



Bobyahed!" on the sound recordings "Whoomp (There It Is)"<sup>2</sup> and "The Best of Tag Team," which plaintiffs allege contains an infringing "sample" of the composition "Flashlight."<sup>3</sup>

### FACTS

DM is a Florida corporation with its principal place of business in Florida. DM claims that there is no basis for asserting personal jurisdiction over it in Tennessee because: (1) DM has never maintained a place of business or other physical presence in Tennessee; (2) DM does not regularly transact business in Tennessee nor has DM taken any action that could be construed as purposefully availing itself of the jurisdiction of the Court; (3) the contacts upon which plaintiffs claim jurisdiction lies were the contacts of companies other than DM that DM subsequently acquired through purchases under the United States Bankruptcy Code; and (4) the alleged infringement occurred prior to DM's acquisition of the bankrupt estates that DM purchased. Memorandum of Law in Support of Motion to Dismiss ("DM's Memorandum") at 2 (Docket No. 16).

In response, plaintiffs allege that DM, a record label that wholly owns several music publishing companies, has directly and indirectly transacted business in Tennessee by: (1) licensing its musical compositions to be included in sound recordings sold in Nashville, Tennessee; (2) licensing performances of its compositions in Tennessee; and (3) licensing

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<sup>2</sup> DM contends that it does not distribute a sound recording titled "Whoomp (There It Is)," but acknowledges that the allegedly infringing composition appears in its sound recording "Best of Tag Team."

<sup>3</sup> Plaintiffs have alleged copyright infringement against DM in several other Bridgeport Cases (3:01-0827, 3:01-0832, 3:01-0842, 3:01-0856, 3:01-0946, 3:01-1028, and 3:01-1053), each involving a different allegedly infringing composition that was released on one or more sound recordings distributed by DM.

compositions to be synchronized in a movie that was released, distributed, sold and is available to rent in Tennessee. Plaintiffs' Response to the Motion of Defendant DM Records, Inc. to Dismiss for Lack of Personal Jurisdiction ("Plaintiffs' Response") at 1-2 (Docket No. 41). In relation to the subject of these lawsuits, plaintiffs allege that DM has infringed on plaintiffs' copyrights through "sampling" of its compositions and has participated in the distribution of the infringing compositions and/or sound recordings in Tennessee, thereby committing torts and causing tortious injury in Nashville, Tennessee (Docket No. 41 at 2).

Plaintiffs' jurisdictional allegations in the First Amended Complaint do not provide any factual basis for assertion of jurisdiction, as they recite no facts specific to DM or any acts or omissions of DM upon which jurisdiction may be based (Docket No. 5, ¶ 17). However, the Federal Rules of Civil Procedure do not require plaintiffs to plead any facts alleging personal jurisdiction in their complaint. Wright & Miller, Fed. Practice and Procedure: Civil 2d § 1363, at 458 (West 1990). The Court must look, then, to plaintiffs' submissions in response to DM's motion<sup>4</sup> to see if plaintiffs have asserted facts sufficient to establish a prima facie showing of jurisdiction.

In their Statement of Facts (Docket No. 42), plaintiffs allege that:

- DM is a record label that owns several music publishers (¶¶ 7-8);
- DM's music publishers are affiliated with either the American Society of Composers Authors & Publishers ("ASCAP") or Broadcast Music, Inc. ("BMI"),

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<sup>4</sup> Plaintiffs' Response dated Dec. 17, 2001 (Docket No. 41); Statement of Facts in Support of Plaintiffs' Response to the Motion of Defendant DM Records, Inc. to Dismiss for Lack of Personal Jurisdiction dated Dec. 17, 2001 ("Statement of Facts") (Docket No. 42) and exhibits thereto; and Transcript of the Nov. 30, 2001 deposition of Mark Watson (Docket No. 42, Ex. 1).

performing rights organizations that administer licenses with third parties for live performances nationwide of DM's compositions, and collect licensing fees from these performances and remit them to DM (§§ 16-20);

