THE HEARST CORPORATION, Plaintiff,
-against-

ARI GOLDBERGER, Defendant.

No. 96 CIV. 3620 (PKL) (AJP).

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Feb. 26, 1997

1997 U.S. Dist. LEXIS 2065
1997 WL 97097

COUNSEL:

For Plaintiff: Charles P. LaPolla, Esq.
Ostrolenk, Faber, Gerb & Soffen, New York, NY

For Defendant: Ari Goldberger, Esq.

REPORT AND RECOMMENDATION

ANDREW J. PECK, United States Magistrate Judge:

To the Honorable Peter K. Leisure, United States District Judge:

The issue before the Court is whether the Court has personal jurisdiction over defendant because his Internet web site is accessible to, and has been electronically "visited" by, computer users in New York. Defendant has not contracted to sell or sold any products or services to anyone in New York (or elsewhere for that matter--his "business" is not yet operational). The Court lacks personal jurisdiction over defendant on these facts.

Hearst Corporation, owner and publisher of ESQUIRE Magazine, brought this trademark infringement action against defendant Ari Goldberger, who has established an Internet domain name and web site, "ESQWIRE.COM." Goldberger's web site exists to offer law office infrastructure network services for attorneys, but such services are not yet available, and also to provide legal information services, so far limited to information about this lawsuit. Goldberger lives in Cherry Hill, New Jersey and works in Philadelphia.

For the reasons set forth below, I recommend that the Court lacks personal jurisdiction over defendant Goldberger and therefore that the case should be transferred to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. Section 1406(a)

and the parties' consent. Where, as here, defendant has not contracted to sell or actually sold any goods or services to New Yorkers, a finding of personal jurisdiction in New York based on an Internet web site would mean that there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site. Such nationwide jurisdiction is not consistent with traditional personal jurisdiction case law nor acceptable to the Court as a matter of policy.

FACTS

A Brief Description of the Internet

In order to understand the personal jurisdictional issues in this case, it is necessary to understand the Internet. (The computer-literate who are already familiar with the Internet may wish to skip to the next section.)

The Internet is described in detail in the three-judge Court's opinion in American Civil Liberties Union v. Reno, 929 F.Supp. 824, 830-845 (E.D.Pa.1996), familiarity with which is assumed, and will be briefly summarized here. **[FN1]**

"The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks." ACLU v. Reno, 929 F. Supp. at 830 . Over 9.4 million computers, 60% of which are located in the United States, are estimated to be linked to the Internet. Id. at 871 . This does

not count personal computers that people use to access the Internet using modems. Id. Reasonable estimates are that as many as 40 million people around the world can and do access the Internet; that figure is expected to grow to 200 million Internet users by 1999. Id.

The Internet is "a decentralized, global medium of communications--or 'cyber space'--that links people, institutions, corporations and governments around the world.... These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole." Id. **[FN2]** "The Internet is a cooperative venture, owned by no one, but regulated by several volunteer agencies." MTV Networks v. Curry, 867 F. Supp. 202, 204 n. 1 (S.D.N.Y.1994); see also ACLU v. Reno, 929 F.Supp. at 832 .

"Individuals have a wide variety of avenues to access cyberspace in general, and the Internet in particular. In terms of physical access, there are two common methods to establish an actual link to the Internet. First, one can use a computer or computer terminal that is directly (and usually permanently) connected to a computer network that is itself directly or indirectly connected to the Internet. Second, one can use a 'personal computer' with a 'modem' to connect over a telephone line to a larger computer or computer network that is itself directly or indirectly connected to the Internet.... Individuals can also access the Internet through commercial and non-commercial 'Internet service

providers' that typically offer modem telephone access to a computer or computer network linked to the Internet." ACLU v. Reno, 929 F.Supp. at 832-33 ; see also Shea v. Reno, 930 F.Supp. at 926.

"One method of communication on the Internet is via electronic mail, or 'e-mail,' comparable in principle to sending a first-class letter." ACLU v. Reno, 929 F.Supp. at 834 ; see also, e.g., Shea v. Reno, 930 F.Supp. at 927. Another method of communicating over the Internet, "and fast becoming the most well-known on the Internet, is the 'World Wide Web.' ... Though information on the Web is contained in individual computers, the fact that each of the computers is connected to the Internet. allows all of the information to become a part of a single body of knowledge." ACLU v. Reno, 929 F.Supp. at 836 ; see also, e.g., Shea v. Reno, 930 F.Supp. at 929. "An essential element of the Web is that any document has an address (rather like a telephone number)." ACLU v. Reno, 929 F.Supp. at 836 .

Judge McKenna has explained the Internet address system, as follows: Each host computer providing Internet services ("site") has a unique Internet address. Users seeking to exchange digital information (electronic mail ("email"), computer programs, images, music) with a particular Internet host require the host's address in order to establish a connection. Hosts actually possess two fungible addresses: a numeric "IP" address such as 123.456.123.12, and an alphanumeric "domain name" such as microsoft.com, with greater mnemonic potential.... Internet domain names are similar to telephone number mnemonics, but they are of greater importance, since there is no satisfactory Internet equivalent to a telephone company white pages or directory assistance, and domain names can often be guessed. A domain name mirroring a corporate name may be a valuable corporate asset, as it facilitates communication with a customer base. The uniqueness of Internet addresses is ensured by the registration services of the Internet Network Information Center ("Internic"), a collaborative project established by the National Science Foundation.... MTV Networks v. Curry, 867 F.Supp. at 204 n. 2 ; see also ACLU v. Reno, 929 F.Supp. at 848 n. 20 .

"When information is made available, it is said to be 'published' on the Web. Publishing on the Web simply requires that the 'publisher, has a computer connected to the Internet...." ACLU v. Reno, 929 F.Supp. at 837 . "Once a provider posts content on the Internet, it is available to all other Internet users worldwide.... Once a provider posts its content on the Internet, it cannot prevent that content from entering any community.... Internet technology gives a speaker a potential worldwide audience." Id. at 844 .

Plaintiff Hearst and ESQUIRE Magazine

Plaintiff The Hearst Corporation and its predecessors-in-interest (collectively "Hearst") have published the well-known monthly, ESQUIRE Magazine, since 1933. (Cplt. Par. 6; Aff. of Edward Kosner, Editor-In-Chief of ESQUIRE Magazine, Par. 2.) Hearst owns the trademark registration for the mark ESQUIRE for such goods. (Cplt. Par. 6; Kosner Aff. Par. 8.) Hearst also has used the marks ESQUIRE or ESQ. or marks incorporating

those terms on a variety of products and services. (Cplt. Pars. 7-8; Kosner Aff. Pars. 4, 8-9.)

"Hearst has been involved in computer related activities under the ESQUIRE mark. Since approximately June, 1995, selections from Hearst's ESQUIRE magazine have been available on-line. Hearst's collateral products have also been promoted and sold via the computer in 1995." (Kosner Aff. Par. 5.) "Hearst is the owner of the domain names viaesquire.com, esquiremag.com and esquireb2b.com which are registered with" Internic. (Kosner Aff. Par. 6.)

The complaint alleges that Hearst's ESQUIRE and ESQ. marks "have acquired tremendous secondary meaning" and that those marks are "inherently distinctive, nonfunctional, strong and famous marks entitled to a very broad scope of protection." (Cplt.Par. 10.)

Defendant Goldberger and His ESQWIRE and ESQ.WIRE Marks

Defendant Goldberger resides in Cherry Hill, New Jersey and works as an associate at the Pepper, Hamilton & Scheetz law firm in Philadelphia. (Cplt. Par. 2; Goldberger Aff. Par. 1; Goldberger Dep. at 4; Goldberger Br. at 2-3; Goldberger 12/10/96 Letter to the Court at p. 2.)

In 1992, Goldberger came up with the idea to "create an electronic law office infrastructure network that would provide individual attorneys, via computer, with legal support services equivalent to those available to lawyers practicing in large law firms." (Goldberger Aff. Par. 3; Goldberger Dep. at 10-11.) The scope of Goldberger's idea subsequently expanded to

possibly include information services such as the provision of reporting and commentary on legal issues, but so far this has been limited to his own case. (See Goldberger Dep. at 11-13; Hearst Br. at 3.)

Goldberger decided to call his service "ESQ.WIRE" and, on September 16, 1994, applied to register that service mark with the Patent and Trademark Office. (Goldberger Aff. Par. Par. 3-4; Goldberger Dep. at 5-6; Cplt. Par. 11.) Hearst opposed Goldberger's application. (Cplt.Par. 14.) The Trademark Office suspended its proceedings pending disposition of this lawsuit. (Hearst Br. at 2; see Cplt. Par. 14.)

*4 In September 1995, Goldberger registered the Internet domain name ESQWIRE.COM with Internic. (Goldberger Aff. Par. 5; Cplt. Par. 16.) **[FN3]** In June 1996, Goldberger published a worldwide web site on the Internet at the address http://www.esqwire.com. (Goldberger Aff. Par. 7; see Cplt. Pars. 17-18.) Goldberger has published his web site through an Internet provider, Voice Net of Ivyland, Pennsylvania. (Cplt. Par. 15; see Goldberger 12/10/96 Letter to the Court at p. 2 n. 3.) Goldberger's web site consists of a "home page" that briefly describes the services Goldberger plans to offer, and also

contains a summary of Hearst's activities against Goldberger in this lawsuit, **[FN4]** along with computer "links" to court filings and other documents related to this action. (E.g., Goldberger Af f. Ex. 4.) **[FN5]** Goldberger's home page describes Goldberger's planned services as follows:

ESQ.wire will provide virtual law firm support services, legal information services and products to enable attorneys to practice law anywhere on the planet, with the simple click of a mouse. We are looking for attorneys in every jurisdiction in the world to become a part of this revolutionary virtual legal community. For more information, please e-mail esqwire@esqwire.com.

(Goldberger Aff. Ex. 4.) **[FN6]** Goldberger does not consider this to be an advertisement for his services, but agrees that his web site "could become a means to solicit for [customers] when [he is] ready to start doing that." (Goldberger Dep. at 11.)

Although Goldberger has established his ESQWIRE web site, it is undisputed that he does not yet have any services or products to sell, and that he has not sold any products or services in New York, or anywhere else for that matter. (Goldberger 12/10/96 Letter to the Court at p. 3; Goldberger Dep. at 9; 11/25/96 Tr. at 15.) Goldberger specifically advised the Court that "I have not sold anything or provided any service or product to anyone, nor have I been renumerated by anyone with any form of consideration with regard to the ESQWIRE.com site or the ESQ.WIRE business or name or anything." (11/25/96 Tr. at 15.)

It is further undisputed that New Yorkers have accessed Goldberger's ESQWIRE.com web site. (See Goldberger 12/10/96 Letter to the Court at pp. 2-3; see 12/23/96 Tr. at 12.) Goldberger's web site also has been accessed by people from at least 20 other states and 34 foreign countries. (Goldberger 12/10/96 Letter to the Court at p. 2 n. 4.)

