

No. 19-1124

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

UMG RECORDINGS, INC., *ET AL.*

Plaintiffs-Appellants,

v.

TOFIG KURBANOV, *ET AL.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

District Court No. 1:18-cv-00957-CMH-TCB

**BRIEF OF THE COPYRIGHT ALLIANCE AND INTERNATIONAL
ANTICOUNTERFEITING COALITION, AS *AMICI CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL**

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March 19, 2019

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-1124

Caption: UMG Recordings, Inc. v. Tofiq Kurbanov

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Copyright Alliance

(name of party/amicus)

who is amicus curiae, makes the following disclosure:
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2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ John Ulin

Date: 3-19-2019

Counsel for: Copyright Alliance

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If yes, identify entity and nature of interest:

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ John Ulin

Date: 3-19-2019

Counsel for: International AntiCounterfeiting Coalit

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
IDENTITY AND INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. Internet Piracy Is A Vital Threat To Copyright Owners	5
II. Exercising Jurisdiction Over Foreign Websites That Facilitate Massive Internet Piracy In The United States Is Consistent With Federal Rule of Civil Procedure 4(k)(2).....	10
III. The District Court Misread Fourth Circuit Precedent And Left Plaintiffs Exposed To Massive Internet Piracy Without Judicial Recourse In The United States	12
IV. The Nature of the Websites and Their Interactions With Users In Virginia And Throughout The United States Demonstrate Purposeful Availment	19
CONCLUSION.....	21

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>ALS Scan, Inc. v. Digital Serv. Consultants, Inc.</i> , 293 F.3d 707 (4th Cir. 2002)	<i>passim</i>
<i>Bright Imperial Ltd. v. RT MediaSolutions, S.R.O.</i> , No. 1:11-cv-935-LO-TRJ, 2012 WL 1831536 (E.D. Va. 2012)	20
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985).....	15
<i>Calder v. Jones</i> , 465 U.S. 783 (1984).....	20
<i>Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.</i> , 334 F.3d 390 (4th Cir. 2003)	16, 17, 18, 19
<i>Columbia Pictures Television v. Krypton Broad. Of Birmingham, Inc.</i> , 106 F.3d 284 (9th Cir. 1997), <i>rev'd on other grounds Feltner v.</i> <i>Columbia Pictures Television</i> , 523 U.S. 340 (1998).....	20
<i>Fed. Ins. Co. v. Lake Shore Inc.</i> , 886 F.2d 654 (4th Cir.1989)	13
<i>Gorman v. Ameritrade Holding Corp.</i> , 293 F.3d 506 (D.C. Cir. 2002).....	13
<i>Hanson v. Denckla</i> , 357 U.S. 235 (1958).....	14, 19
<i>Int'l Shoe Co. v. State of Wash.</i> , 326 U.S. 310 (1945).....	15
<i>ISI Int'l, Inc. v. Borden Ladner Gervais LLP</i> , 256 F.3d 548 (7th Cir. 2001)	12
<i>Penguin Grp (USA) Inc. v. American Buddha</i> , 16 N.Y.3d 295 (2011).....	20

Tire Eng’g v. Shandong Linglong Rubber Co.,
682 F.3d 292 (4th Cir.2012)13, 14

UMG Recordings, Inc. v. PMD Technologie UG,
No. 2:16-cv-7210-AB (C.D. Cal.) (filed Sept. 26, 2016)8

Universal Leather, LLC v. Koro AR, S.A.,
773 F.3d 553 (4th Cir. 2014)13, 14

Upspam Techs., Inc. v. Chernuk,
716 F.3d 322 (4th Cir. 2013)14, 15

Walden v. Fiore,
571 U.S. 277 (2014).....20

World-Wide Volkswagen v. Woodson,
444 U.S. 286 (1980).....13

Zippo Manufacturing Co. v. Zippo Dot Com, Inc.,
952 F. Supp. 1119 (W.D. Pa. 1997).....*passim*