- The main office for BMI is in Nashville, Tennessee (§ 17);
- The contract between DM and ASCAP was signed in Nashville, Tennessee (§ 18);
- DM has released or re-released the sound recordings containing the allegedly infringing compositions through national distribution channels (§ 23);
- DM sound recordings containing the allegedly infringing compositions have been sold in Tennessee (§§ 28, 37);
- DM sound recordings are promoted on a national and regional basis through "co-op" advertising, whereby retailers promote the recordings in their stores in exchange for a fee (§§ 29-34);
- DM has participated in co-op advertising with Circuit City and Tower Records establishments, national chains that have locations in Tennessee (§ 33);
- DM has advertised directly in "Car Audio" magazine, which is distributed in Tennessee (§ 34);
- DM has licensed at least two of its sound recordings for synchronization<sup>5</sup> in nationally released films (§ 39);
- The sound recordings containing the allegedly infringing compositions are available for sale over the Internet (§§ 41-42);
- DM maintains its own website, which provides links to Amazon.com to purchase DM releases (§ 41).

The question for the Court is whether the foregoing facts provide a sufficient basis for this Court to assert personal jurisdiction over DM.

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<sup>5</sup> A synchronization license is a license for use of a composition in a film, pre-recorded radio or television program, or radio or television commercial. 2 LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 7.01 (2d ed. 2000).

## ANALYSIS

### I.

#### Standard - Motion to Dismiss For Lack of Personal Jurisdiction

On a motion to dismiss for lack of personal jurisdiction, plaintiffs have the burden of setting forth specific facts in support of the Court's exercise of personal jurisdiction over the moving defendants. Theunissen v. Matthews, 935 F.2d 1454, 1458 (6<sup>th</sup> Cir. 1991). Plaintiffs cannot rely solely on the allegations pleaded in their complaint. Id.

The Sixth Circuit has clearly defined the procedure and standards for determining personal jurisdiction. See Dean v. Motel 6 Operating L.P., 134 F.3d 1269, 1271-1272 (6<sup>th</sup> Cir. 1998) (citing Serras v. First Tennessee Bank Nat'l Ass'n, 875 F.2d 1212, 1214 (6<sup>th</sup> Cir. 1989)). The district court may determine the motion on the basis of affidavits alone; it may permit discovery in aid of the motion; it may conduct an evidentiary hearing on the merits of the motion, or it may reserve its decision until trial. Serras, 875 F.2d at 1214. Plaintiffs may defeat the motion by making a prima facie showing of jurisdiction in their pleadings and affidavits, which must be considered by the court in a light most favorable to plaintiffs. CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6<sup>th</sup> Cir. 1996). This burden changes if the court chooses to hold an evidentiary hearing; plaintiffs must then establish jurisdiction by a preponderance of the evidence. Id. If the court chooses to rule on the motion without conducting an evidentiary hearing, it "does not weigh the controverting assertions of the party seeking dismissal."<sup>6</sup> Id.

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<sup>6</sup> DM has filed reply papers in which it challenges some of the factual assertions made by plaintiffs. Reply to Plaintiffs' Response to DM Records, Inc.'s Motion to Dismiss ("DM's Reply Memorandum") (Docket No. 47); Reply to Plaintiffs' Statement of Facts in Support of Plaintiffs' Response to DM Records, Inc.'s Motion to Dismiss ("DM's Reply to Statement of Facts") (Docket No. 48). Because the Court has chosen to rule on the parties'

(quoting Theunissen, 935 F.2d at 1459). The Sixth Circuit has determined that “[a]ny other rule would empower a defendant to defeat personal jurisdiction merely by filing a written affidavit contradicting jurisdictional facts alleged by a plaintiff.” Serras, 875 F.2d at 1214. “Dismissal in this procedural posture is proper only if all the specific facts which the plaintiff [] alleges collectively fail to state a prima facie case for jurisdiction.” CompuServe, 89 F.3d at 1262. If the defendant’s written submissions raise disputed issues of fact or require determinations of credibility, the court may exercise its discretion to hold an evidentiary hearing, or may reserve the issue for trial. Dean, 134 F.2d at 1272.