In addition to Goldberger's Internet web site, Hearst relies on additional contacts Goldberger has had with the media in New York after Hearst commenced this lawsuit. **[FN7]** (See Hearst Br. at 4-5; Hearst Surreply Br. at 2; Goldberger Reply Br. at 5-6.) Goldberger has used ESQWIRE an as e-mail address. (Goldberger Dep. at 6, 8-9.) After the commencement of this lawsuit by Hearst on May 15, 1996, Goldberger sent a few e-mails to media or lawyers in New York. (Goldberger Dep. at 39-43.) Specifically, after the commencement of this litigation, Goldberger:

i) [sent] four e-mails providing information about the instant action to the Wall Street Journal, Newsweek, the New York Times, and an attorney who follows Internet litigation; ii) [made] two telephone calls providing information about the instant action to the New York Law Journal and Associated Press, and a personal call to a friend ...; iii)[had] a single visit by Goldberger to the fourth floor press room of the Southern District Court House to distribute information about the instant litigation to media entities, following the July 26, 1996 pre-trial conference before the Honorable Peter K. Leisure. (Goldberger Br. at 5-6, record citations omitted; see Goldberger Dep. at 39- 43, 58-59; see also LaPolla 2/12/97 Letter to the Court, Exs. 1-2.)

Procedural Background

Hearst brought this action on or about May 15, 1996, asserting seven causes of action. Hearst's first cause of action alleges that Goldberger infringed on Hearst's registered ESQUIRE and ESQ. trademarks in violation of section 32 of the Lanham Act, 15 U.S.C. Section 1114. (Cplt.Pars. 21-25.) The second cause of action is for false designation of origin and false descriptions and representations of fact, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. Section 1125 (a). (Cplt.Pars. 26-30.) Hearst's third cause of action alleges unfair competition under New York common law. (Cplt.Pars. 31-35.) Hearst's fourth and fifth causes of action allege dilution of Hearst's ESQUIRE and ESQ. trademarks in violation of Section 43(c) of the Lanham Act, 15 U.S.C. Section 1125(c), and the New York Anti-Dilution Statute, New York Gen. Bus. Law Section 368-d. (Cplt. Pars. 36-39 & 40-44.) The sixth cause of action alleges deceptive acts and practices under N.Y. Gen. Bus. Law Section 349. (Cplt.Pars. 45-48.) Finally, Hearst's seventh cause of action is an alternative claim for a declaratory judgment, under 28 U.S.C. Sections 2201-02, in the event this Court were to conclude that Goldberger has "not yet made [sufficient] use of the trademarks or trade names ESQ.WIRE and/or ESQWIRE.COM in connection with the advertising, promotion and/or rendering in U.S. commerce of computer services ... on the grounds that said use is imminent." (Cplt.Par. 50.)

On July 13, 1996, defendant Goldberger moved to dismiss for lack of personal jurisdiction or alternatively to transfer venue. Goldberger also moved to dismiss for failure to state a claim.

On October 18, 1996, I rendered a Report and Recommendation from the bench denying Goldberger's motion to dismiss for failure to state a claim. (10/18/96 Tr. at 5-14.)

The parties agreed that, because the case would proceed in some federal court, it was appropriate for discovery to proceed while the Court considered Goldberger's motion to dismiss or transfer for lack of personal jurisdiction. (See 10/18/96 Tr. at 3-5, 18-20.) **[FN8]** The discovery cut-off date is March 28, 1997.

Finally, the parties have stipulated that if the Court finds that there is no personal jurisdiction over defendant Goldberger in New York, the Court should transfer this action on consent, rather than dismiss it. (12/23/96 Tr. at 13- 15; LaPolla 1/7/97 Letter to the Court at p. 1.) **[FN9]**

ANALYSIS

I. LEGAL STANDARDS APPLICABLE TO A MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

A plaintiff's obligation to establish a basis for the Court's personal jurisdiction over the defendant varies depending on the procedural posture of the litigation. Ball v. Metallurgie Hoboken-Overvelt S.A., 902 F.2d 194, 197 (2d Cir.), cert. denied, 498 U.S. 854 , 111 5. Ct. 150 (1990). As the Second Circuit explained: Prior to discovery, a plaintiff challenged

by a jurisdiction testing motion may defeat the motion by pleading in good faith, legally sufficient allegations of jurisdiction. At that preliminary stage, the plaintiff's prima facie showing may be established solely by allegations. After discovery, the plaintiff's prima facie showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant. At that point, the prima facie showing must be factually supported.

Where the jurisdictional issue is in dispute, the plaintiff's averment of jurisdictional facts will normally be met in one of three ways: (1) by a Rule 12(b)(2) motion, which assumes the truth of the plaintiff's factual allegations for purposes of the motion and challenges their sufficiency, (2) by a Rule 56 motion, which asserts that there are undisputed facts demonstrating the absence of jurisdiction, or (3) by a request for an adjudication of disputed jurisdictional facts, either at a hearing on the issue of jurisdiction or in the course of trial on the merits. If the defendant is content to challenge only the sufficiency of the plaintiff's factual allegation, in effect demurring by filing a Rule 12(b)(2) motion, the plaintiff need persuade the court only that its factual allegations constitute a prima facie showing of jurisdiction. If the defendant asserts in a Rule 56 motion that undisputed facts show the absence of jurisdiction, the court proceeds, as with any summary judgment motion, to determine if undisputed facts exist that warrant the relief sought. If the defendant contests the plaintiff's factual allegations, then a hearing is required, at which the plaintiff must prove the existence of jurisdiction by a preponderance of the evidence. Ball, 902 F.2d at 197 (citations omitted); see also, e.g., PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1997 WL 5913 at *3 (2d Cir.1977); A.I. Trade Fin., Inc. v. Petra Bank, 989 F.2d 76, 80 (2d Cir.1993); Hoffritz for Cutlery, Inc. v. Amajac, Inc., 763 F.2d 55, 57 (2d Cir.1985); Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117, 120 (2d Cir.1984); Beacon Enterprises, Inc. v. Menzies, 715 F.2d 757, 768 (2d Cir.1983); Visual Sciences, Inc. v. Integrated Communications Inc., 660 F.2d 56, 58 (2d Cir.1981); Bensusan Restaurant Corp. v. King, 937 F.Supp. 295, 298 (S.D.N.Y.1996); Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F.Supp. 1040 , 1043 & n. 1 (S.D.N.Y.1987) (Leisure, J.); 1 M. Silberberg, Civil Practice in the Southern District of New York Section 8.06.

Here, the parties have engaged in jurisdictional discovery, including taking Goldberger's deposition. The parties have not addressed the issue of whether the prima facie evidence or preponderance of the evidence standard should apply. The dispositive jurisdictional facts, however, are undisputed, and thus a jurisdictional hearing is not necessary (nor has one been requested). I conclude that under either standard, the Court lacks personal jurisdiction over defendant Goldberger.

The Court will construe the pleadings and evidence in Hearst's favor at this stage. See, e.g., PDK Labs v. Friedlander, 1996 WL 5913 at *3; Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d at 57 ; A.I. Trade Fin., Inc. v. Petra Bank, 989 F.2d at 79-80 ; Bensusan Restaurant Corp. v. King, 937 F.Supp. at 298 ; Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F.Supp. at 1043 & n. 1 .

Hearst brings this action under the Lanham Act, the federal trademark law. The Lanham Act does not provide for national service of process. See, e.g., Hershey Pasta Group v. Vitelli-Elvea Co., 921 F.Supp. 1344, 1346 (M.D.Pa.1996); 4 J. Thomas McCarthy, McCarthy on Trademarks & Unfair Competition Section 32:38-:45 (4th ed.1996); see also 1 M. Silberberg, Civil Practice in the Southern District of New York Section 8.04 (listing federal nationwide service of process statutes as Securities Exchange Act of 1934, RICO and CERCLA). "In a federal question case where a defendant resides outside the forum state, a federal court applies the forum state's personal jurisdiction rules 'if the federal statute does not specifically provide for national service of process.' " PDK Labs v. Friedlander, 1997 WL 5913 at *3; see also, e.g., Omni Capital Int'l v. Rudolff Wolff & Co., 484 U.S. 97, 108, 108 S.Ct. 404, 411 (1987); Bensusan Restaurant Corp. v. King, 937 F.Supp. at 298 (Internet trademark action); Rothschild v. Paramount Distillers, Inc., 923 F.Supp. 433, 436 (S.D.N.Y.1996) (trademark action); 1 M. Silberberg, Civil Practice in the Southern District of New York Section 8.04; 4 Wright & Miller, Federal Practice & Procedure: Civil 2d Section 1067.1 (Supp.1996).

The Court therefore turns to New York's jurisdictional statutes, CPLR Sections 301 and 302.

II. THE COURT LACKS JURISDICTION OVER GOLDBERGER UNDER NEW YORK'S JURISDICTIONAL STATUTES, CPLR Sections 301 AND 302

The issue of personal jurisdiction and the Internet has split the federal district courts that have addressed the issue to date. The Court discusses those cases in Point III below. Not surprisingly, "[s]ome commentators ... believe a new body of jurisprudence is needed to address" the question of personal jurisdiction and the Internet. Richard S. Zembek, Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace, 6 Albany L.J. Science & Tech. 339, 346 (1996). Unless and until Congress or the New York legislature enacts Internet specific jurisdictional legislation, however, the Court must employ New York's existing jurisdictional statutes, CPLR Sections 301 and 302, and analogize to presently existing, traditional, non- Internet personal jurisdiction case law.

A. CPLR Section 301

CPLR Section 301 provides, cryptically, that a "court may exercise such jurisdiction over persons, property or states as might have been exercised heretofore." Section 301 traditionally applies to persons actually present in New York and to corporations "doing business" in New York, "not occasionally or casually, but with a fair degree of permanence and continuity." Joseph McLaughlin, Practice Commentary to CPLR Section C301:1, Section C:301:2 at pp. 7-9 (McKinney's 1990); accord, e.g., Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 58 (2d Cir.1995) (citing N.Y. cases); Beacon Enterprises, Inc. v. Menzies, 715 F.2d 757, 762 (2d Cir.1983).

