

No. 19-56452

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LANG VAN, INC.

Plaintiff-Appellant,

v.

VNG CORP.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA, 8:14-cv-00100-AG-JDE

***AMICUS CURIAE* BRIEF OF ASSOCIATION OF AMERICAN
PUBLISHERS IN SUPPORT OF PLAINTIFF-APPELLANT**

Megan L. Brown
David E. Weslow
Ari S. Meltzer
Adrienne J. Kosak
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
mbrown@wiley.law

*Counsel for Amicus Curiae
Association of American Publishers*

June 29, 2020

CORPORATE DISCLOSURE STATEMENT

The Association of American Publishers (“AAP”) is a non-profit association of book, journal, and education publishers. AAP has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

STATEMENT REGARDING CONSENT TO FILE

All parties have consented to the filing of this brief.

Pursuant to Fed. R. App. P. 29(a)(4), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its members made a monetary contribution to its preparation or submission.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
STATEMENT REGARDING CONSENT TO FILE.....	ii
TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. THE DISTRICT COURT’S ERRONEOUS FINDING THAT THE DEFENDANT DID NOT PURPOSEFULLY DIRECT ITS ACTIVITIES TOWARD CALIFORNIA INVITES INFRINGEMENT ON A MASSIVE SCALE.	6
A. The District Court’s Application of the <i>Calder</i> Effects Test Improperly Diminished the Extent of the Defendant’s Contacts with Users in California.	10
B. The Court Should Take This Opportunity to Clarify How the <i>Calder</i> Effects Test Applies to Infringement Over the Internet.	18
II. THE DISTRICT COURT’S FAILURE TO CONSIDER THE PLAINTIFF’S RULE 4(K)(2) ARGUMENT SUBSTANTIALLY DILUTES AN IMPORTANT MECHANISM FOR HOLDING FOREIGN ACTORS ACCOUNTABLE FOR ACTIONS TARGETING THE UNITED STATES.....	23
CONCLUSION.....	27

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Am. Chem. Soc’y v. John Does I-99</i> , No. 17-cv-726 [Doc. 36 & 37] (E.D. Va. Nov. 3, 2017).....	4
<i>Axiom Foods, Inc. v. Acerchem Int’l, Inc.</i> , 874 F.3d 1064 (9th Cir. 2017)	8, 12, 14
<i>Core-Vent Corp. v. Nobel Indus. AB</i> , 11 F.3d 1482 (9th Cir. 1993)	21
<i>Cybersell, Inc. v. Cybersell, Inc.</i> , 130 F.3d 414 (9th Cir. 1997)	19
<i>Elsevier Inc. v. www.Sci-Hub.org</i> , No. 15-cv-4282, 2015 WL 6657363 (S.D.N.Y. Oct. 30, 2015)	3
<i>Glacier Films (USA), Inc. v. Turchin</i> , 896 F.3d 1033 (9th Cir. 2018)	6
<i>Hunter Killer Prods. v. Zarlish</i> , No. 19-cv-00168, 2020 WL 2064912 (D. Haw. Apr. 29, 2020)	22
<i>Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.</i> , 297 F. Supp. 2d 1154 (W.D. Wis. 2004)	20
<i>Lamparello v. Falwell</i> , 420 F.3d 309 (4th Cir. 2005)	21
<i>Lindora, LLC v. Isagenix Int’l, LLC</i> , 198 F. Supp. 3d 1127 (S.D. Cal. 2016)	22
<i>Nw. Healthcare All. Inc. v. Healthgrades.Com, Inc.</i> , 50 F. App’x 339 (9th Cir. 2002)	19
<i>Pakootas v. Teck Cominco Metals, Ltd.</i> , 905 F.3d 565 (9th Cir. 2018)	18
<i>Pervasive Software Inc. v. Lexware GmbH & Co. KG</i> , 688 F.3d 214 (5th Cir. 2012)	20

Plixer Int’l, Inc. v. Scrutinizer GmbH,
905 F.3d 1 (1st Cir. 2018).....24

Schwarzenegger v. Fred Martin Motor Co.,
374 F.3d 797 (9th Cir. 2004)11, 12

Spanski Enters. Inc. v. Telewizja Polska S.A.,
883 F.3d 904 (D.C. Cir. 2018).....25