Because this action raises a federal question, the Court must analyze the personal jurisdiction issue pursuant to Rule 4(k) of the Federal Rules of Civil Procedure, which requires this Court to consider whether jurisdiction over the defendant is consistent with the specific requirements of Tennessee’s long-arm statute and constitutional principles of due process. See, e.g., Mitchell v. White Motor Credit Corp., 627 F. Supp. 1241, 1246 (M.D. Tenn. 1986). Under Tennessee’s long-arm statute, jurisdiction may be asserted on “[a]ny basis not inconsistent with the constitution of this state or of the United States.” TENN. CODE. ANN. § 20-2-214(a)(6).<sup>7</sup> This subsection has been interpreted to extend to the limits of personal jurisdiction imposed by the Due Process Clause. Payne v. Motorists’ Mutual Ins. Cos., 4 F.3d 454, 455 (6<sup>th</sup> Cir. 1993).<sup>8</sup>

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written submissions, it cannot give weight to any of DM’s controverting assertions. CompuServe, 89 F.3d at 1262.

<sup>7</sup> See also TENN. CODE. ANN. § 20-2-223.

<sup>8</sup> The Court’s Due Process analysis is governed by the Fifth Amendment of the United States Constitution instead of the Fourteenth Amendment in a federal question case such as this one; however, the standards to be applied under the Fifth Amendment are essentially the same as those applicable under the Fourteenth Amendment. See, e.g., Dakota Inds., Inc. v.

The Supreme Court has held that personal jurisdiction over a defendant comports with the Due Process Clause where that jurisdiction stems from “certain minimum contacts with [the forum] such that maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” Calder v. Jones, 465 U.S. 783, 788, 104 S. Ct. 1482, 1486, 79 L. Ed. 2d 804 (1984) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 158, 90 L. Ed. 95 (1945)).

Personal jurisdiction may be general or specific depending on the nature of the contacts in a particular case. Compuserve, 89 F.3d at 1263. General jurisdiction exists “when a defendant has ‘continuous and systematic contacts with the forum state sufficient to justify the state’s exercise of judicial power with respect to any and all claims.’” Aristech Chemical Int’l Ltd. v. Acrylic Fabricators Ltd., 138 F.3d 624, 627 (6<sup>th</sup> Cir. 1998) (quoting Kerry Steel v. Paragon Indus. Inc., 106 F.3d 147, 149 (6<sup>th</sup> Cir. 1997)). Specific jurisdiction, on the other hand, subjects the defendant “to suit in this forum state only on the claims that ‘arise out of or relate to’ a defendant’s contacts with the forum.” Id.

The Sixth Circuit has established three criteria to be used in determining whether specific jurisdiction exists in a particular case:

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.

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Dakota Sportswear, Inc., 946 F.2d 1384, 1389 n.2 (8<sup>th</sup> Cir. 1991).

Payne, 4 F.3d at 455 (quoting Southern Machine Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6<sup>th</sup> Cir. 1968)). The “purposeful availment” requirement is “the *sine qua non* of *in personam* jurisdiction.” Mohasco Indus., 401 F.2d at 381-82. It is satisfied “when the defendant’s contacts with the forum state ‘proximately result from actions by the defendant himself that create a “substantial connection” with the forum State,’ and when the defendant’s conduct and connection with the forum are such that he ‘should reasonably anticipate being haled into court there.’” CompuServe, Inc., 89 F.3d at 1263 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-74, 105 S. Ct. 2174, 2183-84, 85 L. Ed. 2d 528 (1985)). A defendant should not be haled into a jurisdiction where his contacts are random, fortuitous, or attenuated. Id. Plaintiffs argue that DM is subject to both general and specific jurisdiction.

