

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

BIG GUY’S PINBALL, LLC,

Plaintiff,

Case No. 14-CV-14185  
Hon. Victoria A. Roberts

v.

JIMMY LIPHAM,

Defendant.

**ORDER DENYING MOTION TO DISMISS FOR LACK OF PERSONAL  
JURISDICTION, DENYING MOTION TO DISMISS FOR IMPROPER VENUE,  
DENYING MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, AND  
DENYING MOTION TO TRANSFER VENUE (DOC. #20)**

**I. BACKGROUND**

Plaintiff Big Guy’s Pinball, LLC (“BGP”), a limited liability company incorporated in and with its principal place of business in Michigan, brought this action against Defendant Jimmy Lipham (“Lipham”), a resident of Georgia, for copyright infringement and unfair competition (Count I), violation of the Michigan Uniform Trade Secrets Act, M.C.L. 445.1901 *et seq.* (Count II), and tortious interference with business relationships and/or business expectations (Count III).

Lipham moved to dismiss for: (1) lack of personal jurisdiction; (2) improper venue; and (3) failure to state a claim upon which relief can be granted. In the alternative, he moved to transfer venue. Lipham’s motions to dismiss and to transfer venue are based on his out-of-state defendant status. Lipham’s motion to dismiss for failure to state a claim rests on his contention that BGP violated the GNU General Public License (“GPL”) which governs the usage of Free Software, a “collaborative ecosystem based on principles of reciprocity.” Lipham argues that

because BGP did not follow the requirements of the GPL, he did nothing wrong by uploading the modified software. He requests that the Court recognize an equitable defense to the copyright infringement allegations under this “novel” theory. BGP opposes all of Lipham’s motions. Oral argument was heard on July 8th, 2015.

The Court finds that it may exercise personal jurisdiction over Lipham under Michigan’s long-arm statute and that the exercise of personal jurisdiction does not violate federal due process. Venue is proper, because Lipham is subject to personal jurisdiction in this forum. And, the Court declines to transfer venue to the Northern District of Georgia; Lipham does not meet his burden to overcome the substantial deference given to BGP’s choice of forum. Lastly, BGP’s claim will not be dismissed for failure to state a claim upon which relief can be granted. BGP does state a proper claim, and this Court cannot consider the merit of Lipham’s equitable defense argument.

**A. STATEMENT OF FACTS**

BGP holds a copyright in proprietary software known as “Nucore,” which emulates the functions of obsolete hardware used in Pinball 2000 pinball games. BGP first published Nucore for public download in March 2009 via its website and sold the software both on optical compact disks and as downloadable files.

In July 2013, digital copies of Nucore were downloaded from BGP’s website by an internet user with an IP address identified as belonging to Lipham. A security file stored within Nucore recorded the user’s entries. BGP alleges that Lipham downloaded Nucore, removed the security keys that prevented unauthorized sharing, and uploaded a modified version of Nucore under the name of “Pinbox” to his own website called “PlayPinBox.com.” The Nucore

alternative was available for free download. BGP obtained subpoenas which revealed Lipham to be both the IP address user and the website domain owner.

## II. ANALYSIS

### A. THIS COURT MAY EXERCISE LIMITED PERSONAL JURISDICTION OVER LIPHAM, AND THE EXERCISE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

To avoid dismissal where there has been no evidentiary hearing, a plaintiff must only present a *prima facie* case for jurisdiction. *Audi AG & Volkswagen of Am., Inc. v. D'Amato*, 341 F. Supp. 2d 734, 741 (E.D. Mich. 2004). The Court must consider all affidavits and pleadings in the light most favorable to the plaintiffs and not weigh the assertions of the party seeking dismissal. *Id.* The Court may exercise personal jurisdiction over a defendant if both the defendant is subject to service of process under Michigan's long-arm statute and the exercise of jurisdiction would not deny the defendant due process. *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1176 (6th Cir. 1992). Because Michigan's long-arm statute, M.C.L. § 600.705, extends to the limits of federal due process, this Court must determine only whether the exercise of personal jurisdiction over Lipham would violate Lipham's due process rights. *Id.*

Due process requires the plaintiff to establish that the defendant has minimum contacts with the forum state sufficient to comport with "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). The Sixth Circuit sets forth three criteria that must be met for a court to exercise personal jurisdiction over a non-resident defendant:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must

arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

341 F. Supp. 2d at 742 (quoting *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 150 (6th Cir.1997)).

### **1. LIPHAM PURPOSEFULLY AVAILED HIMSELF OF CAUSING CONSEQUENCES IN MICHIGAN.**

The “purposeful availment” requirement protects a defendant from being forced to litigate in a forum due to “‘random,’ ‘fortuitous’ or ‘attenuated’” contacts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528 (1985). The defendant’s conduct and connection with the forum state must be of the nature that the defendant could reasonably anticipate being sued in that forum. *Id.* at 474. “Purposeful availment” is satisfied when a defendant deliberately engages in conduct that can be “properly regarded as a prime generating cause of the effects resulting in Michigan.” 341 F. Supp. 2d at 742. Lipham’s deliberate actions aimed at Michigan-based BGP amounted to an intentional tort, which satisfies the purposeful availment requirement under the “effects test” that the Supreme Court adopted in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984).

#### **a. THE “EFFECTS TEST”**

In *Calder*, the Court held that a valid basis for personal jurisdiction over an out-of-state defendant existed on the theory that the defendants intended to, and did, cause tortious injury to the plaintiff in the forum state, even though the defendants did not have sufficient minimum contacts with the forum state. *Id.* at 788-89. For the “effects test” to apply, BGP must show that (1) BGP felt the brunt of the injury in Michigan, (2) Lipham used BGP’s copyrighted material

intentionally or deliberately, and (3) Lipham expressly aimed his actions at Michigan. *Ford Motor Co. v. Great Domains, Inc.*, 141 F. Supp. 2d 763, 774 (E.D. Mich. 2001).

The facts that BGP alleges, which the Court must accept as true, satisfy the elements required for application of the “effects test.” First, BGP demonstrates that it felt the brunt of the injury resulting from Lipham’s actions in Michigan. BGP is incorporated in Michigan and has its primary place of business in Michigan. Naturally, Michigan is the state in which BGP has felt the copyright infringement.

Second, BGP alleges that Lipham deliberately and intentionally downloaded Nucore and uploaded a modified version of the software available for free download on his website. Lipham argues that he never intended to infringe on BGP’s copyright, but his argument rests on a theory that there should be an equitable defense to actions which otherwise constitute copyright infringement. Since the merit of Lipham’s equitable defense argument cannot be considered at this stage, BGP satisfies its requirement to show that Lipham’s actions were deliberate or intentional.

Third, BGP has shown that Lipham’s acts were expressly aimed at Michigan. Lipham’s deliberate actions resulting in copyright infringement were expressly aimed at BGP, a Michigan-based corporation that has its headquarters in Michigan. Two of BGP’s co-founders also reside in Michigan. Whether Lipham had actual knowledge that BGP was located in Michigan does not matter. If Lipham was ignorant of this fact, that ignorance does not protect him from litigating in the state where he caused consequences resulting in tortious injury. Taking BGP’s allegations as true, Lipham could have reasonably anticipated being sued in Michigan. Having shown that the “effects test” applies, the “purposeful availment” requirement is satisfied.

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