Rules

Federal Rule of Civil Procedure 44, 10, 11, 12

Federal Rules of Appellate Procedure 291

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Brett Danaher, Michael D. Smith, Rahul Telang, *How Piracy Can Hurt Consumers*, Technology Policy Institute (Dec. 6, 2017), <https://techpolicyinstitute.org/2017/12/06/how-piracy-can-hurt-consumers/>6

Comments of the Copyright Alliance to the Federal Trade Commission, Project No. P181201, Copyright Alliance (Aug. 7, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0055-d-0017-155017.pdf6

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Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207, 207 (1996).....18

Global Movie and TV Piracy on the Rise as Web Video Piracy Growth Adds to Peer-to-Peer Piracy, Irdeto (Aug. 7, 2018), <https://irdeto.com/news/global-movie-and-tv-piracy-on-the-rise-as-web-video-piracy-growth-adds-to-peer-to-peer-piracy/>7

Office of the United States Trade Representative, *2017 Out-of-Cycle Review of Notorious Markets*, at 13, <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.....8, 9

Office of the United States Trade Representative, *2018 Special 301 Report*, at 24 (Apr. 27, 2018), <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>.....8

Dennis Yokoyama, *You Can't Always Use the Zippo Code: The Fallacy Of A Uniform Theory Of Internet Personal Jurisdiction*, 54 DePaul L. Rev. 1147, 1166 (2005)18

IDENTITY AND INTEREST OF *AMICI CURIAE*¹

Amicus curiae, the Copyright Alliance, is a non-profit and non-partisan membership organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. It represents the interests of individual authors from the entire spectrum of creative industries—including writers, musical composers and recording artists, journalists, documentarians and filmmakers, graphic and visual artists, photographers, and software developers—and the many large and small businesses that are affected by the unauthorized use of their works. Members of the Copyright Alliance include these individual creators and innovators, creative union workers, and small businesses in the creative industry, as well as the larger organizations and corporations that support and invest in them.

Amicus curiae, the International AntiCounterfeiting Coalition (“IACC”) is likewise a non-profit and non-partisan membership organization dedicated to promoting the protection and enforcement of intellectual property rights in the United States and abroad. Founded forty years ago, the IACC represents many of

¹ No party’s counsel authored this brief in whole or in part. No party or a party’s counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae* or its counsel made such a monetary contribution. The Copyright Alliance and IACC submit this brief, with the consent of all parties, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

the world's best-known brands, including trademark owners across a variety of industry sectors, and producers and distributors of copyrighted content.

Amici and their members embrace the use of new technologies—especially the lawful distribution of protected content via the Internet. They also rely on the protections of copyright to ensure a vibrant digital marketplace. Unauthorized and infringing use of their works undermines members' ability to exploit that marketplace and protect their livelihood. Copyright Alliance and IACC members thus have an interest in being able to enforce their copyrights against Internet services that infringe their works either directly or by facilitating or contributing to their users' infringement. And that interest extends to advocating for fair and predictable standards for asserting personal jurisdiction in United States courts over foreign-based Internet services. That said, it bears emphasis that both the Copyright Alliance and the IACC also represent companies and associations whose members engage in Internet commerce and therefore are interested in balanced rules that establish personal jurisdiction in appropriate circumstances with reasonable limiting principles.

The interests of these *amici* in this case extend far beyond the Eastern District of Virginia's assertion of personal jurisdiction over Tofig Kurbanov and his Russian-based websites (collectively "Defendants"). In granting Defendants' motion to dismiss, the District Court misapplied the framework originally

established in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) for analyzing personal jurisdiction over entities whose contacts with a forum occur principally over the Internet. Relying on *Zippo*, the District Court improperly elevated two factors—“the level of interactivity and commercial nature of the exchange of information” occurring on Defendants’ websites—to dispositive status and dismissed Defendants from the lawsuit without sufficient regard for numerous other factors that demonstrate Defendants’ purposeful direction of his websites to users in Virginia and in the United States who infringed the plaintiffs’ copyrights and caused harm in those forums, and without considering whether the exercise of jurisdiction was constitutionally reasonable. In so doing, the District Court abandoned traditional principles of personal jurisdiction in favor of a standard that threatens to undermine the ability of Copyright Alliance and IACC members to protect their works from mass domestic infringement over the Internet by entities that happen to be physically located outside the United States. The Copyright Alliance and the International AntiCounterfeiting Coalition submit this brief to request respectfully that this Court correct the errors below and articulate a personal jurisdiction standard that assures that foreign websites that facilitate large scale infringement of United States copyrights by individuals in this country can be held to answer for their misconduct in a United States federal court.

SUMMARY OF ARGUMENT

Internet piracy is an enormous problem that costs United States copyright owners billions of dollars in lost revenues annually. Copyright law is the primary vehicle to protect copyright owners against websites that facilitate piracy. But the District Court's opinion in this case eviscerated that protection. While Defendant's stream-ripping websites had tens of millions of users in the United States and hundreds of thousands in Virginia and facilitated the illegal copying and downloading of roughly 100 million copyrighted songs (or more) in the year before this case was filed, the District Court refused to assert jurisdiction over Defendants because they are based in Russia and supposedly had not purposefully directed their unlawful conduct to the United States or Virginia.

To the extent that the District Court granted Defendants' motion to dismiss because it believed their conduct was not sufficiently directed toward Virginia, its decision runs afoul of the basic policy of Fed. R. Civ. P. 4(k)(2), which was adopted to assure that foreign entities that violate federal law are subject to suit in federal court if they have sufficient contacts with the United States as a whole, even if those contacts do not give rise to jurisdiction in any one State.

More fundamentally though, the District Court's decision is based on a misreading of this Court's personal jurisdiction jurisprudence. Because the case involves claims against foreign entities whose forum contacts occur over the

Internet, the District Court focused its analysis on the interactivity of the Defendants' websites and the commercial nature of their interactions with users and discounted other factors that compel a finding of personal jurisdiction, including Defendants' involvement in copyright infringement by tens of millions of users of their websites in this country.

But the Fourth Circuit never intended consideration of a foreign website's interactivity or commerciality to act as a strict barrier to exercising jurisdiction. To the contrary, this Court has repeatedly emphasized that personal jurisdiction is a flexible, multi-factor analysis that is highly case-specific. The District Court never truly engaged in that analysis here. If it had, it would have found that Defendants can plainly be made to answer in federal court for supporting mass copyright infringement in the United States and cannot be immunized from suit simply because they are based outside the country.

ARGUMENT

I. Internet Piracy Is A Vital Threat To Copyright Owners

Internet piracy is an enormous and persistent problem for copyright owners and companies that distribute copyrighted content lawfully. The harms that piracy causes both copyright owners and creators, on the one hand, and content distributors, on the other, are well established. Piracy erodes sales of protected works and the revenues of creators and those who invest in them. *See* Brett

Danaher, Michael D. Smith, Rahul Telang, *The Truth About Piracy*, Technology Policy Institute (Feb. 2, 2016), <https://techpolicyinstitute.org/2016/02/02/the-truth-about-piracy/>. And the availability of pirated works lowers the demand for lawful distribution services and improperly affects the prices they can set. The loss of revenue, in turn, diminishes investment in the creation and lawful distribution of the types of content in greatest demand and ultimately harms consumers by reducing the numbers of new works that become available and impairing innovation in distribution technology that could improve their access to that content. See Brett Danaher, Michael D. Smith, Rahul Telang, *Piracy and the Supply of New Creative Works*, Technology Policy Institute (Feb. 16, 2016), <https://techpolicyinstitute.org/2016/02/16/piracy-and-the-supply-of-new-creative-works/>; Brett Danaher, Michael D. Smith, Rahul Telang, *How Piracy Can Hurt Consumers*, Technology Policy Institute (Dec. 6, 2017), <https://techpolicyinstitute.org/2017/12/06/how-piracy-can-hurt-consumers/>; *accord Comments of the Copyright Alliance to the Federal Trade Commission, Project No. P181201*, Copyright Alliance (Aug. 7, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0055-d-0017-155017.pdf

While established channels of piracy, such as peer-to-peer networks and cyberlockers remain popular, see *Comments of the Copyright Alliance to the U.S. Intellectual Property Enforcement Coordinator*, Copyright Alliance, at 8 & n. 8

(Nov. 13, 2018), <https://copyrightalliance.org/wp-content/uploads/2018/11/Copyright-Alliance-IPEC-JSP-Comment.pdf>; see *Global Movie and TV Piracy on the Rise as Web Video Piracy Growth Adds to Peer-to-Peer Piracy*, Irdeto (Aug. 7, 2018), <https://irdeto.com/news/global-movie-and-tv-piracy-on-the-rise-as-web-video-piracy-growth-adds-to-peer-to-peer-piracy/>, newer piracy technologies like stream-ripping, which is at issue in this case, have gained ground in recent years and pose increasing threats to the copyright marketplace. According to one recent report, stream-ripping accounted for 55% of all piracy in 2016, whereas it had accounted for just 15% of all piracy only two years earlier. See *Comments of the Copyright Alliance to the U.S. Trade Representative*, Copyright Alliance, at 3 n.6 (June 12, 2017), <https://copyrightalliance.org/wp-content/uploads/2017/06/CA-USTR-NAFTA-FINAL.pdf> (citing analysis by the Recording Industry Association of America). Another study found that fully 35% of all Internet users had accessed infringing music via stream-ripping during a three-month period in 2017 and that number ballooned to 53% for Internet users between the ages of 16 and 24. See *Connecting With Music: Music Consumer Insight Report*, IFPI (Sept. 2017), <https://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf>. And the United States Trade Representative has concluded that stream-ripping is “now a dominant method of music piracy.” Office of the United States Trade

Representative, *2018 Special 301 Report*, at 24 (Apr. 27, 2018), <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>.

Under these circumstances, effective enforcement against stream-ripping is critical to preventing digital piracy. But the reasoning behind the District Court's decision to grant Defendants' motion to dismiss in this case on personal jurisdiction grounds threatens to gut the copyright owners' ability to enforce their rights against leading stream-ripping sites. Like the Defendants, other major stream-ripping websites are frequently located outside the United States. If they cannot be sued here based on their operation of services that enable millions of United States users to infringe countless United States copyrights, a critical enforcement tool against the principal vehicle for online piracy will be lost.

When copyright owners succeeded in shutting down the largest stream-ripping site on the Internet in 2017 (YouTube-mp3), they did so through a lawsuit against the German website and its German proprietors in the Central District of California. *See UMG Recordings, Inc. v. PMD Technologie UG*, No. 2:16-cv-7210-AB (C.D. Cal.) (filed Sept. 26, 2016). Other significant stream-ripping sites are also located overseas, including German-based Convert2mp3.net, *see* Office of the United States Trade Representative, *2017 Out-of-Cycle Review of Notorious Markets*, at 13, <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>, and, of course,

Defendants' own Russian-based websites. The District Court's reasoning would prevent enforcement litigation in the United States against any of them, despite the massive infringement of United States copyrights on these websites by millions of users in the United States.

Nor are stream-ripping sites the only foreign-based Internet services that facilitate online piracy in this country. The United States Trade Representative's Out-of-Cycle Review of Notorious Markets lists online and physical markets based outside the United States that engage in and facilitate substantial copyright piracy and trademark counterfeiting here. *See id.* In addition to stream-ripping sites, the list includes foreign-based peer-to-peer networks, torrent sites, cyberlockers, and illegal streaming sites that are involved in large scale piracy online. *Id.* The District Court's opinion also threatens the future viability of enforcement litigation in federal court against the foreign proprietors of these sites for facilitating mass infringement by users in the United States.

It bears emphasis that this appeal affects copyright owners in a wide range of industries who are plagued by various forms of Internet piracy over foreign websites. By way of example, the most recent Review of Notorious Markets lists a French cyberlocker that hosts and makes available illegal copies of video games, a cyberlocker in Brazil that facilitates streaming and downloading of pirated ebooks, videos and video games, a Chinese online marketplace for the sale and distribution

of pirated academic textbooks, Russian websites that make pirated books and academic journals available for download, and numerous foreign sites that stream or provide access to pirated movies and television programs. *Id.* at 11-20. The District Court’s personal jurisdiction analysis threatens to put all these sites beyond the reach of the federal courts and to deprive United States copyright owners of the ability to enforce their rights against these “notorious” infringers.

And it is not sufficient to suggest that copyright owners may seek to enforce their rights in foreign courts. For individual creators and smaller rights owners, many of whom are members of the Copyright Alliance and the IACC, the cost and burden of litigating overseas simply means enforcement will be impossible as a practical matter. Even for those entities that can afford to pursue their rights overseas, it is hardly fair—and fairness is the touchstone of personal jurisdiction—to ask them to seek redress in courts thousands of miles away for mass infringement of United States copyrights that takes place over Defendant’s foreign-based websites in this country.

II. Exercising Jurisdiction Over Foreign Websites That Facilitate Massive Internet Piracy In The United States Is Consistent With Federal Rule of Civil Procedure 4(k)(2)

Despite Defendants’ extensive contacts with the United States and the Commonwealth of Virginia, including the copying and transfer of roughly 100 million infringing digital files (or more) to over 32 million users in this country

(and over 1.35 million files to roughly 550,000 users in Virginia) during the year before this case was filed, the District Court found that it lacked personal jurisdiction to adjudicate Plaintiffs' claims against Defendants for the infringement they facilitate over their websites. To the extent that the District Court based its decision on a conclusion that Defendants did not direct their websites toward users in Virginia specifically, under these circumstances it should at least have exercised jurisdiction under Federal Rule of Civil Procedure 4(k)(2), which was created precisely to ensure that cases like this one can be litigated in federal court.

Rule 4(k)(2) "corrects a gap in the enforcement of federal law" which previously permitted foreign actors to escape the application United States law despite "having sufficient contacts with the United States to justify jurisdiction" because the foreign actor could not be subject to the jurisdiction of any particular state. *See* Fed. R. Civ. P. 4(k)(2) advisory committee's note to 1993 amendment. The Rule allows a plaintiff to establish jurisdiction over a defendant for a claim that arises under federal law, if the defendant is not subject to jurisdiction in the courts of any one state and the exercise of jurisdiction comports with due process. Fed. R. Civ. P. 4(k)(2). It "recognizes the greater powers of the United States as a whole" over those persons "who do not reside in the United States, and have ample contacts with the nation as a whole, but whose contacts are so scattered among the states that none of them would have jurisdiction." *ISI Int'l*,

Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548, 551, 552 (7th Cir. 2001). While *amici* contend that Defendants' contacts with Virginia are sufficient to establish jurisdiction there, even if the District Court believed they were not Rule 4(k)(2) could scarcely find a better application than preventing foreign stream-ripping websites from facilitating mass copyright infringement in the United States without having to answer for their misconduct in federal court.

III. The District Court Misread Fourth Circuit Precedent And Left Plaintiffs Exposed To Massive Internet Piracy Without Judicial Recourse In The United States

Whether it considered jurisdiction over Defendants in Virginia or in the United States as a whole, in granting Defendants' motion to dismiss, the District Court misread this Court's precedents governing personal jurisdiction over parties whose contacts with a forum occur over the Internet. As a result, it applied an incorrect legal standard that would leave copyright owners without judicial recourse in the United States against foreign stream-ripping websites that have become one of the principal platforms for online piracy.

Traditional due process principles govern the personal jurisdiction inquiry in the Internet context every bit as much as they do in the physical world. While courts have worked since the 1990s to craft analyses that tailor these principles to the issues that arise in cyberspace, these newer analyses and tests do not replace the broad, flexible principles that came before them. As one court noted, "[j]ust as

our traditional notions of personal jurisdiction have proven adaptable to other changes in the national economy, so too are they adaptable to the transformations wrought by the Internet.” *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510-51 (D.C. Cir. 2002).

The Fourth Circuit has recognized that “[f]airness is the touchstone of the jurisdictional inquiry.” *Tire Eng’g v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 301 (4th Cir.2012); accord *Universal Leather, LLC v. Koro AR, S.A.*, 773 F.3d 553, 558 (4th Cir. 2014). In determining whether the exercise of personal jurisdiction over a foreign defendant is permissible, this Court asks whether “the defendant’s conduct and connection with the forum [s]tate are such that he should reasonably anticipate being haled into court there.” *Fed. Ins. Co. v. Lake Shore Inc.*, 886 F.2d 654, 658 (4th Cir.1989) (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980)) (internal quotation marks omitted).

In this case, Plaintiffs seek to establish to establish *specific* jurisdiction over Defendants, which exists when a defendant’s qualifying contacts for personal jurisdiction are also the basis for the suit. When analyzing specific jurisdiction, courts in the Fourth Circuit consider (1) the extent to which the defendant “purposefully avail[ed]” itself of the privilege of conducting activities in the forum; (2) whether the plaintiffs’ claims arise out of those activities directed at the forum; and (3) whether the exercise of personal jurisdiction would be

constitutionally “reasonable.” *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002); accord *Universal Leather*, 773 F.3d at 559. This Court has emphasized that the jurisdictional analysis is “flexible,” and depends on a number of factors that courts must consider on a case-by-case basis. See *Tire Eng’g*, 682 F.3d at 302; accord *Universal Leather*, 773 F.3d at 560; see also *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958) (describing “the flexible standard of *International Shoe*” as a response to the need for personal jurisdiction standards to adapt to “technological progress [that] increased the flow of commerce”).

In *ALS Scan*, the Court adapted that “flexible standard” to analyze specific jurisdiction where the defendant’s contacts with the forum occur primarily over the Internet. In those circumstances, courts in the Fourth Circuit consider whether: (1) the defendant directs electronic activity into the forum, (2) with the manifested intent of engaging in business or other interactions within the forum, and (3) that activity creates, in a person within the forum, a potential cause of action. *ALS Scan*, 293 F.3d at 714. The Court has emphasized that it did not intend these factors to *replace* the traditional due process inquiry, but instead “[t]ailor” it “to electronic Internet activity.” *Upspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 328 (4th Cir. 2013).

Nor is the test meant to be rigidly applied: “[t]he flexibility of the [*ALS Scan*] factors allows a court to focus its attention on the ultimate question of whether a defendant, through its actions, has subjected itself to the sovereignty of the State such that a court in the State can lawfully subject that defendant to a judgment.” *Id.* This approach is entirely consistent with the Supreme Court’s long held view that flexibility is paramount in the due process analysis and that there can be no simple “mechanical test” for evaluating personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79 (1985); accord *Int’l Shoe Co. v. State of Wash.*, 326 U.S. 310, 319 (1945) (“the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative”).

The District Court did not heed these admonitions regarding flexibility in its personal jurisdiction analysis. Instead it converted the *ALS Scan* factors into a rigid and mechanical test for purposeful availment and, finding that Defendants did not meet the test, declined even to inquire into the fairness of asserting jurisdiction over them. The District Court based its analysis on the “sliding scale” described in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)—a case that this Court relied upon in *ALS Scan*. At one end of the *Zippo* scale are highly interactive websites through which a foreign defendant “clearly does business over the Internet,” entering into contracts with forum residents and

knowingly and repeatedly delivering electronic files to them. *Zippo* holds that personal jurisdiction over such websites is appropriate. *Id.* at 1124. At the other end are passive websites on which foreign defendants merely post information that interested users can retrieve wherever they are located. They are not a proper basis for jurisdiction. *Id.* In the middle lie interactive websites, where users exchange information with a host computer. “In these cases,” *Zippo* held, “the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.” *Id.*

But the Fourth Circuit did not adopt the *Zippo* sliding scale framework wholesale in *ALS Scan*. Instead it “adopt[ed] and adapt[ed] the *Zippo* model,” *ALS Scan*, 293 F.3d at 714, and formulated its own three-factor analysis of specific jurisdiction over foreign websites, which is set forth above. The District Court’s narrow focus on *Zippo* therefore runs afoul of this Court’s precedents, which call for a broader and more flexible analysis of whether Plaintiffs’ claims arise from Defendants’ forum-directed activities such that the exercise of jurisdiction comports with constitutional notions of fairness and due process.

Because it found Defendants’ websites to be “semi-interactive,” the District Court elevated two factors in its personal jurisdiction analysis to dispositive status—(1) the “level of interactivity” of the website; and (2) the “commercial nature of the exchange that occurs.” *See Carefirst of Md., Inc. v.*

Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390 (4th Cir. 2003). Citing *Carefirst*, the District Court focused the vast majority of its brief analysis on those two factors, while downplaying other facts that demonstrated Defendants' purposeful direction of their conduct toward the United States and Virginia and extensive contacts here. By doing so, it committed legal error.

This Court did not limit its personal jurisdiction inquiry in *Carefirst* to the degree to which the website at issue in that case was interactive or the commercial nature of its contacts with the forum. On the contrary, while the Fourth Circuit noted that it was "relevant" under *Zippo* that the defendant's websites were semi-interactive, 334 F.3d at 400, it cautioned against "merely count[ing] the contacts and quantitatively compar[ing] this case to other preceding cases," and instead focused on "the quality and nature of [the defendant's forum] contacts." *Id.* at 399 (quoting *Nichols v. G.D. Searle & Co.*, 783 F. Supp. 233, 238 (D. Md. 1992), *aff'd*, 991 F.2d 1195 (4th Cir.1993)). Ultimately, the *Carefirst* Court looked beyond *Zippo* and based its jurisdictional decision on a variety of factors, including: (1) the number of forum residents with whom the defendant did business over its website; (2) the local character of the website, including whether it emphasized issues or activities in the forum or where the defendant was located; (3) where the plaintiff felt the harm of the defendant's misconduct; and (4) the forum's interest in adjudicating disputes involving infringement of intellectual

property rights occurring in its jurisdiction. *Id.* at 400-01. The analysis in *Carefirst* is consistent with *Zippo* itself, which emphasized that “[d]ifferent results [in jurisdictional analysis] should not be reached simply because business is conducted over the Internet.”² *Zippo*, 952 F. Supp. at 1124.

The District Court in this case thus erred by elevating *Zippo*’s interactivity and commerciality standards to dispositive status simply because it was analyzing personal jurisdiction in a case involving a website. Read correctly, *Carefirst* and *ALS Scan* teach that the *Zippo* framework may be relevant to the inquiry, but it remains only one consideration among many in a flexible and case-specific personal jurisdiction analysis. The threshold question under *Carefirst* and *ALS*

² The Fourth Circuit’s approach is also consistent with commentary that has questioned the utility of *Zippo*’s sliding scale, “especially in the middle classification.” See 5 William F. Patry, *Patry On Copyright* § 17:186 (Rev. ed. 2018). “[M]ost websites are now interactive,” *id.*, and fall into the “vast middle area of the *Zippo* spectrum,” creating what one commentator has termed a “black hole of doubt and confusion.” Dennis Yokoyama, *You Can’t Always Use the Zippo Code: The Fallacy Of A Uniform Theory Of Internet Personal Jurisdiction*, 54 DePaul L. Rev. 1147, 1166 (2005). Interactivity itself is a “legally undefined term for jurisdictional purposes and cannot be said to have a single colloquial meaning either.” *Patry* § 17:186. As Professor Patry has admonished, until we make significant advances in agreeing upon technical characteristics of websites that make them more or less interactive and the legal consequences of possessing one or more ‘interactive’ characteristics, “courts and litigants are better served by reference to traditional notions of minimum contacts.” *Id.*; see Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207, 207 (1996) (specialized tests for particular technologies are “doomed to be shallow and to miss unifying principles” and should be rejected in favor of “general rules”).

Scan is whether the defendant” purposely availed itself of the privilege of conducting activities in the State.” *ALS Scan*, 293 F.3d at 712 (internal quotation marks omitted). As the Supreme Court noted long ago, purposeful availment analysis is not a rigid test. It “var[ies] with the quality and nature of the defendant’s [forum-related] activity.” *Hanson*, 357 U. S. at 253.

Because it read *Carefirst* to narrow the purposeful availment inquiry for semi-interactive websites to focus primarily on the interactivity and commerciality of activity on Defendant’s websites, the District Court improperly discounted many important indicia that Defendants purposefully directed their conduct toward the United States generally and Virginia, in particular. As a result, the Court issued an order that would deprive United States copyright owners of a forum in which to challenge massive internet piracy that Defendants are facilitating in this country.

IV. The Nature of the Websites and Their Interactions With Users In Virginia And Throughout The United States Demonstrate Purposeful Availment

Had the District Court given appropriate emphasis to all of the relevant factors in this case, it could hardly have granted Defendants’ motion to dismiss. Among the factors that support a finding of purposeful availment and ultimately personal jurisdiction are:

- ***Numbers of Users and Infringements in the Forum.*** In the year before this case was filed, Defendants’ websites had over 32 million users in the United States and over half a million in Virginia and they used the websites to infringe the copyrights in nearly 100 million songs (and possibly more). The quantity of

contacts between a website and residents of the forum is a recognized factor in evaluating whether a website operate had a “manifest intent” to target the forum. *Bright Imperial Ltd. v. RT MediaSolutions, S.R.O.*, No. 1:11-cv-935-LO–TRJ, 2012 WL 1831536, at *6 (E.D. Va. 2012) (“a significant number of contacts within the forum might indicate the necessary manifested intent”).

- ***Infringing Purpose of the Websites.*** The basic purpose of Defendants’ websites is to facilitate mass infringement of United States copyrights. Both sites direct users to “stream-rip” and download infringing copies from links posted to the United States-based website YouTube and provide instructions for how to do it. Those links (and especially the music files) provide access to content that is predominantly protected by United States copyright and owned by United States copyright owners. Infringement of copyrights owned by companies an infringer knows to be in a jurisdiction is strong evidence of purposeful availment. *See Columbia Pictures Television v. Krypton Broad. Of Birmingham, Inc.*, 106 F.3d 284, 289 (9th Cir. 1997), *rev’d on other grounds Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998).
- ***Defendants’ Use of Servers In the United States.*** Until recently, Defendants’ used Amazon Web Services to host their websites on front-end servers in the United States and, for a period of time, within the State of Virginia. Their infringing conduct thus resulted from forum contacts.
- ***The Effect of Defendants’ Infringing Conduct in the United States.*** The vast majority of the activity occurring on Defendants’ websites infringes United States copyrights and therefore causes harm to copyright owners in the United States by making freely available what otherwise would only be available through authorized sources. *See Penguin Grp (USA) Inc. v. American Buddha*, 16 N.Y.3d 295, 305-06 (2011) (holding that the harm caused by the infringement of copyright necessarily occurs where the owner of the copyrights resides). The Supreme Court has held that the effects of an interaction are an essential factor in the personal jurisdiction inquiry. *Calder v. Jones*, 465 U.S. 783, 788-89 (1984); *accord ALS Scan*, 293 F.3d at 714. And that is especially true where, as here, the harm results from the effect of Defendants’ conduct on third-persons in the jurisdiction—including users in the United States who infringe Plaintiffs’ copyrights on Defendants’ websites, and others in this country whose respect for the exclusive rights of owners and distributors of copyrighted material and perceptions of the value of protected works are diminished by Defendants’ infringement. *See Walden v. Fiore*, 571 U.S. 277, 288-89 (2014).

In combination, these and other factors cited in Plaintiffs' opening brief on this appeal, *see* Brief for Plaintiffs-Appellants at 20-49, make clear that the exercise of personal jurisdiction over Defendants in this case is entirely appropriate. Of course, the exercise of jurisdiction is also essential to enable copyright owners large and small to take effective action to prevent massive Internet piracy, which causes severe harm to creators, investors in, and consumers of protected content and lawful distribution companies, regardless of whether it originates on domestic websites or ones that are based outside the United States.

CONCLUSION

The judgment of the District Court should be reversed.

Dated: March 19, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit via the Court's appellate Case Management/Electronic Case Files (CM/ECF) system. I certify that all parties are registered CM/ECF users and that they will be served by the CM/ECF system.

/s/ John Ulin

John C. Ulin