#### Venue

In addition to its jurisdictional challenge, DM also argues that venue is not proper in the Middle District of Tennessee. The venue provision of the Copyright Act provides that “[c]ivil actions, suits, or proceedings arising under any Act of Congress relating to copyrights ... may be instituted in the district in which the defendant or his agent resides or may be found.” 28 U.S.C. § 1400(a). It is widely accepted that, for the purposes of this venue provision, a defendant is “found” wherever personal jurisdiction can be properly asserted against it. Linzer v. EMI Blackwood Music, Inc., 904 F. Supp. 207, 214 (S.D.N.Y. 1995). Therefore, if DM is subject to the personal jurisdiction of this Court, then venue would properly lie in this District. Walker v. Concooby, 79 F. Supp. 2d 827, 835 (N.D. Ohio 1999).

### Failure to State a Claim

In considering a motion to dismiss for failure to state a claim on which relief can be granted, the court must accept as true all factual allegations in the complaint. Broyde v. Gotham Tower, Inc., 13 F.3d 994, 996 (6<sup>th</sup> Cir. 1994), cert. denied, 511 U.S. 1128, 114 S. Ct. 2137, 128 L. Ed. 2d 866 (1994). The motion should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Id. The district court is without authority to dismiss claims unless it can be demonstrated beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. City of Toledo v. Beazer Materials and Services, Inc., 833 F. Supp. 646, 650 (N.D. Ohio 1993).

### II.

#### DM Does Not Have Systematic And Continuous Contacts with Tennessee

Under Tennessee law, contacts sufficient to warrant exercise of general jurisdiction "must be continuous corporate operations within the state that are so substantial and of such a nature that they would justify a suit against the defendant on a cause of action arising from dealings entirely distinct from those activities." Preston v. Garrett Realty Service, Inc., 2001 WL 965094, \*3 (Tenn. Ct. App. Aug. 27, 2001). Plaintiffs assert that the following amount to systematic and continuous contacts with Tennessee: (1) DM sells its musical compositions in Tennessee by licensing them for inclusion in sound recordings sold in Tennessee; (2) DM has entered into agreements with BMI and ASCAP, both of which have offices in Nashville, for the provision of third-party performance licensing services; (3) DM receives royalties from sales of its sound recordings over the Internet, and has "no reason to doubt" that sales have been made to

Tennessee consumers; (4) DM sound recordings have been sold and are available for sale in Nashville, Tennessee; (5) DM engages in national advertising of its sound recordings, including in Tennessee; (6) DM's music publishers contract with record labels (including DM), distributors, and performance rights organizations to market, advertise, and sell records containing their musical compositions, and to license performances of its musical compositions, across the country, including in Tennessee; and (7) both DM and its music publishers have granted synchronization licenses to motion picture studios to include DM compositions and sound recordings in films distributed nationally, including in Tennessee (Docket No. 41 at 9-12).

Many of plaintiffs' assertions of jurisdictional "contacts" are the acts of third party entities – distributors, other record labels, on-line retailer Amazon.com – who are not alleged to be affiliated with or agents of DM. Plaintiffs' assertions regarding DM's licensing activities fall into this category. The acts connected with Tennessee – the sale and distribution of sound recordings sold here – are not alleged to be performed by DM or its music publishers, and plaintiffs do not allege that the act of licensing occurs here. Therefore, these assertions are not attributable to DM and do not provide a factual basis for assertion of general jurisdiction. See generally Hospital Underwriting Group, Inc. v. Summit Health Ltd., 719 F. Supp. 627, 632-33 (M.D. Tenn. 1989) (finding of agency for jurisdictional purposes requires, inter alia, evidence of right of control).

