to be haled into a New York court when the plaintiff is a New York copyright owner of a printed literary work." Id. at 307, --- N.E.2d at ---, --- N.Y.S.2d at ---. The Court was satisfied that the long-arm statute's "built-in safeguards against such exposure," together with the requirements of the United States Constitution's Due Process Clause, would guard against such abuse. Id. at 307, --- N.E.2d at ---, --- N.Y.S.2d at ---.

When this appeal was last before us, we indicated that "were we eventually to agree with Penguin, contrary to the district court's decision, that the situs of injury was indeed New York, the proper course would be to remand to the district

court to consider the remaining four factors for personal jurisdiction under the long-arm statute." Am. Buddha II, 609 F.3d at 41. The Court of Appeals' decision now compels us to "agree with Penguin" and to conclude, for the purposes of the personal jurisdiction analysis pursuant to New York's long-arm statute, that the situs of Penguin's alleged injury was New York.

As we observed in American Buddha II, the district court's opinion and order dismissing Penguin's complaint addressed only the situs-of-injury issue. See id.; Am. Buddha I, 2009 WL 1069158, at *4, 2009 U.S. Dist. LEXIS 34032, at *13 ("As this issue is dispositive, it is not necessary to explore whether plaintiff has met its burden on the other elements necessary to establish jurisdiction under Rule 302(a)(3)(ii), or whether the exercise of jurisdiction would comport with due process."). We therefore vacate the judgment of the district court and remand this case to that court for its consideration in the first instance of whether Penguin has established the four remaining jurisdictional requisites, and the extent to which the assertion of personal jurisdiction over American Buddha would be consistent with the requirements of Due Process.

For the foregoing reasons, the judgment dismissing the plaintiff's complaint is vacated and the case is remanded to the district court for further proceedings consistent with this opinion and with the Court of Appeals' response to our certified question.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit
UNITED STATES SECOND CIRCUIT COURT OF APPEALS
Catherine O'Hagan Wolfe

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This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 7
Penguin Group (USA) Inc.,
Appellant,
v.
American Buddha,
Respondent.

Richard Dannay, for appellant.
Submitted by Charles H. Carreon, for respondent.
Michael H. Page, for Public Citizen, amicus curiae.
International Trademark Association; American Association of Publishers et al., amici curiae.

GRAFFEO, J.:

The United States Court of Appeals for the Second Circuit has asked us a question regarding the scope of long-arm jurisdiction under CPLR 302 (a) (3) (ii) in the context of a federal copyright infringement action.

Plaintiff Penguin Group (USA) is a large trade book

publisher with its principal place of business in New York City. Defendant American Buddha is an Oregon not-for-profit corporation whose principal place of business is in Arizona. It operates two Web sites -- the American Buddha Online Library and the Ralph Nader Library[1] -- that are hosted on servers located in Oregon and Arizona.

Penguin commenced this copyright infringement action against American Buddha in the United States District Court for the Southern District of New York, alleging that American Buddha infringed on Penguin's copyrights to four books: "Oil!" by Upton Sinclair; "It Can't Happen Here" by Sinclair Lewis; "The Golden Ass" by Apuleius, as translated by E.J. Kenney; and "On the Nature of the Universe" by Lucretius, as translated by R.E. Latham. The complaint alleges that American Buddha published complete copies of these works on its two Web sites, making them available free of charge to its 50,000 members and anyone with an Internet connection. The electronic copying and uploading of the works was apparently undertaken in Oregon or Arizona.

American Buddha's Web sites assure its users that its uploading of these works and the users' downloading of them do not constitute copyright infringement because they are protected under sections 107 and 108 of the Copyright Act (17 USC § 101 et seq.), which govern fair use and reproduction by libraries and

[1] The Ralph Nader Library is not affiliated with Ralph Nader.

archives. Penguin disputes that any exception to the Copyright Act applies to American Buddha's activities.

American Buddha moved to dismiss the complaint for lack of personal jurisdiction, arguing that its ties to New York were too insubstantial. In response, Penguin asserted that it had secured long-arm jurisdiction over American Buddha by virtue of CPLR 302 (a) (3) (ii), which provides jurisdiction over nondomiciliaries who commit tortious acts outside the state that result in injuries within New York. American Buddha countered that CPLR 302 (a) (3) (ii) was inapplicable because Penguin did not suffer an in-state injury.

The district court granted American Buddha's motion and dismissed the complaint, holding that Penguin was injured in Oregon or Arizona, where the copying and uploading of the books took place. The court determined that Penguin suffered only a "purely derivative economic injury" in New York based on its domicile here, which was insufficient to trigger CPLR 302 (a) (3) (ii). Although the court acknowledged that the Internet could be a complicating factor in analyzing personal jurisdiction, it concluded that the Internet played "no role in determining the situs of [Penguin's] alleged injury" since the claimed infringement occurred in Oregon or Arizona.