It is unclear whether an individual (as opposed to a corporation or other entity) is subject to "doing business" jurisdiction under CPLR Section 301 pursuant to New York law. See, e.g., Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d at 58 ; Beacon Enterprises, Inc. v. Menzies, 715 F.2d at 764 n. 6 ; Joseph McLaughlin, Practice Commentary to CPLR Section C:301:1 at pp. 7-8 (McKinney's 1990); Vincent C. Alexander, Supplementary Practice Commentary to CPLR Section C301:1 at pp. 1, 5-6 (McKinney's 1997 Supp.). The Court in this case, however, need not resolve the question of whether "doing business" jurisdiction applies to an individual person. Although Hearst's complaint asserts jurisdiction under CPLR Section 301 as well as Section 302 (Cplt.Par. 3), Hearst's brief in opposition to Goldberger's motion to dismiss does not rely at all on CPLR Section 301 jurisdiction. (See Hearst Br. at 5-14.) Accordingly, the Court finds that Hearst has waived any CPLR Section 301 argument. See, e.g., Abrahams v. Young & Rubicam Inc., 79 F.3d 234 , 237 & n. 2 (2d Cir.), cert. denied, 117 S.Ct. 66 (1996); Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1214 (2d Cir. 1987) **[FN10]**

Even if Hearst had not waived the CPLR Section 301 argument and even if New York would apply CPLR Section 301 "doing business" jurisdiction to an individual, Section 301 jurisdiction still would be lacking. Goldberger's only contacts with New York, according to the record before the Court on this motion, are the contacts involving his ESQWIRE Internet web site and e-mail. As discussed below, those contacts with New York do not even establish "transacting business" jurisdiction under CPLR Section 302. Those contacts therefore do not establish "doing business" jurisdiction under CPLR Section 301 either. See, e.g., Hoffritz for Cutlery, Inc. v. Amalac, Ltd., 763 F.2d 55, 58 (2d Cir1980) ("The showing necessary for finding that defendant 'transacted business' and is suable on a cause of action arising from that transaction is considerably less than that needed to establish defendant's 'doing business,' which renders the defendant subject to suit on even an unrelated cause of action.' "); Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F.Supp. 1040, 1051 (S.D.N.Y.1987) (Leisure, J.); Joseph McLaughlin, Practice Commentary to CPLR Section C302:9 at p. 90 (McKinney's 1990); 1 Weinstein, Korn & Miller, New York Civil Practice Section 301.17 (1996).

B. CPLR Section 302(a)

New York "long-arm" jurisdiction is codified in CPLR Section 302(a). **[FN11]** CPLR Section 302(a) provides:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary ... who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or

2. commits a tortious act within the state .. .; or

3. commits a tortious act without the state causing injury to person or property within the state ... if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce....

CPLR Section 302.

CPLR Section 302 does not extend New York's long-arm jurisdiction to the full extent of constitutional limits. See, e.g., Beacon Enterprises, Inc. v. Menzies, 715 F.2d 757, 764 n. 6 (2d Cir.1983); Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 459-60, 261 N.Y.S.2d 8, 20-21, cert. denied, 382 U.S. 905, 86 S.Ct. 241 (1965); Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F.Supp. 1040, 1044 (S.D.N.Y.1987) (Leisure, J.). **[FN12]**

1. CPLR Section 302(a)(1): Transaction of Business in New York

"Section 302(a)(1) is typically invoked for a cause of action against a defendant who breaches a contract with plaintiff, ... or commits a commercial tort against plaintiff in the course of transacting business or contracting to supply goods or services in New York." Beacon Enterprises, Inc. v. Menzies, 715 F.2d 757, 764 (2d Cir.1983).

" '[I]n order for personal jurisdiction over [Goldberger] to lie in New York [under CPLR Section 302(a)(1), Goldberger] must have transacted business in this state and the cause of action must arise out of such transaction.' " Rolls- Royce Motors, Inc. v. Charles Schmitt & Co., 657 F.Supp. 1040, 1050 (S.D.N.Y.1987) (Leisure, J.); accord, e.g., Joseph McLaughlin, Practice Commentary to CPLR Section C302:2 at pp. 77-78, Section C302:9 at pp. 90-91 (McKinney's 1990); 1 M. Silberberg, Civil Practice in the Southern District of New York Section 8.16. As Judge Leisure further explained in Rolls-Royce:

The test [under CPLR Section 302(a)(1)] is hardly a precise one; the court must look at the aggregation of defendant's activities, coupled with the selective weighing of the various actions.... Moreover, it is the "nature and quality, and not the amount of New York contacts [which] must be considered by the court." ... Primary factors to consider include the physical presence of defendant in New York, the risk of loss as it effects the New York transaction, and the extent to which the contract is performed in New York.

Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F.Supp. at 1050-51 (citations omitted). Jurisdiction under CPLR Section 302(a)(1) can exist "even though the defendant never enter[ed] New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1997 WL 5913 at *3 (2d

Cir.1997); see also, e.g., 1 M. Silberberg, Civil Practice in the Southern District of New York Section 8.16; 1 Weinstein, Korn & Miller, Civil Practice in New York Section 302.07, Section 302.08 (1996).

a. Goldberger's Internet Web Site

The present case does not involve a contract, but rather a tort (trademark infringement) in the course of a commercial activity, i.e., Goldberger's Internet web site. It is undisputed that Goldberger created and "published" his ESQWIRE web site from the Cherry Hill, NJ-Philadelphia area, not New York. (Cplt. Par. 15; Goldberger 12/20/96 Letter to the Court at p. 2 n. 3.) It is also undisputed that people located in New York have accessed ("visited") Goldberger's web site. (Goldberger 12/10/96 Letter to the Court at pp. 2-3; 12/23/96 Tr. at 12.) Further, it is undisputed that Goldberger has not sold any product or services. (Goldberger 12/10/96 Letter to the Court at p. 3; Goldberger Dep. at 9; 11/25/96 Tr. at 15.) His Internet web site is, at most, an announcement of the future availability of his services for attorneys. (See Goldberger Dep. at 11.)

Goldberger's ESQWIRE Internet web site thus is most analogous to an advertisement in a national magazine. Like such an ad, Goldberger's Internet web site may be viewed by people in all fifty states (and all over the world too for that matter), but it is not targeted at the residents of New York or any other particular state. See Richard S. Zembeck, Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace, 6 Albany L.J. Science & Tech. 339, 368-70 (1996); Dale M. Cendali & James D. Arbogast, Net Use Raises Issues of Jurisdiction, Nat'l L.J., Oct. 28, 1996, at C7.

New York law is clear, however, that advertisements in national publications are not sufficient to provide personal jurisdiction under Section 302(a)(1). See e.g., Davidson Extrusions, Inc. v. Touche Ross & Co., 131 A.D.2d 421, 424, 516 N.Y.S.2d 230, 232 (2d Dep't 1987) (defendant "did not transact business within the State by virtue of its placing an advertisement ... in a trade journal with national circulation"); Simplicity Machine & Mfg. Co. v. Stevens Co., 30 A.D.2d 768, 769-89, 292 N.Y.S.2d 259, 260-61 (4th Dep't 1968) ("advertisement in a national industrial directory which was circulated throughout New York State" was "not a solicitation of business in the State by defendant sufficient to constitute the transaction of business by it here"); Naples v. Janesville Apparel Co., 29 A.D.2d 971, 971, 289 N.Y.S.2d 268, 269- 70 (2d Dep't 1968)(advertisement of fireman's coat in magazine published in New York does not constitute transaction of business)

Even advertisements targeted at the New York market have been found to be insufficient for CPLR 302(a)(1) transaction of business jurisdiction. See, e.g., U.S. Mexican Dev. Corp. v. Condor, 91 Civ. 5925, 1992 WL 27179 at *3- 4 (S.D.N.Y. Feb. 5, 1992) ("a non-domiciliary's solicitation of business or advertising within New York generally does not in and of itself constitute transaction of business within the state"); King v. Best Western Country Inn, 138 F.R.D. 39, 42 (S.D.N.Y.1991) (listing in local New York telephone directory of 800 number is not transaction of business); Diskin v. Starck, 538 F.Supp. 877, 880 (E.D.N.Y.1982) (advertisement of Vermont summer camp in New York newsweekly, along with follow-up mailings, not sufficient to create transaction of

business jurisdiction for action by plaintiff injured at the camp); Selman v. Harvard Med. School, 494 F.Supp. 603, 612 (S.D.N.Y.) ("Mere solicitation, advertising, or telephone calls to New York do not satisfy the 'transaction of business' test"), aff'd mem., 636 F.2d 1204 (2d Cir.1980); Carte v. Parkoff, 152 A.D.2d 615, 616, 543 N.Y.S.2d 718, 719-20 (2d Dep't 1989) (listing of telephone number in N.Y. telephone directory not transaction of business); Ziperman v. Frontier Hotel of Las Vegas, 50 A.D.2d 581, 582-83, 374 N.Y.S.2d 697, 700 (2d Dep't 1975) (same); Greenberg v. R.S.P. Realty Corp., 22 A.D.2d 690, 253 N.Y.S.2d 344, 345 (2d Dep't 1964) (advertisement in New York publications not sufficient for personal jurisdiction); General Motors Acceptance Corp. v. Richardson, 59 Misc.2d 744, 748, 300 N.Y.S.2d 757, 761 (Sup.Ct. Monroe Co.1969) ("solicitation of business in New York by means of advertisements, market quotations, and notices of sale ... without more, is not enough to provide a jurisdictional basis under CPLR 302(a)(1)."); 1 N. Silberberg, Civil Practice in the Southern District of New York Section 8.16 ("The solicitation of business in New York by a non-domiciliary generally does not constitute a transaction of business in the state for purposes of jurisdiction under CPLR Section 302(a)(1). Similarly, placing advertisements in New York publications or media is generally not considered a transaction of business in the state."); 4 J. Thomas McCarthy, McCarthy on Trademarks & Unfair Competition Section 32:41 ("most cases" hold that "the mere sending of an advertising for an infringing mark into a state" is not a sufficient contact for personal jurisdiction) (4th ed.1996). **[FN13]**

It appears that Hearst has placed itself in a "Catch 22" situation. If Hearst had waited until Goldberger contracted to sell his attorney support services to New Yorkers, long-arm jurisdiction likely would have been appropriate. See, e.g., En Vogue v. UK Optical Ltd., 843 F.Supp. 838, 843 (E.D.N.Y.1994) (under CPLR 302(a)(1)), "New York courts may exercise personal jurisdiction over a non-domiciliary who contracts out of state to supply goods in the state, even when the goods are never shipped or supplied to the state"); accord, e.g., Laumann Mfg. Corp. v. Castings USA, Inc., 913 F.Supp. 712, 716-17 (E.D.N.Y.1996). But if Hearst had waited, it would have been faced with laches-type defenses and possible greater harm to its ESQUIRE trademark. See, e.g., Tough Traveler, Ltd. v. Outbound Prods., 60 F.3d 964, 968 (2d Cir.1995); Citibank, N.A. v. Citytrust, 756 F.2d 273, 276 (2d Cir.1985); Krueger Int'l, Inc. v. Nightingale Inc., 915 F.Supp. 595, 613 (S.D.N.Y.1996); Nina Ricci S.A.R.L. v. Gemcraft Ltd., 612 F.Supp. 1520, 1531 (S.D.N.Y.1985); Le Sportsac, Inc. v. Dockside Research Inc., 478 F.Supp. 602, 609 (S.D.N.Y.1979); 4 J. Thomas McCarthy, McCarthy on Trademarks & Unfair Competition Section 31:11 at 31-29 (4th ed.1996). The appropriate trademark litigation strategy, however, leaves the Court without personal jurisdiction over defendant Goldberger.

