

Internet-based jurisdiction under the New York long arm statute

Kramer Levin Naftalis & Frankel LLP
Brendan M. Schulman, Norman C. Simon and
Samantha V. Ettari

USA

October 27 2011

KRAMER LEVIN
KRAMER LEVIN NAFTALIS & FRANKEL LLP

For our readers interested in how technology shapes litigation apart from e-discovery concerns, we highlight two recent cases that provide insight into the interplay between emerging technologies and establishing or warding off personal jurisdiction.

Recently, the New York Court of Appeals was asked to revisit the state's long-arm statute in the context of an internet copyright infringement claim. *Penguin Group Inc. v. American Buddha*, 946 N.E.2d 159, 165 (N.Y. Mar. 24, 2011). Penguin Publishing Group ("Penguin") sued American Buddha ("Buddha") for publishing four of Penguin's copyrighted literary works on Buddha's website, making them freely available to all internet users. Buddha moved to dismiss for lack of personal jurisdiction, claiming that it did not maintain an office in New York and it allegedly uploaded the copyrighted works to its servers in either *Arizona or Oregon*. *Penguin Group Inc. v. American Buddha*, 2009 WL 1069158, at *1 (S.D.N.Y. Apr. 21, 2009). Penguin argued that the court had personal jurisdiction over Buddha because its alleged actions caused injury to Penguin in New York, where Penguin has its principal place of business. *Id.* at *2. The Southern District rejected Penguin's claim and dismissed the case for failure to establish personal jurisdiction over Buddha. Penguin appealed to the Second Circuit, which certified the question to the New York Court of Appeals because it required an interpretation of the New York long-arm statute. *Penguin Group Inc. v. American Buddha*, 609 F.3d 30, 42-43 (2d Cir. 2010).



[Author page »](#)



[Author page »](#)



[Author page »](#)

Upon the certification, New York's highest court considered whether Penguin had established one of several personal jurisdiction requirements: C.P.L.R. § 302(a)(3)(ii)'s "situs of the injury" provision grants personal jurisdiction over a person or entity committing a tortious act outside the state causing injury within New York 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." *Penguin Group*, 946 N.E.2d at 160. The Court of Appeals determined that, if copyright infringement of literary works is facilitated by the internet, the situs of the injury for purposes of New York's long-arm statute is the location of the copyright. Two factors proved "critical" to the court's analysis: the "intangible and ubiquitous" nature of the internet, which makes it "difficult, if not impossible to correlate lost sales to a particular geographic area," and the "multifaceted nature" of a

copyright holder's rights, the violation of which involves more than merely economic harms. *Id.* at 163-64. "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 —" led the court to conclude "that the alleged injury in this case occurred in New York for purposes of [the long-arm statute]." *Id.* at 165.

In accordance with this decision, the Second Circuit vacated its earlier opinion and remanded the case to the district court to determine whether Penguin could establish other personal jurisdiction requirements. *Penguin Group Inc. v. American Buddha*, 640 F.3d 497 (2d Cir. May 12, 2011).

The New York Court of Appeal's decision is not likely to open the floodgates to suits against out-of-state alleged internet copyright infringers in New York courts because the other requirements of New York's long-arm statute and the constitutional requirements of due process remain stringent and significant barriers. This is demonstrated by *Digiprotect USA Co. v. John/Jane Does* 1-266, 2011 WL 1466073 (S.D.N.Y. Apr. 13, 2011). In that recent decision, plaintiff Digiprotect held a copyright in New York for a pornographic film and claimed various John and Jane Does identified by IP addresses had infringed that copyright by downloading and sharing the film via peer-to-peer online networks. *Id.* at *1. Digiprotect asserted, in light of the New York Court of Appeals' decision in *Penguin*, that the John and Jane Does caused injury in New York because Digiprotect held its copyright in New York. Digiprotect requested expedited discovery in order to serve subpoenas against Time Warner Cable and Comcast, among other ISPs, to reveal the identities of the IP address account-holders. *Id.*

While the court conceded that the injury would have occurred in New York pursuant to *Penguin*, it denied personal jurisdiction over those defendants with non-New York-based IP addresses. The court stated that "[s]howing the situs of injury to be New York is only the first step in satisfying the requirements of [the long-arm statute]." *Id.* at *4. Because Digiprotect "made no showing that any of the Doe defendants expected or reasonably should have expected their downloading of this film to have consequences in New York, particularly when the producer of the film is located in California[.]" Digiprotect did not make a prima facie case for all the requirements of C.P.L.R. § 302, nor for constitutional due process. *Id.*

Emerging technologies will likely continue to produce uncertainty in the realm of personal jurisdiction. These two recent cases highlight the evolving and uncertain nature of personal jurisdiction as it relates to business conducted on the internet. However, courts have not demonstrated eagerness to venture to extremes by providing jurisdiction over all tortious internet activity. Due process considerations would preclude such drastic action. The years to come promise interesting debates over the internet's jurisdictional boundaries.

Tags USA, Copyrights, E-commerce, Litigation, Media & Entertainment,
Kramer Levin Naftalis & Frankel LLP

If you are interested in submitting an article to Lexology, please contact Andrew Teague at ateague@lexology.com.

© Copyright 2006-2011 Globe Business Publishing Ltd | Disclaimer | Privacy policy