Recognizing a split of authority in the New York district courts regarding the application of CPLR 302 (a) (3) (ii) to copyright infringement cases against out-of-state

defendants, the Second Circuit certified the following question to us:

> "In copyright infringement cases, is the situs of injury for purposes of determining long-arm jurisdiction under N.Y. C.P.L.R. § 302 (a) (3) (ii) the location of the infringing action or the residence or location of the principal place of business of the copyright holder?" (609 F3d 30, 32 [2d Cir 2010]).

The Second Circuit invited this Court to "alter this question as it should deem appropriate" (id. at 42) and noted that, "in the context of certifying a question to the New York Court of Appeals[,] . . . the allegation of distribution over the Internet may be a factor in the Court's interpretation of the statute in question" (id. at 39).[2]

Because the Internet plays a significant role in this case, we narrow and reformulate the certified question to read:

> In copyright infringement cases involving the uploading of a copyrighted printed literary work onto the Internet, is the situs of injury for purposes of determining long-arm jurisdiction under N.Y. C.P.L.R. § 302 (a) (3) (ii) the location of the infringing action or the residence or location of the

[2] The Second Circuit also stated that "[t]here is a possible question at the threshold that neither the district court nor the parties have addressed and which we do not here decide: whether a copyright -- in and of itself an intangible thing -- has a physical location for jurisdictional purposes and, if so, what that location is" (609 F3d at 36 n 4). The Second Circuit resolved to "accept for the purposes of this appeal the district court's implicit conclusion that copyrights have a location and that their location in this case is in New York State" (id.). We, too, accept this characterization in answering the certified question.

> principal place of business of the copyright holder?

In answer to this reformulated question and under the circumstances of this case, we conclude it is the location of the copyright holder.

CPLR 302 (a) (3) (ii) allows a court in New York to exercise personal jurisdiction over an out-of-state defendant when the nondomiciliary:

> "3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> . . .
>
> "(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

Consequently, a plaintiff relying on this statute must show that (1) the defendant committed a tortious act outside New York; (2) the cause of action arose from that act; (3) the tortious act caused an injury to a person or property in New York; (4) the defendant expected or should reasonably have expected the act to have consequences in New York; and (5) the defendant derived substantial revenue from interstate or international commerce (see LaMarca v Pak-Mor Mfg. Co., 95 NY2d 210, 214 [2000]). If these five elements are met, a court must then assess whether a finding of personal jurisdiction satisfies federal due process (see id. at 216). The only issue before us

concerns the third requirement -- whether an out-of-state act of copyright infringement has caused injury in New York.

Penguin, supported by amici curiae American Association of Publishers and other national publishing organizations, argues that a New York-based copyright holder sustains an injury in New York for purposes of CPLR 302 (a) (3) (ii) when its copyright is infringed through the out-of-state uploading of its protected work onto the Internet. American Buddha and amicus curiae Public Citizen respond that this case is controlled by Fantis Foods v Standard Importing Co. (49 NY2d 317 [1980]), where we held that a derivative economic injury felt in New York based solely on the domicile of the plaintiff is insufficient to establish an in-state injury within the meaning of the statute. Both parties raise compelling arguments.

Our analysis begins with Fantis Foods, where we found personal jurisdiction to be lacking in the absence of a "direct injury" within New York. In that case, Standard, a New York wholesaler of feta cheese, asserted a claim for conversion against a Greek entity that had diverted a cheese shipment -- meant to be shipped to Standard in Chicago -- to a competitor while the shipment was in Greece or on the high seas. We concluded that personal jurisdiction over the Greek defendant did not lie under CPLR 302 (a) (3) (ii) because:

> "In final analysis the only possible connection between the claimed conversion and any injury or foreseeable consequence in New York is the fact that Standard is

> incorporated and maintains offices there. It has, however, long been held that the residence or domicile of the injured party within a State is not a sufficient predicate for jurisdiction, which must be based upon a more direct injury within the State and a closer expectation of consequences within the State than the indirect financial loss resulting from the fact that the injured person resides or is domiciled there" (id. at 326).

In a different commercial tort context, in Sybron Corp. v Wetzel (46 NY2d 197 [1978]), we held that an injury had occurred in New York under CPLR 302 (a) (3) (ii). The defendant in Sybron, a nondomiciliary corporation, hired a former employee of Sybron -- a competitor engaged in manufacturing in New York -- allegedly to obtain Sybron's protected trade secrets. Recognizing that the locus of injury in commercial cases "is not as readily identifiable as it is in torts causing physical harm" (id. at 205), we determined that Sybron sustained a sufficiently direct injury in New York to support jurisdiction under CPLR 302 (a) (3) (ii) since its claim was based on more than just its in-state domicile. Rather, Sybron had alleged that it acquired the trade secrets at issue in New York and, further, that the defendant's unfair competition threatened to pilfer Sybron's significant New York customers.