This Court finds that Goldberger's ESQWIRE Internet web site is analogous to an advertisement in a national publication and thus does not constitute sufficient contacts with New York to provide the Court with personal jurisdiction over Goldberger for transacting business under CPLR Section 302(a)(1).

b. Goldberger's Post-Litigation E-Mails and Other New York Contacts

Although Hearst mainly relies on Goldberger's Internet web site, Hearst also points to the e-mail messages that Goldberger sent to or received from New York. Those e-mails, alone or in conjunction with Goldberger's Internet web site, do not provide CPLR Section 302(a)(1) personal jurisdiction over Goldberger, for two reasons. First, the only e-mail communications with New York occurred after Hearst brought this suit. (See Goldberger Br. at 5-6; Goldberger Dep. at 8-9, 18-19, 22-23, 39-43, 58-59.) Only pre-litigation contacts are relevant to the jurisdictional question. See, e.g., Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 89 F.3d 560, 569 (2d Cir. cert. denied, 117 S.Ct. 508 (1996); Greene v. Sha-Na-Na, 637 F.Supp. 591, 595 (D.Conn.1986) ("It is well-established that jurisdiction is to be determined by examining the conduct of the defendants as of the time of service of the complaint"); Connecticut Artcraft Corp. v. Smith, 574 F.Supp. 626, 630 (D.Conn.1983) (same); Lachman v. Bank of Louisiana in New Orleans, 510 F.Supp. 753, 757 (ND.Ohio 1981) (same); In re Puerto Rico Air Disaster Litig., 340 F.Supp. 492 , 498 & n. 19 (D.P.R.1972). Indeed these contacts with New York arise more due to Hearst's choice of the New York forum than through any purposeful decision by Goldberger to associate himself with the State of New York. See, e.g., Educational Testing Serv. v. Katzman, 631 F.Supp. 550 ,. 556 (D.N.J.1986) (defendant's contacts with the forum "subsequent to the filing of the complaint, but which are not the result of his defense of this case, are relevant to determining" personal jurisdiction); accord, e.g., M.P.A. Inc. v. Avalon Pointe Marina, Inc., No. Civ. A. 87-5370, 1988 WL 46219 at *1 (E.D.Pa. May 10, 1988) (quoting Katzman).

Second, even if the Court were to consider the post-litigation e-mails, e-mails are analogous to letters to or telephone communications with people in New York. See, e.g., Dale M. Cendali & James D. Arbogast, Net Use Raises Issues of Jurisdiction, Nat'l L.J., Oct. 28, 1996, at C7. Letters and telephone calls from outside New York to people in New York are not sufficient to establish personal jurisdiction under CPLR Section 302(a)(1) or the due process clause. See, e.g., Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 511 (2d Cir.1994) ("isolated phone call is an insufficient basis for personal jurisdiction"); Fiedler v. First City Nat'l Bank of Houston, 807 F.2d 315, 316-18 (2d Cir.1986) (three telephone calls and one mailing into New York not sufficient for personal jurisdiction); Fox v. Boucher, 794 F.2d 34, 37 (2d Cir.1986) (single telephone call to New York not sufficient); Beacon Enterprises, Inc. v. Menzies, 715 F.2d 757, 766 (2d Cir.1983) ("New York courts have consistently refused to sustain section 302(a)(1) jurisdiction solely on the basis of defendant's communications from another locale with a party in New York."); Mayes v. Leipziger, 674 F.2d 178, 185 (2d Cir.1982) (telephone calls and letters into New York not sufficient); Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583, 587 (2d Cir.1965) (negotiating and concluding goods contracts by telephone and mail did not provide personal jurisdiction); Glassman v. Hyder, 23 N.Y.2d 354, 363, 296 N.Y.S.2d 783, 789 (1968) ("This court has previously held that there is no transaction of business in New York where an offer placed outside the State by telephone is received and accepted in New York"); Professional Personnel Mgmt. Corp. v. Southwest Med. Assoc., Inc., 216 A.D.2d 958, 958, 628 N.Y.S.2d 919, 919 (4th Dep't 1995). **[FN14]**

In short, neither Goldberger's ESQWIRE Internet web site, which is the equivalent of an advertisement in a national publication, nor his e-mails, which are equivalent to letters or telephone calls, are sufficient to provide this Court with personal jurisdiction over Goldberger under CPLR Section 302(a)(1).

2. CPLR Section 302(a)(2): Committing a Tortious Act in New York

Hearst asserts (Hearst Br. at 6) that personal jurisdiction may be had over Goldberger pursuant to CPLR Section 302(a)(2), which provides for personal jurisdiction over one who commits a tortious act within the state so long as the cause of action asserted arises from the tortious act. See, e.g., Bensusan Restaurant Corp. v. King, 937 F.Supp. 295, 299 (S.D.N.Y.1996); Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F.Supp. 1040, 1052 (S.D.N.Y.1987) (Leisure, J.).

Trademark infringement occurs "where the passing off occurs, i.e., where the deceived customer buys the defendant's product in the belief that he is buying the plaintiff's." Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 639 (2d Cir.), cert. denied, 352 U.S. 871, 77 S.Ct. 96 (1956); accord, e.g., Bensusan Restaurant Corp. v. King, 937 F.Supp. at 299 . Thus, the tort of trademark infringement occurs within New York in satisfaction of CPLR Section 302(a)(2) if the "passing off" occurs within New York. It also is well- established that the offering for sale of infringing goods in New York constitutes such passing off. See Artemide SpA v. Grandlite Design & Mfg. Co., 672 F.Supp. 698, 705 (S.D.N.Y.1987) (shipment of 17 infringing lamps into New York sufficient to establish CPLR Section 302(a)(2) jurisdiction). "Under this standard, courts have found that an offering for sale of even one copy of an infringing product in New York, even if no sale results, is sufficient to vest a court with jurisdiction over the alleged infringer." Bensusan Restaurant Corp. v. King, 937 F.Supp. at 299 .

Even if Goldberger's Internet web site could be considered an "offer for sale" where, as here, Goldberger has no produce or service yet available for sale, jurisdiction does not exist in New York based merely on his placing the offer on the Internet outside New York. As one commentator has noted, "[p]ersonal jurisdiction is generally appropriate under [CPLR Section 302(a)(2)] only if the defendant was physically present in New York when committing the tort.... The transmission of a communication from outside New York by mail or telephone is generally not considered an act committed within the state for purposes of CPLR Section 302(a)(2)." 1 M. Silberberg, Civil Practice in the Southern District of New York Section 8.23 at 8-64 (fns. citing cases omitted); see also, e.g., Carlson v. Cuevas, 932 F.Supp. 76, 79-80 (S.D.N.Y.1996); Beckett v. Prudential Ins. Co. of America, 893 F.Supp. 234, 239 (S.D.N.Y.1995); Stein v. Annenberg Research Inst., 90 Civ. No. 224, 1991 WL 143400 at *2-4 (S.D.N.Y. July 19, 1991); Van Essche v. Leroy, 692 F.Supp. 320, 324-25 (S.D.N.Y.1988) **[FN15]**

The Court lacks jurisdiction over Goldberger under CPLR Section 302(a)(2).

3. CPLR 302(a)(3): Tortious Act Outside New York Causing Injury in New York

While Hearst does not rely on CPLR 302(a)(3), the Court will briefly address it for the sake of completeness.

CPLR 302(a)(3) provides jurisdiction over one who commits a tortious act outside New York causing injury within New York. The mere fact that plaintiff is domiciled in New York is not enough to show injury in New York; "to show an injury in New York, in commercial disputes, plaintiff traditionally must show direct interference with its New York customers or business." Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F.Supp. 1040, 1054-55 (S.D.N.Y.1987) (Leisure, J.); see also, e.g., Bensusan Restaurant Corp. v. King, 937 F.Supp. 295, 300 (S.D.N.Y.1996); Interface Biomedical Lab. Corp. v. Axiom Medical, Inc., 600 F.Supp. 731, 738-39 (E.D.N.Y.1985). Because Goldberger's conduct is insufficient under CPLR Section 302(a)(3)(i)--(ii), the Court need not determine if Goldberger's alleged infringement of New York-based Hearst's ESQUIRE trademark satisfies the injury in New York aspect of CPLR Section 302(a)(3).

For CPLR Section 302(a)(3) to be applicable, the defendant must be one who either (i) regularly transacts business or "derives substantial revenue from goods used or consumed or services rendered, in the state" or (ii) expects his act "to have consequences in the state and derives substantial revenue from interstate or international commerce." CPLR Section 302(a)(3)(i)-(ii).

As to CPLR Section 302(a)(3)(i), commentators have explained that:

Though the contacts required by the paragraph are all in the alternative, they must be "regular," "persistent" or "substantial." " 'The one shot' business transaction is insufficient and a regular course of conduct in the state is required." [Unlike 302(a)(1),] CPLR 302(a)(3)(i) does not require any connection between defendants' regular activities and the particular tortious act or the cause of action arising from it. Under subparagraph (i), the defendant must be engaged in substantial commercial activities within New York consisting of regularly doing or soliciting business, or engaging in any other persistent conduct, or deriving substantial revenues from dispensing goods or services in the state. Clearly, activities amounting to transacting of business or supplying goods or services (compare CPLR 302(a)(1)), rather than "doing of business" are contemplated despite the phrase "regularly does ... business," because there would be no need for long-arm jurisdiction if the "doing business" requirements of CPLR 301 were satisfied. 1 Weinstein, Korn & Miller, New York Civil Practice: CPLR Section 302.14 at 3-156 to 3-157 (1996) (footnotes omitted); see also Joseph McLaughlin, Practice Commentary to CPLR Section C302:21 at pp. 109-10 (McKinney's 1990) (concept of "doing business" here is more akin to the transaction of business concept of CPLR Section 302(a)(1), but unlike CPLR Section 302(a)(1), the cause of action under CPLR 302(a)(3) need not arise out of the transacted business). Goldberger's only business activities in New York relate to his ESQWIRE Internet site, and the Court has already found that that does not constitute the transaction of business in New York.

CPLR Section 302(a)(3)(i), however, also covers one who solicits business on a regular basis in New York. Judge McLaughlin has explained the significance of this:

The provision that a defendant who merely solicits business on a regular basis in New York may be subject to personal jurisdiction for a tortious injury in New York is also of major significance. It has long been black letter law in New York that the mere solicitation of business in the state does not subject the defendant to personal jurisdiction. More is required. Under the new statute the combination of regular advertisement of products in New York, plus a tortious injury in New York, will suffice for personal jurisdiction even if there is no causal relationship between the advertisement and the injury. The only causal nexus required by the statute is that the cause of action arise out of the tortious act; the solicitation of business is the extra ingredient which the statute prescribes in order to make it reasonable for New York to require the defendant to answer here for his tortious act.

Joseph McLaughlin, Practice Commentary to CPLR Section C302.21 (McKinney's 1990). Here, as discussed above, even if Goldberger's present Internet web site is considered a solicitation (since he does not yet have any product or service to sell), it did not occur in New York. Thus, Section 302(a)(3)(i) is not applicable. If it were, it would offend traditional notions of fair play, because it would lead to nationwide jurisdiction over the Internet. See Bensusan Restaurant Corp. v. King, 937 F.Supp. 295, 300-01 (S.D.N.Y.1996).

For CPLR Section 302(a)(3)(ii) to apply, Goldberger both would have to "expect the act to have consequences in" New York and "derive substantial revenue from interstate or international commerce." CPLR Section 302(a)(3)(ii); see also 1 Weinstein, Korn & Miller, Civil Practice in New York Section 302.14 at 3-159 (1966). The Court need not concern itself with whether Goldberger expected consequences in New York **[FN16]** because it is undisputed that Goldberger does not derive substantial revenue from interstate or international commerce--indeed, it is undisputed that his ESQWIRE business has notderived any revenue at this point. (Goldberger 12/10/96 Letter to the Court at p. 3; Goldberger Dep. at 9; 11/25/96 Tr. at 15.) **[FN17]**

In short, CPLR Section 302(a)(3) is not relied upon by Hearst and even if it were, does not provide jurisdiction over Goldberger.

III. ANALYSIS OF OTHER INTERNET PERSONAL JURISDICTION CASES

The courts that already have addressed Internet personal jurisdiction have reached conflicting results.

A. Cases Finding No Jurisdiction

In this District, in Bensusan Restaurant Corp. v. King, 937 F.Supp. 295 (S.D.N.Y.1996), Judge Stein reached the same conclusion as I do here--that an Internet web page is not sufficient to establish long-arm jurisdiction in New York. Bensusan was a trademark

infringement suit by the owner of the famous New York jazz club (and of the federally registered trademark) "The Blue Note" against King, owner of a small Missouri jazz club with the same name, over King's Internet web site. 937 F.Supp. at 297 . Judge Stein found personal jurisdiction over King lacking under both CPLR Section 302 and constitutional due process. As to CPLR Section 302(a)(2), Judge Stein held that "the mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York." 937 F.Supp. at 299 . As to CPLR Section 302(a)(3), King did not derive substantial revenue from interstate commerce, nor was the "foreseeability" requirement met based on King's knowledge that plaintiff's club was in New York. 937 F.Supp. at 300 . "That prong of [CPLR Section 302(a)(3)(ii)] requires that a defendant make a 'discernable effort ... to serve, directly or indirectly, a market in the forum state." 937 F.Supp. at 300 . Plaintiff in Bensusan, as does Hearst here, argued that the accessibility of the defendant's web site in New York should be sufficient to establish jurisdiction. As does this Court, Judge Stein disagreed, holding that "mere foreseeability of an in-state consequence and a failure to avert that consequence [by restricting New Yorkers' access to the web site] is not sufficient to establish personal jurisdiction." 937 F.Supp. at 300 . Finally, Judge Stein held that even if jurisdiction were proper under New York's long-arm statute, asserting jurisdiction would violate constitutional due process. Judge Stein explained:

King has done nothing to purposefully avail himself of the benefits of New York. King, like numerous others, simply created a Web site and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nationwide--or even worldwide--but, without more, it is not an act purposefully directed towards the forum state. There are no allegations that King actively sought to encourage New Yorkers to access his site, or that he conducted any business--let alone a continuous and systematic part of its business--in New York. There is in fact no suggestion that King has any presence of any kind in New York other than the Web site that can be accessed worldwide.

Id. at 301 (citations omitted).

Similarly, Goldberger has "simply created a Web site and permitted anyone who could find it to access it." Id. This Court, like Judge Stein in Bensusan, does not find the mere creation of a web site, without more, to constitute sufficient contacts to provide this Court with personal jurisdiction over Goldberger.

This Court's Report and Recommendation also is supported by the recent decision in McDonough v. Fallon McElligot, Inc., No. 95-4037, slip op. (S.D.Cal. Aug. 6, 1996). The McDonough court refused to exercise personal jurisdiction over the defendant solely on the basis of its maintenance of a web site, explaining:

Plaintiff has alleged that [defendant] maintains a World Wide Web ("Web") site. Because the Web enables easy world-wide access, allowing computer interaction via the web to supply sufficient contacts to establish jurisdiction would eviscerate the personal

jurisdiction requirement as it currently exists; the Court is not willing to take this step. Thus, the fact that [defendant] has a Web site used by Californians cannot establish jurisdiction by itself.

Id. at 5-6. **[FN18]**

B. Cases Distinguishable on Their Facts

Hearst's reliance on Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc., 939 F.Supp. 1032 (S.D.N.Y.1996), is misplaced. (See Hearst Br. at 7- 8.) Playboy involved a contempt proceeding against defendant for violation of a 1981 judgment enjoining it from publishing or distributing in the United States its "Playmen" magazine. 939 F.Supp. at 1033 . The opinion did not address personal jurisdiction based on an Internet web site, since the Court had "retained jurisdiction over Defendant for the purposes of enforcing the 1981 Injunction." 939 F.Supp. at 1036 n. 4 . On the merits, the Court found that defendant had violated the injunction because defendant "actively solicited United States customers to its Internet site, and in doing so has distributed its product within the United States." Id. at 1039 . One of defendants, web sites, however, was not just a source of passive information but was a "pay" site; thus, to access the site, the customer had to affirmatively subscribe to the service and pay defendant, and the customer would receive from defendant a "password" allowing access to the site. Thus, defendant knew that people in the United States were accessing its site. Id. at 1039 . Judge Scheindlin found that to be a United States distribution in violation of the injunction. She thus ordered defendant to stop accepting subscriptions from United States customers, while allowing defendant to continue operating its Internet web site:

Defendant argues that it is merely posting pictorial images on a computer server in Italy, rather than distributing those images to anyone within the United States.... Defendant argues that its publication of pictorial images over the Internet cannot be barred by the Injunction despite the fact that computer operators can view these pictorial images in the United States. Once more, I disagree. Defendant has actively solicited United States customers to its Internet site, and in doing so has distributed its product within the United States. When a potential subscriber faxes the required form to Tattilo, he receives back via e-mail a password and user name. By this process, Tattilo distributes its product within the United States. Defendant's analogy of "flying to Italy" to purchase a copy of the PLAYMEN magazine is inapposite. Tattilo may of course maintain its Italian Internet site. The Internet is a world-wide phenomenon, accessible from every corner of the globe. Tattilo cannot be prohibited from operating its Internet site merely because the site is accessible from within one country in which its product is banned. To hold otherwise "would be tantamount to a declaration that this Court, and every other court throughout the world, may assert jurisdiction over all information providers on the global World Wide Web." Such a holding would have a devastating impact on those who use this global service. The Internet deserves special protection as a place where public discourse may be conducted without regard to nationality, religion, sex, age, or to monitors of community standards of decency.

However, this special protection does not extend to ignoring court orders and injunctions. If it did, injunctions would cease to have meaning and intellectual property would no longer be adequately protected.

Id. at 1039-40 (citations omitted) Playboy is of no help to Hearst in the present case.

Hearst's reliance on CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir.1996), also is misplaced. (See Hearst Br. at 8-9.) CompuServe is distinguishable for the reasons explained by Judge Stein in distinguishing it from Bensusan, which are equally applicable here:

Although Compuserve Inc. v. Patterson ... reached a different result, it was based on vastly different facts. In that case, the Sixth Circuit found personal jurisdiction proper in Ohio over an Internet user from Texas who subscribed to a network service based in Ohio. The user, however, specifically targeted Ohio by subscribing to the service and entering into a separate agreement with the service to sell his software over the Internet. Furthermore, he advertised his software though the service and repeatedly sent his software to the service in Ohio. This led that court to conclude that the Internet user "reached out" from Texas to Ohio and "originated and maintained" contacts with Ohio. This action, on the other hand, contains no allegations that King in any way directed any contact to, or had any contact with, New York or intended to avail itself of any of New York's benefits.

Bensusan Restaurant Corp. v. King, 937 F.Supp. at 301 (citations omitted). Goldberger, like King, has not in any meaningful way "directed any contact to, or had any contact with, New York or intended to avail itself of New York's benefits." Id.

Plus System, Inc. v. New England Network, Inc., 804 F.Supp. 111 (D.Colo.1992), also is distinguishable from the instant case for similar reasons. In Plus System, the Colorado court exercised personal jurisdiction over a New England regional automatic teller machine, or ATM, network. The Plus System court based jurisdiction upon defendant's computer communications via telephone with plaintiff's computer in Colorado, in combination with: a licensing contract entered into by defendant with the Colorado based company and signed by defendant in Colorado; defendant's monthly payments to plaintiff in the forum state pursuant to the contract; and visits by defendant's representative to Colorado to initiate the business relationship with plaintiff. Id. at 118-19 . The Plus System court was careful to note that the defendant "availed itself of the State of Colorado by means which might be of insufficient quantum to justify personal jurisdiction if considered individually, but which clearly rise to purposeful availment when viewed collectively." Id. at 118 . Here, Goldberger has no contract with Hearst, sent no representative to New York to deal with Hearst, and Goldberger's computer did not obtain computer services from Hearst. Plus System is thus of no use to Hearst here.

Panavision Int'l, L.P. v. Toenpen, 938 F.Supp. 616 (C.D.Cal.1996), also is distinguishable. In Panavision, defendant Toeppen, an Illinois resident, was a "cybersquatter." Cybersquatters are "individuals [that] attempt to profit from the Internet

by reserving and later reselling or licensing domain names back to the companies that spent millions of dollars developing the goodwill of the trademark." Intermatic Inc. v. Toeppen, No. 96 C 1982, 1996 WL 716892 at *6 (N.D.Ill. Nov. 26, 1996). Toeppen had registered, as his Internet domain name, Panavision's trademark, as well as the trademarks of numerous other well-known companies. Panavision, 938 F.Supp. at 619 . When Panavision later attempted to establish a web site using its own trademarked name, it was prevented from doing so by Toeppen's prior registration. Id. at 619, 621 . Rather than acquiesce to Toeppen's extortionate demand for $13,000 to release the domain name, Panavision sued in California for trademark infringement. Id. at 619 . The California court held that jurisdiction was "proper because Toeppen's out of state conduct was intended to, and did, result in harmful effects in California." Id. at 622 . It reasoned that "Toeppen allegedly registered Panavision's trademarks as domain names with the knowledge that the name belonged to Panavision and with the intent to interfere with Panavision's business. Toeppen expressly aimed his conduct at California," which is Panavision's principal place of business. Id. at 621 . The Panavision Court distinguished Bensusan because in Bensusan the defendant "had legitimate businesses and legitimate legal disputes," while "Toeppen is not conducting a business but is, according to Panavision, running a scam directed at California." Id. at 622.