Plaintiffs next assert that the activities of ASCAP and BMI in Tennessee can be imputed to DM for the purposes of jurisdiction because ASCAP and BMI are essentially agents of DM (Docket No. 41 at 8-10). The cases cited by plaintiffs in support of this proposition – In re Magnetic Audiotape Antitrust Litigation, 99 Civ. 1580, 2001 U.S. Dist. LEXIS 5160, \*15

(S.D.N.Y. Feb. 20, 2001); Top Form Mills, Inc. v. Sociedad Nazionale Industria Applicazioni Viscosa, 428 F. Supp. 1237, 1242 (S.D.N.Y. 1977); and Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 120-121 (2d Cir. 1967) – are clearly distinguishable from the facts presented here. ASCAP and BMI are alleged to be performance rights organizations, not music publishers or record labels (Docket No. 23, ¶¶ 82). ASCAP and BMI provide only licensing services to DM. In order to assert an agency relationship from which jurisdiction can be imputed, based on the case law cited by plaintiffs, plaintiffs would have to show that ASCAP's and BMI's activities here are the same as DM's would be if DM had a Tennessee office – i.e., they would be performing the functions of a music publishing company or record label in Tennessee. No such showing has been made. See Magnetic Audiotape, 2001 U.S. Dist. LEXIS 1560 at \*15 (non-resident defendant not involved in magnetic audiotape business during relevant period, therefore subsidiaries could not have been doing what non-resident defendant would do if subsidiaries did not exist). The Court concludes that the activities of ASCAP and BMI cannot be imputed to DM for the purposes of establishing jurisdiction. See also R.L. Lipton Distrib. Co. v. Dribeck Importers, Inc., 811 F.2d 967, 970 (6<sup>th</sup> Cir. 1987) (conduct and contacts of independent distributor over which non-resident defendant had little, if any, control not attributed to defendant); Hospital Underwriting, 791 F. Supp. at 633.

Plaintiffs assert two jurisdictional facts that are directly attributable to DM: (1) that DM advertised its sound recordings nationally, including in Tennessee; and (2) that DM's contract with ASCAP was signed in Nashville, Tennessee (Docket No. 41 at 10-12). Plaintiffs' facts

show only one instance of direct advertising<sup>9</sup> – an advertisement for DM’s instrumental music line, Bass, in “Car Audio” magazine (Docket 42, ¶ 34; Ex. 1 at 124). However, “national advertising, alone, is insufficient to justify general personal jurisdiction,” Hi-Tex, Inc. v. TSG, Inc., 87 F. Supp. 2d 738, 743 (E.D. Mich. 2000) (citing Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1199 (4<sup>th</sup> Cir. 1993), especially when only one instance of advertising is alleged.

Plaintiffs also assert that DM’s contract with ASCAP was signed in Nashville, Tennessee. While plaintiffs emphasize that “DM even acknowledged that its contract with ASCAP was signed in Nashville, Tennessee,” the citation to the record reveals more ambiguous facts. DM’s witness, Mark Watson, when asked where the agreement with ASCAP was signed, first responded, “I’m not really sure.” Docket No. 42, Ex. 1 at 49.<sup>10</sup> When asked if it was signed in Nashville, Tennessee, Mr. Watson responded, “It could have been Nashville. Not that I had a choice in the matter, but I think that’s where it was.” Id. Plaintiffs did not include a copy of the agreement in the record, although that may have provided conclusive proof as to where it was executed.

At this stage the Court must accept plaintiffs’ assertions that the contract was signed in Nashville as this assertion is not clearly contradicted by the record. CompuServe, 89 F.3d at 1262. However, merely entering into a contract with ASCAP in Nashville does not amount to “continuous and systematic contacts” with Tennessee, where there are no assertions as to any

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<sup>9</sup> The “co-op” advertising with nationwide retailers, as alleged (Docket 42, ¶¶ 29-33), is an activity of third party entities not attributable to DM.

<sup>10</sup> Exhibit 1 was copied so that the far left-hand side of the transcript pages are missing on many pages. Therefore, the Court cannot provide a line reference for this cite.

activities performed by ASCAP in Tennessee on behalf of DM, or contacts between DM and ASCAP's office in Tennessee. See United States Fidelity and Guaranty Co. v. Mayberry, 789 F. Supp. 901, 905 (E.D. Tenn. 1992) (defendant's purchase of heater and contracting in Tennessee for its installation elsewhere did not amount to continuous and systematic contacts). The Court declines to exercise general jurisdiction over DM on the basis of one instance of national advertising and one contract with the Tennessee office of ASCAP.