Triple Up Ltd. v. Youku Tudou Inc.,
235 F. Supp. 3d 15 (D.D.C. 2017).....25

UMG Recordings, Inc. v. Kurbanov,
No. 19-1124 [Doc. 72] (4th Cir. June 26, 2020) *passim*

Walden v. Fiore,
571 U.S. 277 (2014).....12, 16, 18

Wash. Shoe Co. v. A-Z Sporting Goods Inc.,
704 F.3d 668 (9th Cir. 2012)8

Wild v. Preventive Pest Control, LLC,
No. 19-cv-01420, 2019 WL 2871155 (C.D. Cal. May 29, 2019)12

Wilson v. PTT, LLC,
351 F. Supp. 3d 1325 (W.D. Wash. 2018)25

Zippo Mfg. Co. v. Zippo Dot Com, Inc.,
952 F. Supp. 1119 (W.D. Pa. 1997).....19, 20

Statutes

Fed. R. Civ. P. 4(k)(2).....23

Other Authorities

2018 Out-of-Cycle Review of Notorious Markets, Office of the United States Trade Representative (2019), https://ustr.gov/sites/default/files/2018_Notorious_Markets_List.pdf.....3

Alan M. Trammell, Derek E. Bambauer, *Personal Jurisdiction and the “Interwebs”*, 100 Cornell L. Rev. 1129 (2015).....18

Daniel S Himmelstein, Ariel Rodriguez Romero, Jacob G Levernier, Thomas Anthony Munro, Stephen Reid McLaughlin, Bastian Greshake Tzovaras, and Casey S Greene, <i>Research: Sci-Hub Provides Access to Nearly All Scholarly Literature</i> , eLife (Feb. 9, 2018), https://elifesciences.org/articles/32822	15
Marketa Trimble, <i>The Role of Geoblocking in the Internet Legal Landscape</i> , IDP Revista d’Internet (2016)	24
Patrick J. Borchers, <i>Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess</i> , 67 Am. U. L. Rev. 413 (2017).....	18
Zoe Niesel, <i>#personaljurisdiction: A New Age of Internet Contacts</i> , 94 Ind. L.J. 103 (2019)	20

INTEREST OF *AMICUS CURIAE*

The Association of American Publishers, Inc. (“AAP”) is the largest national trade organization of U.S. book and journal publishers, representing organizations ranging from major commercial book and journal publishers to small, non-profit, university, and scholarly presses. AAP seeks to promote the adequate and effective protection of copyright to enable publishers and their technology partners to create and disseminate literary works in new and convenient formats for consumers around the world.

The U.S. journal publishing industry invests in the development of authors and the publication of trade books, academic textbooks, and scientific articles, as well as in the development of services through which published works may be shared with and distributed to relevant audiences. This investment is significant and would be rendered meaningless if publishers are unable to protect and enforce their intellectual property rights.

Unfortunately, by closing the doors to U.S. courthouses through its overly narrow interpretation of personal jurisdiction, the District Court’s decision threatens to deal a major blow to the ability of members of the book and publishing industry to enforce intellectual property rights against some of the most brazen and prolific infringers of content created and distributed in the United States. The availability of unauthorized copies of copyright-protected works for download from foreign-owned

sites directly impacts the return on the sizeable investments made by publishing houses in the development, production, and publication of books and journals. Ultimately, these infringing sites and services undermine the continued ability of publishers to invest in and publish high quality books and journals relied upon by consumers and the scientific, academic, and medical communities. In turn, the reduced capacity of publishers to recoup their investments may result in less investment in new authors and new publications.

The AAP is deeply concerned about the decision below. This appeal presents an important opportunity to address the realities of online infringement and the methods that infringers employ to exploit a market while attempting to avoid the consequences of their blatant intellectual property theft. The AAP urges this Court to reverse the decision below and clarify the law to ensure that victims of copyright infringement have meaningful and effective access to U.S. federal courts.

SUMMARY OF ARGUMENT

The District Court's decision threatens to derail an important intellectual property enforcement mechanism for U.S. publishers and other copyright owners whose works are copied and/or reproduced without authorization by foreign actors and subsequently redistributed in the United States using instrumentalities located in the United States, in violation of U.S. copyright law. The internet has made massive copyright infringement possible on a global scale. As the United States

Trade Representative recently recognized, “Commercial-scale copyright piracy . . . cause[s] significant financial losses for U.S. right holders and legitimate businesses, undermine[s] critical U.S. comparative advantages in innovation and creativity to the detriment of American workers, and pose significant risks to consumer health and safety.” *See 2018 Out-of-Cycle Review of Notorious Markets*, Office of the United States Trade Representative 2 (2019), https://ustr.gov/sites/default/files/2018_Notorious_Markets_List.pdf.