Fantis Foods and Sybron both cited favorably to American Eutectic Welding Alloys Sales Co. v Dytron Alloys Corp. (439 F2d 428 [2d Cir 1971]). There, the plaintiffs, two related New York corporations, brought an action against an out-of-state

competitor alleging that it induced their employees to work for the competitor and to use confidential information to lure away plaintiffs' customers in Kentucky and Pennsylvania. The Second Circuit identified three options for determining the situs of injury under CPLR 302 (a) (3) (ii) in a commercial tort case: "(1) any place where plaintiff does business; (2) the principal place of business of the plaintiff; and (3) the place where plaintiff lost business" (id. at 433, quoting Spectacular Promotions, Inc. v Radio Station WING, 272 F Supp 734, 737 [ED NY 1967] [Weinstein, J.]). The Court determined that the third choice "seem[ed] most apt," observing that "[t]he place where the plaintiff lost business would normally be a forum reasonably foreseeable by a tortfeasor" (id. [internal quotation marks and citation omitted]). Because plaintiffs alleged a loss of business only in Kentucky and Pennsylvania, the claim against the competitor was dismissed for lack of personal jurisdiction in New York. The Court rejected plaintiffs' reliance on their New York domicile, reasoning that any "derivative commercial injury" predicated on a loss of sales in other states was too remote to establish an in-state injury within the meaning of the statute (id.).

The injury in the case before us is more difficult to identify and quantify because the alleged infringement involves the Internet, which by its nature is intangible and ubiquitous. But the convergence of two factors persuades us that a New York

copyright owner alleging infringement sustains an in-state injury pursuant to CPLR 302 (a) (3) (ii) when its printed literary work is uploaded without permission onto the Internet for public access. First, it is clear that the Internet itself plays an important role in the jurisdictional analysis in the specific context of this case. It is widely recognized that "the digital environment poses a unique threat to the rights of copyright owners" and that "digital technology enables pirates to reproduce and distribute perfect copies of works -- at virtually no cost at all to the pirate" (House Commerce Comm Rep on the DMCA, HR Rep 551, 105th Cong, 2d Sess, at 25, reprinted in 10 Nimmer on Copyright, Appendix 53, at 37). Indeed, the rate of e-book piracy has risen in conjunction with the increasing popularity of electronic book devices (see Trivedi, Writing the Wrong: What the E-Book Industry Can Learn from Digital Music's Mistakes with DRM, 18 JL & Poly 925, 928 [2010]).

The crux of Penguin's copyright infringement claim is not merely the unlawful electronic copying or uploading of the four copyrighted books. Rather, it is the intended consequence of those activities -- the instantaneous availability of those copyrighted works on American Buddha's Web sites for anyone, in New York or elsewhere, with an Internet connection to read and download the books free of charge.[3] Unlike American Eutectic,

[3] Of course, we take no position on the merits of Penguin's claims.

where the locus of injury was clearly circumscribed to two other states, the alleged injury in this case involves online infringement that is dispersed throughout the country and perhaps the world. In cases of this nature, identifying the situs of injury is not as simple as turning to "the place where plaintiff lost business" (American Eutectic, 439 F2d at 433) because there is no singular location that fits that description.

As a result, although it may make sense in traditional commercial tort cases to equate a plaintiff's injury with the place where its business is lost or threatened, it is illogical to extend that concept to online copyright infringement cases where the place of uploading is inconsequential and it is difficult, if not impossible, to correlate lost sales to a particular geographic area. In short, the out-of-state location of the infringing conduct carries less weight in the jurisdictional inquiry in circumstances alleging digital piracy and is therefore not dispositive.

The second critical factor that tips the balance in favor of identifying New York as the situs of injury derives from the unique bundle of rights granted to copyright owners. The Copyright Act gives owners of copyrighted literary works five "exclusive rights," which include the right of reproduction; the right to prepare derivative works; the right to distribute copies by sale, rental, lease or lending; the right to perform the work publicly; and the right to display the work publicly (see 17 USC

§ 106). Hence, a copyright holder possesses an overarching "right to exclude others from using his property" (eBay Inc. v MercExchange, L.L.C., 547 US 388, 392 [2006] [internal quotation marks and citation omitted]).