### III.

#### Plaintiffs' Assertions Fail To Establish that DM Purposefully Availed Itself of this Forum

In order for this Court to assert specific jurisdiction over DM, plaintiffs must establish the following three criteria: (1) DM must be shown to have purposefully availed itself of the privilege of acting in Tennessee or causing a consequence in Tennessee; (2) the cause of action must arise from DM's activities here; and (3) the acts of DM or consequences caused by it must have a substantial enough connection with Tennessee to make the exercise of jurisdiction over the defendant reasonable. Payne, 4 F.3d at 455. Plaintiffs have failed to establish that DM has purposefully availed itself of this forum, and therefore DM is not subject to the specific jurisdiction of this Court. Conti v. Pneumatic Products Corp., 977 F.2d 978, 982 (6<sup>th</sup> Cir. 1992).

"The most authoritative formulation of the [purposeful availment] requirement ... has been provided by the Supreme Court: 'it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'" International Tech. Consultants,

Inc. v. Euroglas, S.A., 107 F.3d 386, 395-396 (6<sup>th</sup> Cir. 1997) (quoting Burger King, 471 U.S. at 475, 105 S. Ct. at 2183).

Plaintiffs argue that DM has purposefully availed itself of the privilege of doing business in Tennessee by entering into contracts with national record distributors, national movie companies, and BMI and ASCAP to supply its compositions and sound recordings to Tennessee and to earn the maximum amount of profits from Tennessee (Docket No. 41 at 20). Plaintiffs cite three cases in support thereof: Linzer v. EMI Blackwood Music, 904 F. Supp. at 214; Triple A Partnership v. MPL Communications, Inc., 629 F. Supp. 1520, 1524 (D. Kan. 1986); and Gray v. St. Martin's Press, 929 F. Supp. 40, 48 (D.N.H. 1996). The Court does not find these cases to be persuasive as to DM's purposeful availment of this forum.

In Linzer, the plaintiffs were songwriters who claimed copyright interests in a collection of songs performed by the musical group The Four Seasons and brought an action against the group in the district court for the Southern District of New York. 904 F. Supp. at 211. In deciding whether jurisdiction existed over two individual members of the group under New York's long-arm statute, the Linzer court analyzed whether the individual defendants' contacts satisfied the requirements of that statute, but it did not perform a separate due process analysis as required in this Circuit. See CompuServe, 89 F.3d at 1263 ("crucial federal constitutional inquiry" is whether non-resident defendant has sufficient contacts; citing three criteria of purposeful availment, cause of action arising from activities in forum, and substantial connection of defendant's activities to forum). The Linzer court determined that the individuals' contracts with two licensing agencies located in New York that conducted their activities, including passing on royalties to the individuals, in New York, were sufficient to satisfy the requirements

of “transacting business” in New York under the long-arm statute. Id. at 213. The court relied on the holding in Greenky v. Irving Music, Inc., 217 U.S.P.Q. 750 (S.D.N.Y. 1981), where the court found that “by soliciting services of New York licensing agents for the licensing and promotion of the Songs in this state and throughout the nation, a party contracts to sell its goods or services here and thus exposes itself to the jurisdiction of New York courts” (emphasis added). Id. at 214.

Here, plaintiffs have not shown that DM’s contracts with ASCAP or BMI provide for the provision of services in Tennessee, and while both ASCAP and BMI maintain offices in Tennessee, plaintiffs have proffered no facts to support the conclusion that their activities on behalf of DM, including collecting and delivering royalty payments to DM, are performed here as opposed to New York or elsewhere. Moreover, plaintiffs have not alleged DM’s compositions and/or sound recordings have been performed in Tennessee, and defendants have averred that they have not received any performance royalties related to the subject sound recordings. DM’s Reply to Statement of Facts at 14 (Docket No. 48). This Court does not find the reasoning in Linzer to be dispositive as to activities of all licensing agencies, and, without any Tennessee-specific facts in the record, declines to attribute ASCAP’s or BMI’s activities to DM as purposeful availment. State Indus., 200 F.R.D. at 396.

