

On Reconsideration, Judge Albright Transfers *AudioEye, Inc. v. accessiBe Ltd.*

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On March 9, 2022, several months after accessiBe Ltd. (“accessiBe”) was denied transfer in *AudioEye, Inc. v. accessiBe Ltd.*, Judge Albright reversed his decision on reconsideration. The case will proceed in the Western District of New York (“WDNY”).

On December 29, 2020, AudioEye, Inc. (“AudioEye”) filed a second amended complaint in the Western District of Texas (“WDTX”), accusing accessiBe of infringing nine patents, committing false advertising, product disparagement, and violating New York state law. accessiBe responded by filing for transfer of venue to the WDNY. On November 3, 2021, Judge Albright denied the motion after concluding that although the WDNY was a clearly more convenient venue, jurisdiction would be inappropriate in the WDNY. The following month, accessiBe filed a motion to reconsider, and Judge Albright found that this motion to reconsider laid out “sufficient facts, arguments, and law to convince this Court that the WDNY has personal jurisdiction over AudioEye for all the asserted claims.” AudioEye also did not dispute that jurisdiction is proper in the WDNY. Because this jurisdiction question was the “threshold question” vexing the motion to transfer, Judge Albright then turned to “balance the conveniences under section 1404(a). In doing so, Judge Albright found that four of the eight factors favored transfer, while only one favored the case staying in the WDTX. The rest were neutral. The following is a breakdown of each element:

PRIVATE INTEREST FACTORS

1. **Relative Ease of Access to Source of Proof.** With respect to party evidence, accessiBe is registered and located in Israel. Its servers are in New York and backed up in Europe. Further, two members of AudioEye’s sales team, relevant to the case, reside in New York. While “[e]vidence located in Israel and Europe is neutral under this factor because such evidence is remote from the WDNY and [the WDTX],” Judge Albright noted that “the location of hardware storing relevant electronic documents bears on the convenience” and that “the location of accessiBe’s servers in New York is accorded some weight.” With respect to non-party evidence, Judge Albright accorded “little to no weight to the location of evidence retained by accessiBe customers and strategic partners” since “AudioEye has not represented that accessiBe’s Texas customers and partners maintain any evidence a New York customer or partner would not have.” However, Judge Albright noted one exception, which is that many of AudioEye’s New York state law claims involve conduct directed at the Marketing Association for the Finger Lakes Wine Country of New York (“Finger Lakes”) and the Hoselton Auto Mall (“Hoselton”), both of which are New York-

based. Because of this, Judge Albright found it is “more likely that Finger Lakes and Hoselton, as the New York residents AudioEye has placed at issue, maintain unique and relevant evidence bearing on the New York state law claims.” Therefore, Judge Albright found this factor favored transfer.

2. **Availability of Compulsory Process.** Judge Albright found that the “same rationale supporting the Court’s finding that Finger Lakes and Hoselton maintain relevant evidence” also supported “a finding that Finger Lakes and Hoselton personnel likely possessed relevant knowledge. And because such personnel are likely located in New York, the WDNY may be able to compel their testimony” while the WDTX could not. Thus, this factor favored transfer.
3. **Cost of Attendance of Willing Witnesses.** The court found a split between several witnesses. Some would find the WDNY more convenient. Others would find no added convenience if transfer were granted. Nevertheless, Judge Albright concluded that this factor favored transfer, “but only slightly.”
4. **Practical Problems.** Judge Albright found this factor neutral, remarking: “Neither party made a particularly cogent or compelling case under this factor.”

PUBLIC INTEREST FACTORS

1. **Court Congestion.** Judge Albright found this factor disfavored transfer after AudioEye cited statistics showing that the average time to trial in the WDNY was “more than four years.”
2. **Local Interests.** Judge Albright concluded that this factor favored transfer. Although Texas and New York had equally strong interests in the resolution of the federal claims, Judge Albright found that the New York state law claims “naturally center on conduct arising from New York or directed at New York residents,” and thus, New York and its residents “have an interest in the outcome of these disputes.”
3. **Familiarity of the Forum with Law-At-Issue.** Judge Albright concluded that this factor – at best – slightly favored transfer because “this Court is confident in its ability to apply New York state law.”
4. **Conflict of Laws.** The parties did not dispute that this factor is neutral and Judge Albright agreed.

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