Based on the multifaceted nature of these rights, a New York copyright holder whose copyright is infringed suffers something more than the indirect financial loss we deemed inadequate in Fantis Foods. For instance, one of the harms arising from copyright infringement is the loss or diminishment of the incentive to publish or write (see Twentieth Century Music Corp. v Aiken, 422 US 151, 156 [1975]; see also Princeton Univ. Press v Michigan Document Servs., Inc., 99 F3d 1381, 1391 [6th Cir 1996], cert denied 520 US 1156 [1997] ["[P]ublishers obviously need economic incentives to publish scholarly works . . . If publishers cannot look forward to receiving permission fees, why should they continue publishing marginally profitable books at all? And how will artistic creativity be stimulated if the diminution of economic incentives for publishers to publish academic works means that fewer academic works will be published?"]). And, the harm to a plaintiff's property interest in copyright infringement cases "has often been characterized as irreparable in light of possible market confusion" (Salinger v Colting, 607 F3d 68, 81 [2d Cir 2010]).

Moreover, the absence of any evidence of the actual downloading of Penguin's four works by users in New York is not

fatal to a finding that the alleged injury occurred in New York.[4] In Sybron, we made clear that a tort committed outside the state that was likely to cause harm through the loss of business inside the state was sufficient to establish personal jurisdiction regardless of whether damages were likely recoverable or even ascertainable (see Sybron, 46 NY2d at 204; see also Sung Hwan Co., Ltd. v Rite Aid Corp., 7 NY3d 78, 85 [2006]). Courts often issue injunctive relief in copyright infringement cases to halt impermissible uses because "to prove the loss of sales due to infringement is . . . notoriously difficult" (Salinger, 607 F3d at 81 [internal quotation marks and citation omitted]). In any event, it is undisputed that American Buddha's Web sites are accessible by any New Yorker with an Internet connection and, as discussed, an injury allegedly inflicted by digital piracy is felt throughout the United States, which necessarily includes New York.

In sum, the role of the Internet in cases alleging the uploading of copyrighted books distinguishes them from traditional commercial tort cases where courts have generally linked the injury to the place where sales or customers are lost. The location of the infringement in online cases is of little

[4] In its brief, Penguin asserts that its claim is solely against American Buddha and that it is "loath to sue its readers," particularly where they are assured by American Buddha's Web sites that downloading the works contained therein would not constitute copyright infringement.

import inasmuch as the primary aim of the infringer is to make the works available to anyone with access to an Internet connection, including computer users in New York. In addition, the injury to a New York copyright holder, while difficult to quantify, is not as remote as a purely indirect financial loss due to the broad spectrum of rights accorded by copyright law. The concurrence of these two elements -- the function and nature of the Internet and the diverse ownership rights enjoyed by copyright holders situated in New York -- leads us to view this case as closer to Syb ron than Fantis Foods. Thus, we conclude that the alleged injury in this case occurred in New York for purposes of CPLR 302 (a) (3) (ii).[5]

Finally, contrary to American Buddha's assertion, our decision today does not open a Pandora's box allowing any nondomiciliary accused of digital copyright infringement to be haled into a New York court when the plaintiff is a New York copyright owner of a printed literary work. Rather, CPLR 302 (a)

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[5] We do not find it necessary to address whether a New York copyright holder sustains an in-state injury pursuant to CPLR 302 (a) (3) (ii) in a copyright infringement case that does not allege digital piracy and, therefore, express no opinion on that question (compare McGraw-Hill Cos. v Ingenium Tech. Corp., 375 F Supp 2d 252, 256 [SD NY 2005] ["The torts of copyright and trademark infringement cause injury in the state where the allegedly infringed intellectual property is held"] with Freeplay Music, Inc. v Cox Radio, Inc., 2005 WL 1500896 [SD NY 2005] [holding that personal jurisdiction over a nondomiciliary in a copyright infringement case did not exist because the injury occurred where the alleged out-of-state infringement took place]).

(3) (ii) incorporates built-in safeguards against such exposure by requiring a plaintiff to show that the nondomiciliary both "expects or should reasonably expect the act to have consequences in the state" and, importantly, "derives substantial revenue from interstate or international commerce." There must also be proof that the out-of-state defendant has the requisite "minimum contacts" with the forum state and that the prospect of defending a suit here comports with "traditional notions of fair play and substantial justice," as required by the Federal Due Process Clause (International Shoe Co. v Washington, 326 US 310, 316 [1945] [internal quotation marks and citation omitted]; see also World-Wide Volkswagen Corp. v Woodson, 444 US 286, 291-292 [1980]). These issues are beyond the scope of this certified question and their resolution awaits further briefing before the federal courts.

Accordingly, as reformulated, the certified question should be answered in accordance with this opinion.

* * * * * * * * * * * * * * * * *

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section 500.27 of the Rules of Practice of the New York State Court of Appeals, and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question answered in accordance with the opinion herein. Opinion by Judge Graffeo. Chief Judge Lippman and Judges Ciparick, Read, Smith, Pigott and Jones concur.

Decided March 24, 2011