AAP member-publishers rely on the protections of copyright laws to safeguard their investments in developing content. Unfortunately, the proliferation of online sites and services designed to facilitate unauthorized access to copyrighted content, much of which makes its way back to internet users in the United States through websites and applications hosted abroad, continues unabated.

Rights holders depend upon the ability to enforce copyright laws in U.S. federal courts. In many foreign jurisdictions, the online enforcement framework is inadequate, failing to provide appropriate incentives for online sites and services to cooperate with rights holders to effectively address rampant online piracy. Fortunately, AAP member-publishers have been able to obtain relief in U.S. courts against foreign infringers who have both acquired the infringing content in the United States and targeted the United States to distribute the infringing content. *See, e.g., Elsevier Inc. v. www.Sci-Hub.org*, No. 15-cv-4282 (RWS), 2015 WL 6657363,

at *6 (S.D.N.Y. Oct. 30, 2015) (enjoining foreign websites from, *inter alia*, “unlawful access to, use, reproduction, and/or distribution of Elsevier’s copyrighted works” and ultimately awarding Elsevier \$15 million in damages for willful copyright infringement); *Am. Chem. Soc’y v. John Does 1-99*, No. 17-cv-726 [Doc. 36 & 37] (E.D. Va. Nov. 3, 2017) (enjoining Sci-Hub from, *inter alia*, “[c]opying, distributing, altering, displaying, hosting, selling and/or promoting any works registered to Plaintiff ACS with the United States Copyright Office” and awarding ACS \$4.8 million in damages).

The District Court’s opinion included numerous material errors that threaten to eviscerate the protections that U.S. intellectual property laws provide to U.S.-based rights holders against infringement both on and offline. *First*, the court disregarded significant evidence that the Defendant purposefully directed activities toward California through affirmative acts and intentional choices to exploit the California market. The District Court’s analysis was superficial and incomplete, cursorily dismissing certain contacts without considering their broader context, and failing to address others. In so doing, the District Court failed to recognize that the Defendant’s many contacts were part of a systematic effort to make its infringing material available in—and consequently benefit from—the state of California.

Second, the District Court entirely failed to consider the Defendant’s extensive contacts with the United States as a whole. Rule 4(k)(2) provides a process

for enforcing federal laws against a person with significant contacts with the United States, even if no individual state could properly exercise jurisdiction. To the extent jurisdiction in California is not proper, federal long-arm jurisdiction is meant for a case like this. Had the lower court conducted a Rule 4(k)(2) assessment, it would have found that the Defendant had directed its conduct toward the United States in a way that satisfies the requirements for the exercise of personal jurisdiction.

The District Court's errors must not be allowed to stand, not only because of the unduly narrowing impact they will have on personal jurisdiction jurisprudence, but also because of the message they send to the growing ranks of internet infringers. The decision encourages infringers to flagrantly target U.S.-based copyright owners, as such actions will be given no consideration in a personal jurisdiction analysis. Further, it provides a roadmap for avoiding personal jurisdiction, by limiting the relevant evidence to documentation that is entirely within the infringers' control to maintain or, more likely, to not maintain.

Just days ago, the Fourth Circuit issued a decision rejecting a narrow approach to jurisdiction based on Internet-related activities similar to the one adopted by the District Court in this case. *See UMG Recordings, Inc. v. Kurbanov*, No. 19-1124 [Doc. 72] (4th Cir. June 26, 2020). The *Kurbanov* decision recognized the propriety of considering jurisdictional facts—including many that are analogous to the instant case—in context, rather than weighing the adequacy of individual facts in a vacuum.

See id. at *16. If the District Court’s unreasonably narrow approach prevails, it will be difficult, if not impossible, for AAP’s member-publishers to enforce U.S. intellectual property laws against many infringers who benefit from their infringing activities in the United States. Copyright holders will be cut off from one of very few effective means of recourse: access to U.S. courts where the value of intellectual property and the implications of its theft are recognized. *See Glacier Films (USA), Inc. v. Turchin*, 896 F.3d 1033, 1035-36 (9th Cir. 2018) (“Under U.S. law, stealing intellectual property is just that—stealing. It hurts artists, the music industry, the movie industry, and others involved in creative work.” (quoting *Privacy and Piracy: the Paradox of Illegal File Sharing on Peer-To-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the S. Comm. on Governmental Affairs*, 108th Cong. 10–14 (2003) (statement of Sen. Levin))).

ARGUMENT

I. THE DISTRICT COURT’S ERRONEOUS FINDING THAT THE DEFENDANT DID NOT PURPOSEFULLY DIRECT ITS ACTIVITIES TOWARD CALIFORNIA INVITES INFRINGEMENT ON A MASSIVE SCALE.

The internet has transformed the nature of piracy. While it is still possible to find physical copies of bootlegged books, movies, software, and more, infringers increasingly begin and end their schemes online, where they can obtain unauthorized digital copies of copyrighted works and redistribute them broadly—all while using keystrokes rather than pen strokes and leaving digital footprints rather than physical

ones. But while the methods through which these pirates act may have changed, the underlying nature of their infringement has not. Foreign actors are reaching into the United States to steal copyrighted materials, hosting those misappropriated materials abroad, and then knowingly transmitting those infringing materials to massive numbers of U.S. internet users.

The brevity of the District Court's opinion makes it challenging to discern the exact reasons why the court dismissed certain contacts as irrelevant and failed to even consider others. What is clear, however, is that the District Court's failure to see the forest for the trees creates a dangerous precedent for internet-based infringement cases. The court appears to believe that because there was no evidence that each of the Defendant's California contacts, taken individually, involved the specific transmission of the *Plaintiff's* copyrighted songs, none are relevant to a jurisdictional analysis. This assessment is flawed both in its understanding of the nature of the alleged infringement, and its broader implications. First, it takes an overly narrow view of how modern copyright piracy occurs, failing to realize that all of these California contacts—including contracts with California entities invoking California laws to make its infringing application and website available generally, the choice to make the application and website available in California, advertising directed to California, and *nearly 70,000 California users who engaged in more than 7,000,000 sessions in just three years*—were part of the Defendant's

systematic efforts to direct its infringing conduct toward California to its commercial benefit and to a California resident's detriment. Second, the District Court's view sets an impossibly high standard for copyright owners while rewarding infringers' willful blindness, by suggesting that the court only needs to consider information regarding the direct access of infringing materials by California residents—information that infringers intentionally do not maintain.

When evaluating whether specific jurisdiction exists in copyright infringement and other claims sounding in tort, courts in this Circuit consider whether: (1) the non-resident defendant purposefully directed its activities or consummated some transaction with the forum or resident thereof; (2) the claim is one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction comports with fair play and substantial justice, *i.e.* it must be reasonable. *Wash. Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 672 (9th Cir. 2012); *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1069 (9th Cir. 2017). The Defendant satisfied this standard by purposefully directing its contacts toward California and the California-resident Plaintiff and facilitating the exploitation of the Plaintiff's copyrighted material.

In *UMG Recordings, Inc. v. Kurbanov*, the Fourth Circuit considered personal jurisdiction in Virginia over a Russian citizen and resident who operated globally available "stream-ripping" services that infringed the twelve plaintiffs' copyrights.

No. 19-1124 [Doc. 72] (4th Cir. June 26, 2020). Despite the facts that the defendant had never traveled to the United States, the defendant operated the websites entirely within Russia, the websites were free to use for site visitors, and U.S. and Virginia traffic accounted for only a small portion of the websites' total traffic, the Fourth Circuit found that the totality of circumstances demonstrated that the defendant availed himself of the benefits of conducting business in Virginia. *See id.* at *16 (“These facts might not be *individually* sufficient to confer specific personal jurisdiction, but when viewed in the context of other jurisdictionally relevant facts, they contradict Kurbanov’s contention that he could not have anticipated being haled into court in Virginia.”). The court held:

Kurbanov actively facilitated the alleged music piracy through a complex web involving Virginia visitors, advertising brokers, advertisers, and location-based advertising. From Virginia visitors, he collected personal data as they visited the Websites. To the advertising brokers, he sold the collected data and advertising spaces on the Websites. For end advertisers, he enabled location-based advertising in order to pique visitors’ interest and solicit repeated visits. And through this intricate network, Kurbanov directly profited from a substantial audience of Virginia visitors and cannot now disentangle himself from a web woven by him and forms the basis of Appellants’ claims.

Id. at *18.

AAP urges the Court to adopt a similar approach, examining the totality of the circumstances, given the nature of today’s internet piracy. Through such a lens,

it is clear that the Defendant engaged in systematic and purposeful direction toward California to accomplish its goal of willfully infringing the Plaintiff's copyrights for its own commercial gain. Any other result would impose an impossibly high burden on efforts to stop infringers located outside the United States, and would further encourage the rampant copyright abuses for which intellectual property holders already have limited recourse.

A. **The District Court's Application of the *Calder* Effects Test Improperly Diminished the Extent of the Defendant's Contacts with Users in California.**

In 1984, the Supreme Court took on a new type of jurisdictional inquiry—one in which a defendant's contacts were borne not of physical presence in the forum, but rather actions that reach into that forum from afar. The case, *Calder v. Jones*, presented a scenario in which the defendants reached into California by writing a libelous article targeting a California resident, using California sources, that was sold within California. 465 U.S. 783 (1984). The Supreme Court found that the defendants committed “intentional conduct in Florida calculated to cause injury to respondent in California” via “an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the [publication] has its largest circulation.” *Id.* at 789-91. In so ruling, the Supreme Court established that physical contact with a forum is unnecessary to establish

jurisdiction, so long as the defendants' intentional actions are "expressly aimed" at the forum. *Id.* at 791.

The Supreme Court in *Calder* could not possibly have imagined how relevant its decision would become. Since that decision, remote contacts have become a rule, rather than an exception, in the many cases involving internet-based claims. As such, the *Calder* effects test, also referred to as the purposeful direction test, has become a standard test for assessing specific personal jurisdiction. This Circuit has interpreted the test as requiring that the defendant "allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 803 (9th Cir. 2004) (quoting *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)).

In an attempt to keep abreast of technological advancements, this Court has issued numerous rulings that analyzed personal jurisdiction specifically within the context of internet contacts. For instance, in *Mavrix Photo v. Brand Techs.*, the Circuit considered whether an Ohio-based celebrity gossip website could be haled into court in California for unauthorized use of the plaintiff's copyrighted photos. 647 F.3d 1218 (9th Cir. 2011). The court noted that "something more" than mere operation of a passive website was required to support the exercise of personal jurisdiction over a defendant. *Id.* at 1229 (quoting *Brayton Purcell LLP v. Recordon*

& *Recordon*, 606 F.3d 1124, 1129 (9th Cir. 2010)). In assessing whether that “something more” was present, the court noted numerous relevant factors, including the interactivity of a website, the geographic scope of the defendant’s commercial ambitions, and whether a defendant individually targeted a plaintiff known to be a forum resident. *See id.*

The Circuit’s analysis of the *Calder* effects test shifted somewhat following the Supreme Court’s decision in *Walden v. Fiore*, 571 U.S. 277 (2014). In *Walden*, the Supreme Court reemphasized that it is the defendant’s contacts, not the plaintiff’s, that are determinative of purposeful direction. *Id.* at 285. Accordingly, this Circuit modified its analysis to clarify that individualized targeting of a forum plaintiff is not, alone, sufficient to support the exercise of specific personal jurisdiction. *See Axiom Foods*, 874 F.3d at 1070. The Circuit recognized, however, that such individualized targeting may well be relevant, *see id.*, and indeed, district courts have continued to consider such targeting as a factor in determining whether a defendant expressly aimed its conduct toward a forum, *see, e.g., Wild v. Preventive Pest Control, LLC*, No. 19-cv-01420 (CJC/SKX), 2019 WL 2871155, at *3 (C.D. Cal. May 29, 2019).

The District Court’s decision represents a step backwards in this Circuit’s efforts to adapt its personal jurisdiction jurisprudence to evolving technology. The court failed to recognize that the Defendant’s contacts with California were all part

of a larger scheme to facilitate and commercially benefit from the infringement at issue, and that the Defendant's contacts specifically targeted its California-based competitor, the Plaintiff. Rather than acknowledge that scheme, the District Court viewed each contact in isolation, and found that each, standing alone, was too "tenuous" to demonstrate the "something more" required by the *Calder* effects test, and was therefore irrelevant. Op. 6. This narrow consideration of the Defendant's numerous California contacts was an error, and one that threatens not only the Plaintiff, but all intellectual property holders who look to U.S. federal courts to vindicate their rights.

Copyright holders, such as AAP's member-publishers, constantly face infringement by foreign actors who clearly seek to maximize their profits by exploiting U.S. forums while also attempting to shield themselves from liability through virtual contacts initiated from abroad. The Plaintiff laid bare those efforts by uncovering significant evidence that the Defendant expressly aimed numerous actions toward California. The Defendant intentionally targeted the Plaintiff's California-based business to appropriate its particular copyrighted works for inclusion on the Defendant's application and website. Excerpts of Record ("ER") 660-92. To make its infringing application accessible to consumers, the Defendant contracted with California-based entities, and those contracts included provisions invoking California law. ER 284-321; 330-36. The Defendant then targeted

California users via its highly interactive website and application, attracting 68,896 California application users and many more website sessions by Californians. ER 322-28; 706-34. Further, the Defendant engaged in targeted advertising directed specifically to California users that it had attracted with its infringing content. ER 862; 928-49.

Though the Plaintiff was able to pull back the curtain on foreign cyberpiracy practices, the District Court dismissed these substantial contacts, providing minimal discussion of some while entirely ignoring others. For instance, the District Court failed to even acknowledge the fact that the Defendant intentionally targeted the Plaintiff and its holdings. The Defendant specifically directed an employee to search for and appropriate the Plaintiff's intellectual property, ultimately accumulating 2,837 of the Plaintiff's copyrighted works. ER 865; 1021-23. This is clear individualized targeting which, while no longer alone sufficient to establish jurisdiction, remains relevant to whether the Defendant was directing its infringing activities toward this jurisdiction in which the Plaintiff resides. *See Axiom Foods*, 874 F.3d at 1070. If courts did not consider such contacts, increasingly sophisticated foreign infringers would be encouraged to target U.S. intellectual property holders, knowing that such a directed attack would have no bearing on jurisdiction.

Those California contacts that the District Court did discuss were summarily dismissed as unrelated and irrelevant to the alleged infringement. Op. 6-7. In so

doing, the court failed to consider how infringers provide and profit from their internet piracy. Infringers regularly use relationships with U.S.-based entities to both commit infringement and disseminate infringed works, just as the Defendant here utilizes its relationships with California-based Apple and Google to disseminate the applications on which users can access the Plaintiff's pirated music. *See* ER 284-321; 330-36; *see Kurbanov*, Doc. 72 at *16 (noting the relevance of contractual relationships with U.S.-based entities, including domain registries that supported the infringer's websites). Further, pirates rarely charge users for the downloads of the copyrighted works themselves, and instead make their profits in indirect ways such as advertising or donations.¹ *E.g. id.* *15 (noting that the defendant made a calculated business choice to offer his services with no charge to visitors "in order to lure them to his Websites" and profit off selling their information and advertising space). Here, the Defendant profits from its infringement through its advertising on its website and application that specifically targets California and its residents. ER 928-49; 1278-87; *see Mavrix Photo*, 647 F.3d at 1230 (finding that geographically targeted advertising, viewable on a site hosting infringing material, indicated that

¹ AAP members have discovered their copyright protected materials on infringing websites that commercialize their services using both advertisements and donations. For example, by one estimate, prior to 2018, Sci-Hub received donations in Bitcoin alone worth \$421,272 at the time of withdrawal. *See* Daniel S Himmelstein, Ariel Rodriguez Romero, Jacob G Levernier, Thomas Anthony Munro, Stephen Reid McLaughlin, Bastian Greshake Tzovaras, and Casey S Greene, *Research: Sci-Hub Provides Access to Nearly All Scholarly Literature*, eLife (Feb. 9, 2018), <https://elifesciences.org/articles/32822>.

the defendant “exploits [its California user] base for commercial gain”); *Kurbanov*, Doc. 72 at *15 (citing *Mavrix* for the proposition that, even where advertising is outsourced to brokers, geographically targeted advertising indicates a knowledge about the user base and an intent to exploit that base). If these contacts—facilitating the infringement of the copyrighted material and allowing infringers to profit from that infringement—are irrelevant to a jurisdictional analysis, one is left to wonder what internet-based contacts a copyright holder *could* point to, to demonstrate jurisdiction over an internet-based foreign entity.

Under the District Court’s narrow view, it appears that the only relevant contact for internet infringement by a foreign actor would be actual downloads by specifically identifiable forum residents. Here, there was overwhelming evidence that the Plaintiff’s claims arose from the Defendant’s California activities, including evidence demonstrating that nearly *70,000 Californians* downloaded the Defendant’s application which contained over *2,800 of the Plaintiff’s protected works*, and used the application over *7,000,000 times*. Under *Walden*, this should have been sufficient to establish personal jurisdiction. 571 U.S. at 284 (“For a State to exercise jurisdiction consistent with due process, the defendant’s suit-related conduct must create a substantial connection with the forum State”). But, the District Court instead focused on the absence of “specific allegations . . . that any U.S. user (other than someone acting at Plaintiff’s direction) used Zing MP3 to

stream or download any of the recordings at issue.” Op. 6. In other words, the District Court found that to justify the assertion of personal jurisdiction over a foreign infringer, a copyright holder must uncover evidence that specific third-party individuals in the forum downloaded specific content, and that they are not affiliated with the Plaintiff. This is not and should not be the legal standard.

The impossibility of satisfying this requirement cannot be overstated: it is the equivalent of the *Calder* Court requiring the plaintiff to prove that specific individuals in California actually read the defamatory article, not just that the publication had a large readership in California. *See Calder*, 465 U.S. at 785 (noting only the weekly circulation of the newspaper, without reference to actual readership of the offensive article); *see also Kurbanov*, Doc. 72 at *17 (dismissing the infringer’s argument that the raw number of viewers were “non-claim related contacts”). In the context of a centralized service such as Zing (as compared to a peer-to-peer service such as BitTorrent), file downloading and streaming are direct interactions between the service provider and the individual end user. The only entity that could possibly record identifying information for the individuals that stream or download specific content would be the entity maintaining the service—i.e., the infringer. Thus, if evidence gathered by the plaintiff outside of discovery is discounted, all an infringer needs to do to avoid U.S. jurisdiction is not maintain this type of highly specific evidence. The District Court’s decision endorses a policy of

willful ignorance by foreign infringers, and places copyright holders such as the Plaintiff and AAP's member-publishers in a Catch-22, requiring them to find their own evidence but disregarding that evidence if they collect it themselves.

B. The Court Should Take This Opportunity to Clarify How the Calder Effects Test Applies to Infringement Over the Internet.

Although the *Calder* effects test is often the only means of establishing personal jurisdiction against foreign internet infringers, its application to internet contacts remains elusive. The *Walden* decision only complicated the inquiry by suggesting that individualized targeting, alone, is insufficient to demonstrate jurisdiction—while expressly declining to clarify the relevance of “virtual contacts.” *Walden*, 571 U.S. 277 at 290 n.9. Indeed, scholars have noted that *Walden* clouded what was once a “relatively clear spot in the jurisdictional fog.” Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 Am. U. L. Rev. 413, 425 (2017). Some have come to believe that personal jurisdiction jurisprudence related to the internet is “intractable,” with courts “tethered to anachronistic approaches that reflect a profound confusion about the technology of the medium.” Alan M. Trammell, Derek E. Bambauer, *Personal Jurisdiction and the “Interwebs”*, 100 Cornell L. Rev. 1129-31, 1133 (2015). This Circuit has acknowledged that the express aiming requirement of purposeful direction is “an ill-defined concept.” *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 577 (9th Cir. 2018).

Courts have attempted to cut through the complicated and relatively novel realm of internet contacts by crafting tests to determine whether such contacts constitute purposeful direction. The most prevalent is the sliding-scale interactivity test developed in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). *Zippo* identified the ends of that sliding scale, as situations where “the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet” in which case jurisdiction is clearly proper, and situations involving a “passive Web site that does little more than make information available to those who are interested in it,” in which case jurisdiction is clearly not. *Id.* In between are those “interactive Web sites where a user can exchange information with the host computer[,]” in which case a court must examine “the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.” *Id.* This test has been widely incorporated into personal jurisdiction analyses, including by this Circuit. *See, e.g., Nw. Healthcare All. Inc. v. Healthgrades.Com, Inc.*, 50 F. App’x 339, 340 (9th Cir. 2002); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997).

Despite the appeal of formulaic tests like the *Zippo* sliding scale, they cannot replace a wholistic analysis of purposeful direction. *See Kurbanov*, