

06-1458

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KAREN DUDNIKOV, and
MICHAEL MEADORS,

Plaintiffs-Appellants,

v.

CHALK & VERMILION FINE
ARTS, INC., and SEVENARTS,
LTD.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado

The Honorable Walker D. Miller
District Judge

D.C. No. 05-CV-02505-WDM-MEH

APPELLANTS' REPLY BRIEF

Gregory A. Beck
PUBLIC CITIZEN LITIGATION GROUP
1600 20th St., NW
Washington, DC 20009
(202) 588-7713

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. DEFENDANTS EXPRESSLY AIMED THEIR ACTIONS AT PLAINTIFFS IN COLORADO AND THEREFORE SATISFY THE REQUIREMENT OF “PURPOSEFUL DIRECTION.” 3

 A. Plaintiffs’ Injuries Were the Direct and Intended Consequence of Defendants’ Actions. 3

 B. Defendants Had Reason to Know that Plaintiffs’ Business Is Located in Colorado. 7

 C. Although Plaintiffs Need Not Show that Defendants’ Actions Were Wrongful to Establish Personal Jurisdiction, Defendants’ Actions Were Nevertheless Wrongful in this Case. 10

II. PLAINTIFFS’ INJURIES ARISE FROM DEFENDANTS’ FORUM-RELATED ACTIVITIES. 13

III. JURISDICTION IN COLORADO IS REASONABLE. 14

 A. Defendants’ Invocation of the DMCA to Interfere with Plaintiffs’ Business Demonstrates the Fairness of Subjecting Them to Jurisdiction in Colorado. 15

 B. The Other Reasonableness Factors Support Personal Jurisdiction. 19

CONCLUSION 22

CERTIFICATE OF COMPLIANCE 23

CERTIFICATE OF SERVICE 24

CERTIFICATION OF DIGITAL SUBMISSIONS 25

TABLE OF AUTHORITIES

CASES

<i>Bancroft & Masters v. Augusta National, Inc.</i> , 223 F.3d 1082 (9th Cir. 2000)	1, 6, 7, 14
<i>Burger King v. Rudzewicz</i> , 471 U.S. 462 (1985).....	10
<i>Calder v. Jones</i> , 465 U.S. 783 (1984).....	1, 3, 4
<i>Dudnikov v. MGA Entertainment, Inc.</i> , 410 F. Supp. 2d 1010 (D. Colo. 2005)	20
<i>Hendrickson v. eBay, Inc.</i> , 165 F. Supp. 2d 1082 (C.D. Cal. 2001).....	18
<i>Metropolitan Life Insurance Co. v. Neaves</i> , 912 F.2d 1062 (9th Cir. 1990)	6
<i>Perfect 10, Inc. v. CC Bill, LLC</i> , 340 F. Supp. 2d 1077 (C.D. Cal. 2004).....	16
<i>Pro Axess, Inc. v. Orlux Distribution, Inc.</i> , 428 F.3d 1270 (10th Cir. 2005)	14, 15, 20
<i>Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc.</i> , 148 F.3d 1355 (Fed. Cir. 1998)	14
<i>Trujillo v. Williams</i> , 465 F.3d 1210 (10th Cir. 2006)	4
<i>Wenz v. Memery Crystal</i> , 55 F.3d 1503 (10th Cir. 1995)	8
<i>Winfield Collection, Ltd. v. McCauley</i> , 105 F. Supp. 2d 746 (E.D. Mich. 2000)	5

Wise v. Lindamood,
89 F. Supp. 2d 1887 (D. Colo. 1999)14

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980).....6

Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme,
433 F.3d 1199 (9th Cir. 2006)6, 11, 13

STATUTES

17 U.S.C. § 512(c)16

17 U.S.C. § 512(c)(3).....18

OTHER MATERIALS

S. Rep. No. 105-190 (May 11, 1998).....16

Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”?*
Takedown Notices Under Section 512 of the Digital Millennium
Copyright Act, Santa Clara Computer & High Tech. L.J. 621 (2006)16

SUMMARY OF THE ARGUMENT

By filing a notice of claimed infringement with eBay against plaintiffs' online auctions, defendants expressly aimed their actions at plaintiffs and thus satisfy the test for personal jurisdiction set forth by the Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984). Plaintiffs' injuries are not merely foreseeable or attenuated results of defendants' actions; they are the direct and intended effect of defendants' demand that eBay expeditiously terminate plaintiffs' online auctions. This case is thus materially indistinguishable from *Bancroft & Masters v. Augusta National, Inc.*, 223 F.3d 1082 (9th Cir. 2000), which found personal jurisdiction to be proper based on a similar notice sent by the defendant to a third party that caused harm to the plaintiffs' website.

Defendants' argument that they never read plaintiffs' auction web pages before terminating the auctions and therefore did not know where plaintiffs' business was located is, at most, a factual dispute that cannot be decided in the context of a motion to dismiss. In any case, defendants have never actually denied that they read plaintiff's auction sites, and fundamental fairness does not protect defendants from jurisdiction in Colorado when they could have easily determined the location of plaintiffs' business had they cared to do so.

Defendants do not even attempt to defend the district court's imposition of a requirement that their conduct be "wrongful" in order to create personal

jurisdiction in the forum state. The district court's imposition of such a requirement erroneously mixed the question of jurisdiction with the merits of the underlying cause of action, and would thus require this Court to accept defendants' unsubstantiated and false allegations regarding plaintiffs' eBay sales to find jurisdiction lacking.

Moreover, defendants are incorrect that this case arises from plaintiffs' operation of their business rather than from defendants' own interference with plaintiffs' sales. This case does not resemble the cases cited by defendants holding that cease-and-desist letters do not give rise to personal jurisdiction in the forum to which the letters are sent. Unlike a cease-and-desist letter, defendants' notice of claimed infringement operated *automatically* to terminate plaintiffs' auctions. Plaintiffs' injuries, and their cause of action, thus arise directly from defendants' filing of the notice of claimed infringement with eBay.

Finally, jurisdiction in Colorado is reasonable. Defendants took advantage of the statutory procedures of the Digital Millennium Copyright Act (DMCA) to interfere with plaintiffs' Internet auctions, and fairness demands that they be held to account in the forum where the impact of their actions is felt. To hold otherwise would give copyright owners the power to shut down auctions, websites, and a wide range of other Internet-based content under the DMCA with impunity, putting the entire burden on the targets of the notices to litigate their innocence in a

foreign jurisdiction. This result would significantly upset the balance wrought by Congress in the DMCA and would allow already widespread abuse of the DMCA system to go unchecked.

Defendants attempt to distract attention from the ramifications of their jurisdictional argument with irrelevant personal attacks against plaintiffs.

Defendants' efforts to portray plaintiffs as serial litigators, however, only highlight the important policy reasons why a finding of jurisdiction in Colorado is necessary in this case. Without access to a convenient forum, plaintiffs would be forced to bring actions contesting frivolous DMCA notices in foreign jurisdictions around the country and the world. Neither plaintiffs, nor any other small Internet-based business, could long survive under those circumstances. Thus, fairness demands that plaintiffs be given a reasonable forum in Colorado in which to vindicate their rights.

ARGUMENT

I. DEFENDANTS EXPRESSLY AIMED THEIR ACTIONS AT PLAINTIFFS IN COLORADO AND THEREFORE SATISFY THE REQUIREMENT OF "PURPOSEFUL DIRECTION."

A. Plaintiffs' Injuries Were the Direct and Intended Consequence of Defendants' Actions.

Setting aside the important policy issues at stake, this case presents a prototypical example of specific jurisdiction under *Calder*, 465 U.S. 783.

Defendants do not dispute that they intentionally sent a notice to eBay demanding

that it expeditiously terminate plaintiffs' auctions. *See* Defs.' Resp. Br. at 4 (noting that defendants "submitted a Notice of Claimed Infringement . . . to eBay in California, notifying eBay of SevenArts' copyrights in the fabric marketed by Plaintiffs"). Nor do they dispute that they knew the notice, pursuant to eBay's policies, would injure plaintiffs by causing the automatic termination of plaintiffs' auctions. Defendants therefore expressly aimed their activities at residents of Colorado and, pursuant to *Calder*, are subject to personal jurisdiction there. *See Calder*, 465 U.S. at 789-90.

Citing this Court's decision in *Trujillo v. Williams*, 465 F.3d 1210 (10th Cir. 2006), defendants nevertheless argue that they did not "purposefully avail" themselves of the privilege of conducting activities in the state. Def.'s Resp. Br. at 5, 9. The Court in *Trujillo*, however, found the requirement of purposeful availment lacking only because there was no indication in that case that the defendants' acts "were either aimed at or had effect in" the forum state. *Trujillo*, 465 F. 3d at 1220 (quotations and alteration omitted). In contrast, defendants here intentionally targeted plaintiffs with their notice of claimed infringement, knowing that the inevitable result of their actions would be to injure plaintiffs in their home state. Defendants' reliance on *Trujillo* is thus misplaced.

Plaintiffs' injuries were not, as defendants contend, merely foreseeable or attenuated results of defendants' conduct—in fact, defendants *expressly* requested

in their notice of claimed infringement that eBay “act expeditiously to remove or disable access to the . . . items claimed to be infringing.” (Aplt. App. at 39-40.)

As the magistrate judge observed, “to allow Defendants to employ eBay’s VeRO program as a means to knowingly harm Plaintiffs’ business without subjecting Defendants to jurisdiction for these actions where the harm occurred would ignore the intentional and apparent consequences of Defendants’ action.” (*Id.* at 117.)

Defendants also rely on cases holding that “the typical online auction process” on sites like eBay does not give rise to personal jurisdiction over the seller in the purchaser’s home state. Defs.’ Resp. Br. at 16-17. The courts in these cases have reasoned that, in the typical online auction, “the choice of [the] highest bidder is . . . beyond the control of the seller,” and the seller’s connection with the purchaser’s home state is therefore necessarily attenuated. *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746, 749 (E.D. Mich. 2000). Termination of an auction pursuant to a claim of copyright infringement, however, is hardly part of the typical auction process. Rather, a copyright owner’s decision to submit a notice of claimed infringement against an online auction is a voluntary act that is completely within the copyright owner’s control. And, because each eBay auction prominently states the location of the auctioned item, defendants can easily “structure their primary conduct with some minimum assurance as to where that

conduct will and will not render them liable to suit.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

This case is materially indistinguishable from other cases that have upheld specific jurisdiction in the plaintiff’s home state. In *Bancroft & Masters*, for example, the Ninth Circuit held the requirements of personal jurisdiction to be satisfied in the plaintiff’s home state of California based on a notice sent by the defendant from Georgia to a Virginia company responsible for registering the plaintiff’s website domain name. 223 F.3d 1082. The court concluded that the defendant’s “letter was expressly aimed at California because it individually targeted [the plaintiff], a California corporation doing business almost exclusively in California” and “the effects of the letter were primarily felt, as [the defendant] knew they would be, in California.” *Id.* at 1088. Like *Bancroft & Masters*, defendants here sent a notice to a third party, intending to injure the plaintiffs in their home state and in fact causing them injury there. *See also Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1205-11 (9th Cir. 2006) (en banc); *Metro. Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1065 (9th Cir. 1990).

Defendants attempt to distinguish *Bancroft & Masters* by noting that the defendant in that case had, in addition to sending a letter to plaintiffs’ domain-name registrar in Virginia, also sent a cease-and-desist letter to the plaintiff in its

home state of California. Defs.' Resp. Br. at 13-14 n.8. Defendants' reliance on this fact is puzzling given their position that cease-and-desist letters are insufficient to give rise to jurisdiction in the state to which they are sent. *Id.* at 17-20. In any case, the court in *Bancroft & Masters* based its finding of jurisdiction on the letter sent by the defendant to plaintiff's domain-name registrar in Virginia, expressly distinguishing other cases that involved "only cease-and-desist letters." 223 F.3d at 1089.

Defendants also contend that the defendant in *Bancroft & Masters* directly targeted the plaintiff's web page rather than a third-party website. Defs.' Resp. Br. at 13-14 n.8. This fact, however, does not distinguish *Bancroft & Masters* from this case. Defendants here may have sent the notice of claimed infringement to *eBay*, but, in doing so, they expressly targeted *plaintiffs'* *eBay* auctions. Their actions are therefore directly analogous to the actions at issue in *Bancroft & Masters*, and defendants cite no authority for a different result in these circumstances.

B. Defendants Had Reason to Know that Plaintiffs' Business Is Located in Colorado.

Defendants also object to personal jurisdiction in Colorado based on the fact that plaintiffs never alleged that defendants *actually viewed* the *eBay* auction websites prior to terminating the auctions, and thus had no way to know that plaintiffs were located in Colorado. Defs.' Resp. Br. at 4-5, 12 & n.5, 15-16.

Defendants presumably realize that plaintiffs could not have been physically present at their corporate headquarters to witness defendants actually reading the auction websites. Plaintiffs did, however, submit an affidavit establishing that the website for each of their eBay auctions prominently states that the auctioned item is located in Hartsel, Colorado. (Aplt. App. at 88, ¶ 2; 92-94.) Plaintiffs also demonstrated that their listings state, in bold red type, their business address in Colorado and, just below the address, a statement that “Colorado residents must pay sales tax on the winning amount.” (*Id.*) Based on this evidence, the magistrate judge wrote that he could “only conclude that Defendants intended to stop a sale from occurring in Hartsel, Colorado” and knew the primary effect of their actions would be felt there. (*Id.* at 117.)

At most, defendants’ claims to the contrary are factual contentions that are inappropriate to decide in the context of a motion to dismiss. At this stage of the litigation, plaintiffs need only make a prima facie showing of minimum contacts with the forum state, and all factual disputes and reasonable inferences must be construed in their favor. *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995). The facts here, however, are not even really in dispute, because defendants have never denied that they read the plaintiffs’ eBay auction pages before terminating the auctions. Their carefully worded denials all specifically relate to the question whether they read plaintiffs’ *personal* website at

<http://www.tabberone.com/>, which plaintiffs maintain separately from the eBay site. *See* Second Affidavit of George Raymond Perman, filed May 25, 2006 (Aplt. App. at 137, ¶ 2) (“[N]o one from SevenArts had viewed *tabberone.com*, or any other internet website *maintained by the Plaintiffs*.” (emphasis added)); Defs.’ Resp. Br. at 4-5 (“Defendants had never viewed any website *maintained by Plaintiffs*” (emphasis added)). Given that the web pages for plaintiffs’ eBay auctions clearly stated in several places that plaintiffs were located in Colorado, plaintiffs need not show that defendants also viewed a separate website with this same information.

Nor have defendants submitted any evidence contradicting the inference that their agent responsible for terminating plaintiffs’ auctions knew that plaintiffs’ business was located in Colorado. The affidavit of SevenArts’ president, George Raymond Perman, states only that, “*to [his] knowledge*, no one from SevenArts knew that Plaintiffs operated out of Colorado.” (Aplt. App. at 137, ¶ 3 (emphasis added).) Perman does not state the basis for this knowledge, and conspicuously absent from defendants’ filings is an affidavit from Eva Rogath, Chalk & Vermilion’s agent who actually submitted the notice of claimed infringement to eBay. (*Id.* at 39-40.) Given Rogath’s submission of a sworn statement that she had a good faith belief that plaintiffs’ auction infringed defendants’ copyright, it is

difficult to believe that she terminated the auction without even bothering to look at it.

More fundamentally, even if defendants could eventually disprove the inference of their knowledge at a hearing or at trial, their failure to inform themselves of plaintiffs' home state would not render jurisdiction in Colorado unfair. Due process is a question of fundamental fairness, not a strict per se knowledge requirement. Because defendants expressly aimed their conduct at plaintiffs and could easily have determined where the effect of their actions would be felt if they cared to do so, they had "fair warning that a particular activity may subject them to jurisdiction" in the forum state. *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985). Denying personal jurisdiction under these circumstances would only encourage defendants to insulate themselves from jurisdiction by adopting an attitude of willful blindness.

C. Although Plaintiffs Need Not Show that Defendants' Actions Were Wrongful to Establish Personal Jurisdiction, Defendants' Actions Were Nevertheless Wrongful in this Case.

The district court's primary basis for finding a lack of personal jurisdiction in this case was its conclusion that defendants' actions were not "wrongful." (Aplt. App. at 190-91.) Defendants do not even attempt to defend the district court's decision on this ground, instead denying that the court ever imposed such a requirement. Defs.' Resp. Br. at 12-15. Defendants' contention is belied by the

plain language of the district court’s decision, which unequivocally imposed a requirement of wrongfulness as an element of the *Calder* personal jurisdiction test, emphasizing this requirement by underlining the word “wrongful” two separate times in its decision. (*Id.*) The court held that, because plaintiffs’ injuries were “not the consequence of a wrongful act in the circumstances,” personal jurisdiction in Colorado was not proper under *Calder*. (*Id.* at 191.)¹

As plaintiffs noted in their opening brief, however, the court in *Yahoo!* declined to impose an independent wrongfulness requirement as part of the *Calder* test. 433 F.3d at 1207-08. The *Yahoo!* court noted that a requirement of wrongfulness would improperly merge the question of jurisdiction with the merits of the underlying action. *Id.* at 1208. Such a requirement would thus make it impossible for a court to determine whether it has jurisdiction to hear a case until it has first determined whether the plaintiffs can prevail on the merits.

Defendants’ arguments in this case underscore the problems with attempting to engage in a merits-based inquiry in the context of a motion to dismiss on jurisdictional grounds. Without evidentiary support, defendants repeatedly accuse

¹ As defendants correctly note, plaintiffs maintained in the district court, as they continue to maintain on appeal, that defendants’ act of filing the notice of claimed infringement was wrongful. Defs.’ Resp. Br. at 13. Plaintiffs never suggested, however, that a finding of wrongfulness was the *only* proper basis for jurisdiction in Colorado. Rather, plaintiffs’ argument in the district court was the same argument that they now make on appeal: that personal jurisdiction arises from a defendant’s purposeful direction of its actions at the forum state. (Aplt. App. at 73-74.)

plaintiffs of selling fabric depicting SevenArts' copyrighted image. Defs.' Resp. Br. at 4, 10, 23, 26. This characterization of the case seriously misrepresents the nature of plaintiffs' conduct. Plaintiffs' fabric does not contain a copy of defendants' Erté image; rather, it contains an image of Betty Boop wearing a dress that *resembles* a dress worn by a woman in Erté's image. (Aplt. App. at 46, 47.) The Betty Boop fabric is an obvious parody of Erté's design, and even a casual comparison of the two images reveals the dramatic differences between them. (*Id.*) Defendants, however, would have this Court determine, in the context of its jurisdictional analysis, that plaintiffs' products nevertheless infringe defendants' copyright in the Erté print and that defendants' interference with plaintiffs' auctions was therefore justified. This approach is fundamentally inconsistent with the requirement of construing all facts and inferences in plaintiffs' favor on a motion to dismiss.

Defendants attempt to distinguish *Yahoo!* on the ground that they took only "one action" against plaintiffs in this case—the act of submitting a notice of claimed infringement to eBay. Defs.' Resp. Br. at 15. This fact, however, has nothing to do with whether the act giving rise to jurisdiction must be wrongful, a question that the *Yahoo!* court answered in the negative. Moreover, the court in *Yahoo!* emphasized that even "[a] single forum state contact can support jurisdiction if the cause of action arises out of that particular purposeful contact of

the defendant with the forum state.” *Yahoo!*, 433 F.3d at 1210 (quotation and alterations omitted). Thus, although the defendants in *Yahoo!* were accused only of obtaining court orders against Yahoo! in France, and “[a]ll of the contacts with the forum state [were] either the [] orders themselves or contacts directly related to those orders,” the court found jurisdiction against Yahoo! to be proper in California. *Id.* Indeed, the court described the case as “the classic polar case for specific jurisdiction described in *International Shoe*, in which there are very few contacts but in which those few contacts are directly related to the suit.” *Id.*

II. PLAINTIFFS’ INJURIES ARISE FROM DEFENDANTS’ FORUM-RELATED ACTIVITIES.

Defendants contend that plaintiffs’ cause of action in this case arises from plaintiffs’ unilateral actions rather than from defendants’ interference with plaintiffs’ business, arguing that plaintiffs are attempting to use their own conduct to “bootstrap a notice sent electronically from Connecticut to California into jurisdiction in Colorado.” Defs.’ Resp. Br. at 11. Although defendants portray events as if they had no control over their own actions, their use of the passive voice cannot disguise the fact that it was *they* who “sent” the notice to eBay with the intent of causing eBay to cancel plaintiffs’ sales. Plaintiffs’ claims are based not on their own conduct, but on *defendants’* act of intentionally interfering with their business.

Defendants' reliance on *Wise v. Lindamood*, 89 F. Supp. 2d 1887 (D. Colo. 1999), and *Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355 (Fed. Cir. 1998), which held that cease-and-desist letters do not give rise to personal jurisdiction in the state to which the letters are sent, is inapposite here for the simple reason that this case does not involve a cease-and-desist letter. Unlike the letters at issue in *Wise*, defendants' notice of claimed infringement directly impacted plaintiffs' business by causing eBay to automatically terminate the targeted auctions. As in *Bancroft & Masters*, if defendants had merely sent a cease-and-desist letter, plaintiffs would not have been harmed and "would have no need for a judicial declaration" of their rights or, in this case, for injunctive relief. 223 F.3d at 1088. The difference between a cease-and-desist letter and a DMCA takedown notice is the difference between asking plaintiffs to cease selling the allegedly infringing products and forcing them to do so.

III. JURISDICTION IN COLORADO IS REASONABLE.

Defendants argue that their burden to show the unreasonableness of jurisdiction in Colorado is not as heavy as the burden set forth by this Court in *Pro Axess, Inc. v. Orlux Distribution, Inc.*, 428 F.3d 1270 (10th Cir. 2005), because, according to defendants, the plaintiff in *Pro Axess* "made a much stronger showing of minimum contacts." Defs.' Resp. Br. at 21 n.15, 22 n.16. The Court in *Pro Axess*, however, relied for its holding only on its conclusion that the defendant had

purposefully directed its actions at the forum state. *Pro Axess*, 428 F.3d at 1279-80. Because plaintiff’s cause of action arose out of that purposeful direction, the Court held that the defendant “must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” *Id.* at 1280 (quotation omitted).

Defendants offer nothing to distinguish this case from *Pro Axess* other than their continued insistence “that their contacts with Colorado are non-existent, that they did not direct activities toward Colorado, and that the claims in this case are not based on Defendants’ activities.” Defs.’ Resp. Br. at 21 n.15. If defendants’ contention that they had *no* relevant contacts with Colorado were correct, there would be no need to even reach the reasonableness prong of the personal jurisdiction test. As explained in the previous sections, however, defendants—like the defendant in *Pro Axess*—purposefully directed their conduct at plaintiffs’ home state. Defendants must therefore satisfy *Pro Axess*’s “exacting” test to show that jurisdiction is unreasonable. *Pro Axess*, 428 F.3d at 1280.

A. Defendants’ Invocation of the DMCA to Interfere with Plaintiffs’ Business Demonstrates the Fairness of Subjecting Them to Jurisdiction in Colorado.

By giving Internet service providers a strong incentive to comply with demands to remove content from the Internet, the DMCA allows copyright owners to obtain what, in practice, often amounts to the equivalent of a temporary

injunction without the need to go to court. *See Perfect 10, Inc. v. CC Bill, LLC*, 340 F. Supp. 2d 1077, 1086-88 (C.D. Cal. 2004). This power goes far beyond the eBay auctions at issue in this case, covering any “material that resides on a system or network” and thus includes the full range of information available on the Internet, including websites, comments posted on blogs or message boards, and even search results on websites like Google. *See* 17 U.S.C. § 512(c).

Congress recognized the potential for abuse of this power, S. Rep. No. 105-190, at 21 (May 11, 1998), and, in practice, abuse of the DMCA system has proved to be all too common. One recent empirical study of DMCA takedown notices found that about thirty percent of reviewed notices raised “significant questions related to the underlying copyright claim, including fair use defenses, other substantive defenses, very thin copyright, or non-copyrightable subject matter.” Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”?* *Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, Santa Clara Computer & High Tech. L.J. 621, 666 (2006). The study concluded that the DMCA process is commonly used “to create leverage in a competitive marketplace, to protect rights not given by copyright (or perhaps any other law), and to stifle criticism, commentary and fair use.” *Id.* at 687. Although it does not purport to represent a scientific sample of all DMCA notices, the study’s findings

confirm Congress' concern about the ease of sending meritless DMCA takedown notices and the importance of providing targets with a reasonable remedy.

In this case, defendants took full advantage of the power granted to them by the DMCA to terminate eBay auctions of fabric that is an obvious parody of their Erté prints. In the process, defendants caused plaintiffs to lose sales and threatened their home-based business and primary source of livelihood. Nevertheless, defendants argue that they should not be subjected to responsibility for the natural consequences of their actions in the state where those actions are most strongly felt. Defendants' position would give copyright owners the power to shut down auctions, websites, and a wide range of other Internet-based content under the DMCA with impunity, putting the entire burden on the targets of the notices to litigate their innocence in a foreign jurisdiction.

Defendants attempt to escape the ramifications of their position by arguing, for the first time on appeal, that they did not rely on the DMCA to terminate plaintiffs' auctions. Defs.' Resp. Br. at 22. Both the magistrate judge and district judge, however, treated defendants' eBay VeRO notice as a notice of claimed infringement under the DMCA (Aplt. App. at 108, 189), and defendants expressly accepted this characterization in the lower court. *See* Defs.' Objections to Recommendations, filed May 25, 2006 (Aplt. App. at 133) (“[Notices of claimed infringement] are provided for in the federal Digital Millennium [Copyright]

Act.”). Moreover, eBay characterizes its own program as an implementation of the DMCA, *see* <http://pages.ebay.com/help/community/registered-agent.html>, and other cases have treated VeRO takedowns as DMCA notices of claimed infringement. *See Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001).

Regardless of what they choose to call their notice—a DMCA notice of claimed infringement or something else—defendants’ notice fulfills all the requirements of a takedown notice under section 512(c)(3) of the DMCA, including a statement of “good faith belief” that the targeted materials are infringing. *Compare* 17 U.S.C. § 512(c)(3) *with* Aplt. App. at 39-40. Even if defendants’ takedown notice could be construed as some form of takedown notice other than the one authorized by the DMCA, defendants’ action was still taken with the intent of terminating plaintiffs’ auctions and with the knowledge that it would succeed in doing so. Either way, the basis for jurisdiction is the same.

Defendants’ contention that eBay’s VeRO program, as opposed to the DMCA, is designed to “facilitate cooperation,” Defs.’ Resp. Br. at 4, is wrong and relies on a quotation from eBay’s website that is taken badly out of context. The “cooperation” facilitated by the VeRO program is “between eBay and rights owners protecting their intellectual property rights,” *not* between rights owners and the targets of takedown notices. (Aplt. App. at 91.) Indeed, the “cooperation”

promoted by eBay is explicitly designed to cause the “[e]xpeditious removal of listings reported to eBay” and the “[s]uspension of repeat offenders.” (*Id.*)

Because eBay automatically terminates these auction listings, targets of takedown notices have no opportunity to negotiate or to refuse to comply with the notice.

eBay’s VeRO program thus resembles cooperation less than it resembles simple coercion.

B. The Other Reasonableness Factors Support Personal Jurisdiction.

Defendants repeat claims made in the district court that subjecting defendant SevenArts to jurisdiction in the United States would be unfair, ignoring plaintiffs’ evidence that SevenArts maintains Chalk & Vermilion as its agent in the United States, that it is registered to do business in New York, that it maintains a New York office, and that its president owns a vacation home in Florida. Pls.’ Opening Br. at 27-28. As explained in plaintiffs’ brief, these contacts with the United States “minimiz[e] concerns about the burden that litigating in [Colorado] might place on” the defendants. (*Id.* at 27.)

Rather than responding to this evidence, defendants focus their argument on irrelevant personal attacks against plaintiffs, attempting to paint plaintiffs as serial litigators based on lawsuits plaintiffs have filed in the past to defend their eBay-based business against DMCA claims. Plaintiffs do not deny that they have filed lawsuits in the past, but defendants’ contention that these lawsuits accomplish

“nothing more than clogging Colorado’s courts” is specious. Plaintiffs, like many other eBay sellers, sometimes receive meritless DMCA takedown notices from overaggressive copyright owners. These notices generally assert claims of copyright infringement based on plaintiffs’ lawful resale of licensed fabric or items made from that fabric. In almost all the cases cited by defendants, plaintiffs obtained favorable settlements in which the defendant agreed to withdraw its notice of claimed infringement and to allow plaintiffs to continue selling the contested products.²

Far from arguing against a finding of personal jurisdiction, plaintiffs’ prior lawsuits actually demonstrate the necessity of providing them a convenient forum in Colorado. If plaintiffs had to repeatedly defend their business against meritless copyright claims in foreign states and countries, they would have been forced out of business long ago. Colorado thus has a strong interest in providing a forum for plaintiffs and other residents to defend their small businesses from this sort of interference by foreign corporations. *See Pro Axess*, 428 F.3d at 1280 (holding

² Defendants point to one previous case that plaintiffs lost, but the decision there has no bearing on the outcome of the issues here. The defendant in that case did not dispute personal jurisdiction in Colorado, and the court’s decision contains no discussion of the jurisdictional question. *See Dudnikov v. MGA Entertainment, Inc.*, 410 F.Supp.2d 1010 (D. Colo. 2005). Whether plaintiffs have in the past lost a case against a different defendant over different issues is irrelevant to whether personal jurisdiction in this case is proper.

that Utah has an interest in providing a forum for a Utah corporation with its principal place of business in Utah).

Finally, defendants attempt to minimize plaintiffs' interest in defending their business by claiming that plaintiffs "agreed" not to sell the disputed Betty Boop fabric in the future. Defs.' Resp. Br. at 24. Defendants rely for this contention on an email from plaintiffs reciting their *offer* to stop selling the fabric in exchange for defendants' agreement to withdraw their claim of copyright infringement—an offer that defendants rejected. (Aplt. App. at 41.) Defendants' characterization of plaintiffs as having a "voracious appetite" for litigation is ironic given that it was *defendants* who threatened to file suit even after plaintiffs offered to give up their right to sell the disputed fabric. Moreover, defendants ignore the threat that their actions pose to the future of plaintiffs' business. If plaintiffs receive other meritless takedown notices in the future, they risk being branded "repeat infringers" under the DMCA and losing control over their online business. Thus, plaintiffs' interest is no less than their ability to earn their livelihood.

In sum, defendants have failed to show any unfairness that would result from a finding of personal jurisdiction in Colorado, much less a *compelling* case of unfairness. For this reason, personal jurisdiction in Colorado is proper.

CONCLUSION

The decision of the district court dismissing this action for lack of personal jurisdiction should be reversed and the case remanded for proceedings on the merits of appellants' action for declaratory and injunctive relief.

Respectfully submitted,

/s/

Gregory A. Beck
PUBLIC CITIZEN LITIGATION GROUP
1600 20th St., NW
Washington, DC 20009
(202) 588-7713

Counsel for Appellants

February 23, 2007

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a fourteen-point proportional typeface, Times New Roman. As calculated by my word processing software (Microsoft Word 2002), the brief contains 4,775 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/

Gregory A. Beck

CERTIFICATE OF SERVICE

I certify that I caused to be mailed on February 23, 2007, two copies of the foregoing Appellants' Reply Brief by first-class U.S. Mail, postage prepaid, to the following:

Scott C. Sandberg
Snell & Wilmer, LLP
1200 Seventeenth Street
Tabor Center #1900
Denver, CO 80202
ssandberg@swlaw.com

An identical electronic copy was filed with the Clerk on the same date and provided to Mr. Sandberg via email.

/s/

Gregory A. Beck

CERTIFICATION OF DIGITAL SUBMISSIONS

I certify that (1) all required privacy redactions have been made and every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and (2) this electronic document has been scanned for viruses with the most recent version of Symantec AntiVirus, version 10.0.1, last updated on February 16, 2007, and, according to the program, is free of viruses.

/s/

Gregory A. Beck