Panavision appears to be one of those cases where "hard cases make bad law." **[FN19]** In any event, Goldberger's situation is more akin to Bensusan than to Panavision. Hearst does not allege that Goldberger is a cybersquatter. Since Goldberger's proposed services are aimed at lawyers, there is a legitimate reason for his use of a name that includes "ESQ"-- particularly in light of the numerous other businesses that use "Esquire" in their name. (See fn. 16 above.) Goldberger's intent is a key element on the merits under the Second Circuit's well-known Polaroid analysis. See Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir.), cert. denied, 368 U.S. 820 , 82 5. Ct. 36 (1961); see also 3 J. Thomas McCarthy, McCarthy on Trademarks & Unfair Competition Sections 24:32, 24:57, 24:59 (4th ed.1996). Except perhaps in the clearest case of a cybersquatter or where intent is undisputed, this court believes it would be a serious mistake for personal jurisdiction to turn on the issue of the defendant's intent, which itself is a major merits issue. Panavision thus is distinguishable, and to the extent it is not distinguishable, the Court declines to follow it.

EDIAS Software Int'l L.L.C. v. BASIS Int'l Ltd., 947 F.Supp. 413 (D.Ariz.1996), is distinguishable as a defamation case and also because of the defendant's much greater contact with the forum. "The contacts that BASIS has with Arizona include: a contract with an Arizona company [the plaintiff], phone, fax and e-mail communications with EDIAS in Arizona during the business relationship, sales to EDIAS and other Arizona customers, and visits to Arizona." 947 F.Supp. at 417 . In addition, the defendant had a CompuServe web page on which it posted the allegedly defamatory statement about plaintiff. Id. at 418 . Because the statement identified plaintiff by name, and Arizona is plaintiff's principal place of business, the Court held that the web page messages "were both directed at Arizona and allegedly caused foreseeable harm to EDIAS" in Arizona. Id. at 420 . The Court exercised jurisdiction based on all of these contacts with Arizona. Id. at 422 . Obviously, BASIS's contacts with the forum were much greater than are

Goldberger's. Moreover, the foreseeable effect and harm in the forum test works well in defamation actions, but does not work well in trademark infringement actions like this, where numerous companies throughout the United States have "Esquire" in their name. (See fn. 16, above.) **[FN20]**

In Minnesota v. Granite Gates Resorts, Inc., No. C6-95-7227, slip op., available on BNA's Electronic Info. Policy & Law Report at 919 (Ramsey Co. D. Ct. Dec. 11, 1996), the court upheld jurisdiction in an action by the State Attorney General to enjoin defendant's gambling web site under the state's gambling and consumer protection laws. The evidence showed that Minnesota residents accessed defendant's web site. Noting that courts "do not view the contacts the same as what is necessary for a private litigant to pursue a case," the Court upheld jurisdiction based on the receipt of the Internet ads into Minnesota. ENA EIPLR at 924-25.

C. The Court Declines to Follow the Opinions of Other Courts Upholding Internet Personal Jurisdiction

Finally, the Court declines to follow the decisions in Maritz, Inc. v. CyberGold, Inc., 947 F.Supp. 1328 (ED. Mo.1996), Inset Systems, Inc. v. Instructions Set, Inc., 937 F.Supp. 161 (D.Conn.1996), and Heroes, Inc. v. Heroes Foundation, No. 96-1260, slip op., available on BNA's Electronic Info. Policy & Law Report (D.D.C. Dec. 12, 1996).

In Maritz, defendant's only contact with Missouri was a web site, "published" on a computer in California, that "provide[d] information about CyberGold's new upcoming [Internet] service." 947 F.Supp. at 1330. Defendant's web site was accessible to any Internet user, including those in Missouri, and in fact had been accessed by people in Missouri. Id. at 1330 .

In Inset, defendant's only contacts with Connecticut were an Internet web site and an 800 telephone number, both of which advertised defendant's services. Inset, 937 F.Supp. at 164 . The web site and 800 number were accessible to anyone with Internet access or a telephone, respectively, including Connecticut residents. Id. at 164-65 .

In Heroes, the defendant charity had placed an ad seeking donations in the Washington Post and also had an Internet web page that was nationally accessible. The Court found transacting business and causing tortious injury (trademark infringement) in the forum jurisdiction based on the combination of the local newspaper ad and the Internet site. While the Court held that because of the newspaper ad it need not decide if the Internet web site alone would support jurisdiction, the opinion left little doubt that it would.

The courts in these three cases--Maritz, Inset and Heroes--chose to exercise personal jurisdiction for similar reasons, which can be summarized as follows: through their web sites, defendants consciously decided to transmit advertising information to all Internet users, including those in the forum state, thereby (allegedly) committing trademark infringement in the forum state and purposefully availing themselves of the privilege of

doing business within the forum state. Maritz, 947 F.Supp. at 1329-34; Inset, 937 F.Supp. at 164- 65 .

The Court recognizes that there is some truth in the Maritz court's statement that "while modern technology has made nationwide commercial transactions simpler and more feasible, ... it must broaden correspondingly the permissible scope of jurisdiction exercisable by the courts." Maritz, Inc. v. Cyberfold, 947 F.Supp. at 1334 (quoting California Software Inc. v. Reliability Research, Inc., 631 F.Supp. at 1363). This Court, however, agrees with the sentiments expressed by Judge Scheindlin in a slightly different context, that to allow personal jurisdiction based on an Internet web site "would be tantamount to a declaration that this Court, and every other court throughout the world, may assert [personal] jurisdiction over all information providers on the global World Wide Web. Such a holding would have a devastating impact on those who use this global service." Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc., 939 F.Supp. 1032, 1039-40 (S.D.N.Y.1996). Upholding personal jurisdiction over Goldberger in the present case would, in effect, create national (or even worldwide) jurisdiction, so that every plaintiff could sue in plaintiff's home court every out-of-state defendant who established an Internet web site. The Court declines to reach such a far-reaching result in the absence of a Congressional enactment of Internet specific trademark infringement personal jurisdictional legislation. **[FN21]**

IV. THE CASE SHOULD BE TRANSFERRED TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, CAMDEN DIVISION

Despite the lack of personal jurisdiction over defendant Goldberger, it is well-established that the Court in the interest of justice may transfer this case to a district in which venue is appropriate pursuant to 28 USC. 1406(a), rather than dismiss. **[FN22]** 28 U.S.C. Section 1406(a); see, e.g., Goldlawr, Inc. v. Heimann, 369 U.S. 463, 465-67, 82 5. Ct. 913, 915-16 (1962); Corke v. Sameiet M.S. Song of Norway, 572 F.2d 77, 78-80 (2d Cir.1978); Volk Corp. v. Art-Pak Clip Art Serv., 432 F.Supp. 1179 (S.D.N.Y.1977) (Weinfeld, J.) (transfer can be based on 28 U.S.C. Section 1404, even if court lacks personal jurisdiction over defendant) see generally 1A , Moore's Federal Practice Section 0.346[1]-[6] (2d ed.1996).

In this case, the interest of justice standard is satisfied because, inter alia, the parties have stipulated to transfer rather than dismissal in the event the Court holds, as it does, that personal jurisdiction is lacking. (12/23/96 Tr. at 13-15; LaPolla 1/7/97 Letter to the Court at p. 1.) This case should be transferred to the United States District Court for the District of New Jersey, Camden Division--the district in which defendant Goldberger resides and from where he established his Internet web site.

CONCLUSION

For the reasons set forth above, I recommend that the Court hold that Goldberger's out-of-state creation of an Internet web site that is accessible in New York, standing alone,

does not provide personal jurisdiction over defendant in New York. Pursuant to the parties' agreement, the case thus should be transferred to the United States District Court for the District of New Jersey, Camden Division.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. Section 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from receipt of this Report to file written objections. See also Fed.R.Civ.P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Peter K. Leisure, 500 Pearl Street, Room 1910, and to the chambers of the undersigned, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Leisure. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 , 106 5. Ct. 466 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir.1993), cert. denied, 115 S.Ct. 86 (1994); Roldan v. Racette, 984 F.2d 85, 89 (2d Cir.1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.), cert. denied, 506 U.S. 1038 , 113 5. Ct. 825 (1992); Small v. Secretary of Health & Human Services, 892 F.2d 15, 16 (2d Cir.1989); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir.1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir.1983); 28 U.S.C. Section 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(e).

FOOTNOTES:

FN1. For additional description of the Internet, see EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd., 947 F.Supp. 413, 419-20 (D.Ariz.1996); Intermatic Inc. v. Toeppen, No. 96 C 1982, 1996 WL 716892 at *2-4 (ND.Ill. Nov. 26, 1996); Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc., 939 F.Supp. 1032, 1035 & nn. 2-3, 1036-37, 1039-40 (S.D.N.Y.1996); Bensusan Bestaurant Corp. v. King, 937 F.Supp. 295 , 297-98 & nn. 1-2 (S.D.N.Y.1996); Maritz, Inc. v. Cybergold, Inc., 947 F.Supp. 1328, 1330 (ED. Mo.1996); Inset Systems, Inc. v. Instruction Set, Inc., 937 F.Supp. 161, 163 (D.Conn.1996); Shea v. Reno, 930 F.Supp. 916, 925-34 (S.D.N.Y.1996) (three judge court); Religious Tech. Center v. Netcom On-Line Communication Servs., Inc., 907 F.Supp. 1361, 1365-66 (N.D.Cal.1995); United States v. Baker, 890 F.Supp. 1375, 1379 n. 1 (E.D.Mich.1995), aff'd, No. 95-1797, 1997 WL 30655 (6th Cir. Jan. 29, 1997); MTV Networks v. Curry, 867 F.Supp. 202 , 203-04 & nn. 1-3 (S.D.N.Y.1994).

FN2. "Science fiction author William Gibson is credited with coining the term [cyberspace] in his novel 'Neuromancer. I Gibson's concept included a direct brain-computer link that gave the user the illusion of physically moving about in the data 'matrix' to obtain information. In Gibson's vision, cyberspace is s 'consensual hallucination that felt and looked like physical space but actually was a computer-generated construct representing abstract data.' As commonly used today, cyberspace is the conceptual 'location' of the electronic interactivity available using one's computer. Cyberspace is a place 'without physical walls or even physical dimensions' in which

interaction occurs as if it happened in the real world and in real time, but constitutes only a 'virtual reality.' Cyberspace is the manifestation of the words, human relationships, data, wealth, and power ... by people using [computer-mediated communications].' " William S. Byassee, Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community, 30 Wake Forest L.Rev. 197, 220 n. 5 (1995) (citations omitted).

FN3. Goldberger could not use ESQ.WIRE.COM because a period (or "dot") cannot be contained in that part of a domain name. (Goldberger Aff. Par. 5; Goldberger Dep. at 5.) Goldberger also has applied to the Trademark Office to register the mark ESQWIRE. (Goldberger Aff. Par. 6.)

FN4. Goldberger's home page states:

Visit the ESQ.wire web site to follow this important trademark battle. The site will have up-to-date pleadings, briefs, documents, deposition transcripts, case law and legal analysis. It is hoped that this information will be helpful to others who are fighting battles against trademark and domain name bullies. (Goldberger Aff. Ex. 4.) A "revised" version of the web site advises that "You can 'sit in' on the Hearst litigation right here and see the power of the firm away from firm," [i.e., Goldberger's web site].

(LaPolla 10/24/96 Letter to the Court, enclosure.) Goldberger's use of the ESQWIRE mark "in connection with the web site dissemination of reporting and commentary about the instant civil action is precisely the type of activities which are of most concern to Hearst." (Kosner Aff. Par. 14.)

FN5. "A 'hyperlink' is 'highlighted text or images that, when detected by the user, permit him to view another, related Web document.' ... With these links 'a user can move seamlessly between documents, regardless of their location; when a user viewing the document located on one server selects a link to a document located elsewhere, the browser will automatically contact the second server and display the document.' " Bensusan Restaurant Corp. v. King, 937 F.Supp. 295, 298 n. 2 (S.D.N.Y.1996).

FN6. During the course of this litigation, Goldberger updated his home page description, to read as follows:

ESQ.wire --pronounced esk-wire--will provide virtual law firm support services, legal information services and products to

enable attorneys to practice law anywhere on the planet with the simple click of a mouse. We are in the early stages of development. If you would like to be a part of this revolutionary virtual legal community as either a legal services provider or as a participating attorney, contact Ari Goldberger: ag @esqwire.com.

(Enc. to LaPolla 10/24/96 Letter to the Court.)

FN7. Goldberger's pre-lawsuit e-mails were to personal friends, or possibly to his Internet provider regarding the creation of his web site, but there is no evidence in the record that any of those pre-suit e-mails were to or from New York. (See Goldberger Dep. at 8-9, 18-19, 22-23.)

FN8. The Court ruled that while the motion was under consideration, all Court conferences would be telephonic so thatGoldberger would not have to travel to New York. (See 10/8/96 Tr. at 26.)

FN9. In so consenting, neither party waived its right to file objections to my Report and Recommendation with Judge Leisure. (12/23/96 Tr. at 13- 15; LaPolla 1/7/97 Letter to the Court at p. 1.)

FN10. See also, e.g., Williams v. Chater, 87 F.3d 702, 706 (5th Cir.1996); Justiss Oil Co. v. Kerr-McGee Refining Corp., 75 F.3d 1057, 1067 (5th Cir.1996); Applewhite v. Reichhold Chems., Inc., 67 F.3d 571 , 573 & n. 7 (5th Cir.1995); Gann v. Fruehauf Corp., 52 F.3d 1320, 1328 (5th Cir.1995); Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 260 n. 9 (5th Cir.1995); Kisser v. Kemp, No. 92-5206, 1994 WL 162411 at *1 (D.C.Cir. April 11, 1994); Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir.1993).

FN11. See, e.g., PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1997 WL 5913 at *3 (2d Cir.1997); Agency Rent A Car System, Inc. v. Grand Rent A Car Corp., 98 F.3d 25, 29 (2d Cir.1996); Pyramyd Stone Int'l Corp. v. Crossman Corp., 95 Civ. 6665, 1997 WL 66778 at *10 (S.D.N.Y. Feb. 18, 1997); see generally 1 M. Silberberg, Civil Practice in the Southern District of New York Sections 8.15-8.29.

FN12. See also, e.g., American Eutectic Welding Alloys Sales Co. v. Bytron Alloys Corp., 439 F.2d 428, 435 (2d Cir.1971); Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951, 955 (2d Cir.1967); International Bankcard Serv. Corp. v. Federally Insured Sav. Network, No. CV-89-0965, 1991 WL 53761 at *5 (E.D.N.Y. April 3, 1991); Future Ways, Inc. v. Odiorne, 697 F.Supp. 1339, 1341 n. 2 (S.D.N.Y.1988); Interface Biomedical Labs. Corp. v. Axiom Med., Inc., 600 F.Supp. 731, 733 n. 3 (E.D.N.Y.1985); Joseph McLaughlin, Practice Commentary to CPLR Section C302:1 at p. 71 (McKinney's 1990); 1 Weinstein, Korn & Miller, Civil Practice in New York Section 302.01 (1996).

FN13. National advertisements also have been held to not constitute sufficient "minimum contacts" to satisfy constitutional due process requirements. See, e.g., Seymour v. Parke, Davis & Co., 423 F.2d 584, 587 (1st Cir.1970) (advertising in forum state by mail and otherwise insufficient contact for personal jurisdiction); Sunbelt Corp. v. Noble, Denton & Assoc., Inc., 5 F.3d 28, 33 n. 10 (3d Cir.1993) (single ad in national periodical received in forum state not sufficient); Mesalic v. Fiberfloat Corp., 897 F.2d 696, 700 n. 10 (3d Cir.1990) (noting that defendant's marketing strategy, which included ads in national publications distributed in New Jersey provided, at best, tangential support for the assertion of specific personal jurisdiction, while upholding jurisdiction for other reasons); Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61 , 66 & n. 8 (3d Cir.1984) (ad in local newspaper); Reliance Steel Prods. Co. v. Watson, Ess, Marshall &

Enggas, 675 F.2d 587, 589 (3d Cir.1982) (ad in Martindale-Hubbell legal directory not basis for jurisdiction); Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1199 (4th Cir.1993) ("advertising and solicitation activities alone do not constitute the 'minimum contacts' required for general jurisdiction"); Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 181, 184 (5th Cir.1992) (no constitutional jurisdiction where defendant placed ads in national journals distributed in forum and mailed information to prospective customers in forum), cert. denied, 506 U.S. 1080, 113 S.Ct. 1047 (1993); Singletary v. B.R.X., Inc., 828 F.2d 1135, 1136-37 (5th Cir.1987) (no personal jurisdiction based on ads in national publications circulated within the forum state); Growden v. Ed Bowlin & Assoc., Inc., 733 F.2d 1149 , 1151-52 & n. 4 (5th Cir.1984) (no personal jurisdiction based on ads in two national publications for the sale of an airplane, the crash of which was the subject of the litigation); Loumar, Inc. v. Smith, 698 F.2d 759, 763-64 (5th Cir.1983) (ads in nationally circulated trade publications circulated within the forum state do not, by themselves, provide personal jurisdiction); Charia v. Cigarette Racing Team, Inc., 583 F.2d 184, 187, 190 (5th Cir.1978) (Roney, J.) (national ads that led to the disputed boat sale held insufficient to establish personal jurisdiction); Benjamin v. Western Boat Bldg. Corp., 472 F.2d 723, 731 (5th Cir.) ("absent other sales activities in the forum state, merely advertising in magazines of national circulation that are read in the forum state is not a significant contact for jurisdictional purposes"), cert. denied, 414 U.S. 830, 94 S.Ct. 60 (1973); Wines v. Lake Havasu Boat Mfg., Inc., 846 F.2d 40, 43 (8th Cir.1988) (no jurisdiction based on ads in national trade publications); Land-O-Nod Co. v. Basset Furniture Indus., Inc., 708 F.2d 1338, 341 (8th Cir.1983)(no jurisdiction based on ad in a national trade journal stating intent to sell allegedly infringes good nationally); Cascade Corp. v. Hiab-Foco AB, 619 F.2d 36, 37-38 (9th Cir.1980) (ad in national publications available in forum state not sufficient for jurisdiction); Williams v. Bowman Livestock Equip. Co., 927 F.2d 1128, 1131 (10th Cir.1991) (advertising in several national trade magazines not sufficient to support general jurisdiction); Fidelity & Cas. Co. of New York v. Philadelphia Resins Corp., 766 F.2d 440, 447 (10th Cir.1985) (ad in national trade publication that led to sale is insufficient to establish general personal jurisdiction), cert. denied, 474 U.S. 1082, 106 S.Ct. 853 (1986); Charlie Fowler Evangelistic Ass'n, Inc. v. Cessna Aircraft Co., 911 F.2d 1564, 1566 (11th Cir.1990) ("This court has held that an advertisement in a forum state newspaper ... was not a 'purposeful availment of the benefits and protections of [the forum state's] laws' "); Johnston v. Frank E. Basil, Inc., 802 F.2d 418, 420 (11th Cir.1986) (same)

FN14. See also, e.g., Premier Lending Servs., Inc. v. J.L.J. Assoc., 924 F.Supp. 13, 16 (S.D.N.Y.1996) (telephone, fax and mail) Becket v. Prudential Ins. Co. of America, 893 F.Supp. 234, 239 (S.D.N.Y.1995); Taurus Int'l Inc. v. Titan Wheel Int'l Inc., 892 F.Supp. 79, 81-82 (S.D.N.Y. Aug. 16, 1995) (mailing, in trademark infringement action); China Resource Products (USA), Ltd. v. China Distributors, Inc., 92 Civ. 7119, 1994 WL 440719 at *6-8 (S.D.N.Y. Aug. 16, 1994); Jolivet v. Cracker, 859 F.Supp. 62, 64 (E.D.N.Y.1994); United States Theatre Corp. v. Gunwyn/Lansburgh Ltd. Partnership, 825 F.Supp. 594, 595-97 (S.D.N.Y.1993); Painewebber Inc. v. Westgate Group Inc., 748 F.Supp. 115, 119 (S.D.N.Y.1990); Vardinoyannis v. Encyclopaedia Brittanica, Inc., 89 Civ. 2475, 1990 WL 124338 at *4 (S.D.N.Y.Aug. 20, 1990); Tripmasters, Inc. v. Hyatt Int'l Corp., 696 .Supp. 925, 938 (S.D.N.Y.1988) (the " 'contacts' of [defendant] with

plaintiff in New York by telex and telephone are plainly insufficient to confer jurisdiction," since " 'New York courts have consistently refused to sustain section 302(a)(1) jurisdiction solely on the basis of defendant's communications from another locale with a party in New York.' "); Lawrence Wisser & Co. v. Slender You, Inc., 695 F.Supp. 1560, 1562-63 (S.D.N.Y.1988) (telephone calls and faxes into New York, including calls to New York media, not sufficient for personal jurisdiction); Celton Man Trade, Inc. v. Utex, S.A., 84 Civ. 8179, 1986 WL 6788 at *3 (S.D.N.Y. June 12, 1986) ("It is well settled that under New York law ... [a] defendant who merely places telephone calls or sends telexes to persons in New York is not thereby subject to personal jurisdiction here."); Advance Realty Assoc. v. Krupp, 636 F.Supp. 316, 318 (S.D.N.Y.1986); Lichtenstein v. Jewelart, Inc., 95 F.R.D. 511, 514 (E.D.N.Y.1982); Empresa Nacional Siderurgica. S.A. v. Glazer Steel Co., 503 F.Supp. 1064 , 106-66 (S.D.N.Y.1980) (Weinfeld, J.); Selman v. Harvard Med. School, 494 F.Supp. 603, 612 (S.D.N.Y.) ("Mere solicitation, advertising or telephone calls to New York do not satisfy the 'transaction of business' test."), aff'd mem., 636 F.2d 1204 (2d Cir.1980); Bross Utils. Serv. Corp. v. Aboubshait, 489 F.Supp. 1366, 1371-72 (D.Conn.) (Cabranes, J.)("The transmission of communications between an out-of-state defendant and a plaintiff within the jurisdiction does not, by itself, constitute the transaction of business in the forum state."), aff'd mem., 646 F.2d 559 (2d Cir.1980). For similar decisions in other circuits, see also, e.g., Digi-Tel Holdings, Inc. v. Proteg Telecommunications (PTE), Ltd., 89 F.3d 519, 523 (8th Cir.1996) ("Although letters and faxes may be used to support the exercise of personal jurisdiction, they do not themselves establish jurisdiction."); Bell Paper Box, Inc. v. Trans Western Polymers. Inc., 53 F.3d 920, 923 (8th Cir.1995)("The use of interstate facilities, such as telephones or mail, is a 'secondary or ancillary' factor 'and cannot alone provide the "minimum contacts" required by due process.' "); Reynolds v. International Amateur Athletic Fed'n, 23 F.3d 1110, 1119 (6th Cir.), cert. denied, 115 S.Ct. 423 (1994); Nicholas v. Buchanan, 806 F.2d 305, 307-08 (1st Cir.1986) (no jurisdiction as matter of due process clause based on telephone calls and letters into the state), cert. denied, 481 U.S. 1071, 107 S.Ct. 2466 (1987); Scheidt v. Young, 389 F.2d 58, 60 (3d Cir.1968) (newspaper ad in New York Daily News and plaintiff's call to defendant in response not constitute minimum contacts); Slocum v. Sandestin Beach Resort Hotel, 679 F.Supp. 899, 901-03 (E.D.Ark.1988) (use of interstate mail and telephone not sufficient minimum contacts for jurisdiction); Bennett Indus., Inc. v. Laher, 557 F.Supp. 965, 967-68 (N.D.Tex.1983) (solicitation flyer and telephone calls not sufficient for personal jurisdiction).

FN15. Cases like QRM Publ'g Co. v. Reed, 86 Civ. 3222, 1986 WL 6490 at *2 (S.D.N.Y. June 3, 1986) (allegedly infringing newsletter offered to and then mailed to New York subscribers), Transamerica Corp. v. Transfer Planning, Inc., 419 F.Supp. 1261, 1261 (S.D.N.Y.1976) (direct mail brochure sent to 100-250 New Yorkers), and Honda Assoc., Inc. v. Nozawa Trading, Inc., 374 F.Supp. 886, 888-89 (S.D.N.Y.1974) (jurisdiction upheld in trademark infringement action over California defendant that sent over 20 catalogs into New York over 5-year period), are distinguishable because in those cases the defendant specifically directed its offer to New Yorkers. See Taurus Int'l Inc. v. Titan Wheel Int'l Inc., 892 F.Supp. 79, 81-82 (S.D.N.Y.1995). In contrast, Goldberger's

Internet site, like an advertisement in a national periodical, was not specifically directed to New Yorkers.

FN16. There is no evidence in the record as to Goldberger's intent in naming his service ESQ.WIRE and ESQWIRE, i.e., no evidence at this stage of the litigation that Goldberger based his mark on Hearst's ESQUIRE mark. The only basis for "expected consequences" in New York would be Hearst's presence in New York. But ESQUIRE is not a unique mark. The Court's Westlaw search of corporate filings revealed more than 1100 corporations in forty-three states with "Esquire" as the first word in their corporate name. This number does not include unincorporated businesses, corporations that are using the mark Esq., or corporations with names containing the word "Esquire," but not as the first word of their corporate name. To allow suit in New York on this record potentially would subject Goldberger to suit in virtually every state. As discussed at length in text, the Court does not believe that creation of an Internet web page, without sale of any product or service, should subject a defendant to suit in virtually every state in the country.

FN17. The revenue from interstate commerce test is not limited to Goldberger's ESQWIRE revenue, but there is no evidence in the record that he earns substantial revenue from interstate commerce, since his main revenue is his salary as an associate at a Philadelphia-based law firm.

FN18. In Pres-Kap, Inc. v. System One, Direct Access, Inc., 636 So.2d 1351 (Fla. D. Ct. of App.), review denied mem., 645 So.2d 455 (Fla.1994), the state court refused to exercise jurisdiction over a New York travel agency that accessed plaintiff's computer reservation system database in Florida and sent contractual payments to Florida. Id. at 1353. The court held that the contract was negotiated in New York by plaintiff's New York office, and that the two contacts with Florida could not create a reasonable expectation of suit in Florida. Id. The court believed that "a contrary decision would, we think, have far-reaching implications for business and professional people who use 'on-line' computer services for which payments are made to out-of-sate companies where the database is located.... Such a result, in our view, is wildly beyond the reasonable expectations of such computer-information users, and, accordingly, the result offends traditional notions of fair play and substantial justice." Id.

FN19. E.g., Board of County Commissioners v. Umbehr, 116 S.Ct. 2361, 2373 (1996) (Scalia, J. dissenting); Hilton v. South Carolina Pub. Ry. Comm'n, 502 U.S. 197, 207, 112 5. Ct. 560, 566 (1991) (O'Connor, J., dissenting); Northern Sec. Co. v. United States, 193 U.S. 197, 364, 24 5. Ct. 436, 467 (1904) (Holmes, J.,dissenting); Letelier v. Republic of Chile, 748 F.2d 790, 791 (2d Cir.1984), cert. denied, 471 U.S. 1125, 105 S.Ct. 2656 (1985); United States v. Mastrangelo, 662 F.2d 946, 953 (2d Cir.1981) (Meskill, J., dissenting), cert. denied, 456 U.S. 973 , 102 S. Ct. 2236 (1982).

FN20. Similar to EDIAS, in California Software Inc. v. Reliability Research, Inc., 631 F.Supp. 1356 (C.D.Cal.1986), the Court exercised personal jurisdiction over the out-of-state defendant in a libel action based on communications by mail and telephone to three

California companies to dissuade them from purchasing from the plaintiff California corporation. Id. at 1361. In addition, the Court found that defendant's placement of a message specifically about plaintiff on a computer network was expressly calculated to cause injury in California where plaintiff was located. Id. Here, in contrast, defendant Goldberger's Internet web site is not specifically about plaintiff or expressly aimed at New York. California Software does not provide a basis for jurisdiction over Goldberger.

FN21. For the benefit of future judges confronted with the issue of Internet personal jurisdiction, some of the commentary on this issue is as follows: David Bender, Emerging Personal Jurisdiction Issues on the Internet, 453 PLI/Pat 7 (1996); William S. Byassee, Jurisdiction of Cyberspace: Applying Real World Precedent To The Virtual Community, 30 Wake Forest L.Rev. 197 (1995); Cynthia L. Counts & C. Amanda Martin, Libel in Cyberspace: A Framework For Addressing Liability and Jurisdictional Issues In This New Frontier, 59 Albany L.Rev. 1083, 1115-33, at 1129-30 (1996)

("jurisdiction should not be permissible in any random state in which a cyberspace message may be read.... [T]he connection is ... remote between a cyberspace user posting a message in one state and the user that ultimately downloads the same message in another state. In both situations, the personal jurisdiction assertion is improper because of the lack of directed purposeful activity towards the forum and the 'uncertainty' or 'unpredictability of the contact.' Because mere awareness that one's product may travel into another state was insufficient to support jurisdiction, mere awareness that a message may be downloaded in another state should also be insufficient."); James Alexander French & Rafael X. Zahralddin, The Difficulty of Enforcing Laws in the Extraterritorial Internet, 1 Nexus J. Opinion, Chapman Univ. School of Law, Fall 1996, at 99; Seth Gorman & Anthony Loo, Blackjack or Bust: Can U.S. Law Stop Internet Gambling?, 16 Loyola L.A. Ent. J. 667, 679-89 (1996); Byron F. Marchan t, On-Line on the Internet: First Amendment and Intellectual Property, 39 Howard L.J. 477, 491-92 (1966); Michael J. Santisi, Pres- Kap, Inc. v. System One, Direct Access, Inc.: Extending the Reach of the Long-Arm Statute Through the Internet, 13 J. Marshall J. Computer & Info. L. 433 (1995); Richard S. Zembek, Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace, 6 Albany L.J. of Science & Tech. 339 (1996); Parry Aftab, Jurisdiction in Cyberspace: Due Process Standards Vary, N.Y.L.J., Jan. 27, 1997, at S4; Robert A. Bourque & Kerry L. Konrad, Avoiding Remote Jurisdiction Based on Internet Web Site, N.Y.L.J., Dec. 10, 1996, at 1; Dale M. Cendali & James D. Arbogast, 'Net Use Raises Issues of Jurisdiction, Nat'l L.J., Oct. 28, 1996, at C7; John Fellas, Do Electronic Links Support Personal Jurisdiction?, N.Y.L.J., Sept. 30, 1996, at S4; Alan J. Hartnick, Copyright & Trademark on the Internet-- And Where to Sue, N.Y.L.J., Feb. 21, 1997 at 5, 7; Wendy R. Leibowitz, High Tech Is Reshaping Legal Basics, Nat'l L.J., Sept. 23, 1996, at A1; W. Scott Petty, Domain Name Dispute Policy Evolves to Address Trademark Issues in Cyberspace, Intell. Prop. Today, Oct. 1996, at 8; Otto B. Ross, Recent Case Finds Web Site Confers Jurisdiction, Nat'l L.J., Feb. 3, 1997 at C11; Martin H. Samson, Trademark Lawsuits in Cyberspace, N.Y.L.J., Dec. 2, 1996, at Sb; Robert C. Scheinfeld & Parker H. Bagley, Long-Arm Jurisdiction; 'Cybersquatting', N.Y.L.J., Nov. 27, 1996, at 3; Alan N. Sutin, Dilution Act Is Powerful Weapon In Internet Domain Name Disputes, N.Y.L.J., Jan. 14, 1997, at 5; Daniel E. Troy & David J. Goldstone,

Foreign Web Sites Pose Problems for U.S. Affiliates, Nat'l L.J., Nov. 18, 1996, at B9; Christopher Wolf & Scott Shorr, Cybercops Are Cracking Down on Internet Fraud, Nat'l L.J., Jan. 13, 1997, at B12.

FN22. Section 1406(a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."