The Linzer court also found that the individual defendants were alleged to have committed several tortious acts that brought them within the ambit of New York’s long-arm statute. 904 F. Supp. at 214. One of those torts was copyright infringement, which, under New York law, is a commercial tort deemed to have occurred at the point of consumer purchase. Id. (citing Lipton v. The Nature Co., 781 F. Supp. 1032, 1036 (S.D.N.Y. 1992)). Plaintiffs claim

that another basis for specific jurisdiction to be asserted against DM is that DM is alleged to have committed the commercial tort of copyright infringement in Tennessee (Docket 41 at 18-19).

Whether copyright infringement is a commercial tort for the purposes of Tennessee's long-arm statute appears to be an open question. Compare Lipton, 781 F. Supp. at 1036 (non-resident defendant that commits copyright infringement through sales by independent brokers or retail agents subject to jurisdiction under tortious act provision of New York's long-arm statute), with Selle v. Gibb, No. 78 C 3656, 1979 U.S. Dist. LEXIS 10623, \* 12-13 (N.D. Ill. Aug. 2, 1979) (cause of action against record company for copyright infringement does not arise from company's telephone solicitation of orders for infringing sound recording in Illinois). Neither party cites Sixth Circuit or Tennessee case law on this issue.

The question remains, therefore, whether in the Sixth Circuit activities amounting to exploitation of an allegedly infringing copyright within the forum state are sufficient contacts by themselves to satisfy the purposeful availment requirement of the due process inquiry. This Court concludes that, without a showing of any additional conduct directed towards the state, mere generalized exploitation of a copyright in the stream of commerce does not amount to purposeful availment. To find otherwise would mean that a copyright infringement defendant would be subject to personal jurisdiction in any forum in which a copy of the allegedly infringing work was ultimately sold by others without the defendant taking any further acts directed at that forum. Such a broad rule would amount to a judicial rewriting of the Copyright Act to provide for nationwide service of process (see Johnson v. Tuff N Rumble Management, Inc., Civ. No. 99-1374, 1999 U.S. Dist. LEXIS 19574, \*10 (E.D. La. Dec. 14, 1999) (no nationwide service of process under Copyright Act)), and is contrary to the Sixth Circuit's approach to stream of

commerce cases. See Tobin v. Astra Pharm. Products, Inc., 993 F.2d 528, 542-544 (6<sup>th</sup> Cir. 1993) (adopting “stream of commerce plus” approach advanced by O’Connor plurality opinion in Asahi Metal Inds. Co. v. Superior Court, 480 U.S. 102, 112, 107 S. Ct. 1026, 1032 (1987)); CompuServe, 89 F.2d at 1265 (injection of product into stream of commerce “without more, would be at best a dubious ground for jurisdiction”).

For the same reasons, the Court declines to follow the decision in Triple A Partnership, in which the district court interpreted Kansas’s long-arm statute to extend jurisdiction over two music publishing companies whose only contacts with the forum were through the licensing activities of two performance rights organizations, an out-of-state licensing agency and the sale of sheet music by an out-of-state print publisher. 629 F. Supp. at 1521. First, the court’s decision in Triple A Partnership is heavily dependent upon language in Kansas’s long-arm statute that includes acts of a defendant’s “agent or instrumentality” as basis for jurisdiction. Id. at 1522-1523. As discussed above, this Court has already ruled that the activities of ASCAP and BMI do not provide an independent basis for assertion of jurisdiction against DM. Second, the Triple A Partnership court applied the stream of commerce theory for its due process analysis, reasoning that the defendant had delivered its product (the allegedly infringing work) into the stream of commerce by entering into licensing agreements and deriving revenues from sales of the song by the licensing agency and the print publisher. Id. at 1524. In this Circuit, the mere act of placing goods into the stream of commerce is not a sufficient basis for jurisdiction without a showing of additional conduct directed at the forum that indicates purposeful availment. Tobin at 544. Because there was no showing of additional conduct in Triple A Partnership, this case does not comport with Sixth Circuit law. Finally, the plaintiff in that case was a Kansas resident,

and the court noted that Kansas had an interest in protecting the proprietary interests of its residents. Id. at 1525. No such interest can be asserted here, where plaintiffs are not residents of Tennessee, nor do they have any other significant contact with this forum.

The Court finds that Gray v. St. Martin's Press also fails to support a finding by this Court of purposeful availment. 929 F. Supp. 40. Gray is a defamation case in which the district court in New Hampshire admitted that the “evidence of purposeful availment is not particularly strong” where the defendant author had no contacts with New Hampshire other than the contract with her publisher to distribute and sell the book nationally. Id. at 48. The court applied Justice O'Connor's “stream of commerce plus” theory (Asahi Metal, 480 U.S. at 112, 107 S. Ct. at 1032) and found that the author's contract with the publisher for national distribution of the book and her receipt of a royalty payment for each book sold provided the “additional conduct” needed and evidenced “an intent to serve every forum encompassed by the Contract, including the consumers of New Hampshire.” Id. This Court does not find this reasoning persuasive.

In the Sixth Circuit, the additional conduct element is not satisfied by a passive agreement to receive compensation if and when goods are sold in the forum. See State Indus., 200 F.R.D. at 396, where the plaintiff in a patent infringement action made a stream of commerce argument based on its allegations that the non-resident defendant had sent the allegedly infringing gas burners into the state through an established distribution channel. The District Court ruled that the plaintiff's claim that the defendant had sold the burners with knowledge that heaters containing those burners would be sold in Tennessee was insufficient without any evidence “of purposeful action directed toward Tennessee” by the defendant. Id.; see also Bailey v. Turbine Design, 86 F. Supp. 2d at 795 (where jurisdiction was sought based on publication of allegedly

defamatory statements on corporate defendant's website, plaintiff failed to show that defendants had any contacts with Tennessee other than website posting, or made any effort to "reach out to Tennessee residents, any more than to persons residing elsewhere"). These cases illustrate that in this Circuit, additional conduct requires a purposeful action directed at the state by the defendant in addition to placing its product in the stream of commerce. See CompuServe, 89 F.2d at 1264, 1265 ("There is no question that [defendant] himself took actions that created a connection with Ohio"; defendant both injected product into stream of commerce and entered into contract with plaintiff, an Ohio internet service provider).

Plaintiffs cite to Editorial Musical Latino Americana v. MAR Internat'l Records, Inc., where the district court found personal jurisdiction over a record label based on its distribution of the allegedly infringing record to several stores in New York (Docket No 41 at 14). The Editorial Musical court in its due process analysis did not look for any additional conduct with the State of New York, following Second Circuit law that has rejected the "stream of commerce plus" approach. 829 F. Supp. at 66. This case does not provide the Court with any guidance as to whether the facts alleged by plaintiffs amount to additional conduct under Sixth Circuit law.

Having found that plaintiffs have failed to show that DM has purposefully availed itself of this forum, it is not necessary to determine whether plaintiff's showing fulfills the two remaining criteria for jurisdiction in this Circuit – that the cause of action arises from activities in the forum, and that a substantial connection exists between defendant's activities and the forum such that exercise of jurisdiction would be reasonable. CompuServe, 89 F.3d at 1263. Nor is it necessary to address defendant's arguments regarding improper venue or failure to state a claim.

For the foregoing reasons, the motion of defendant DM Records, Inc. to dismiss for lack of personal jurisdiction is GRANTED. Defendant's motions to dismiss for improper venue and for failure to state a claim are DENIED as moot.

  
TODD J. CAMPBELL  
UNITED STATES DISTRICT JUDGE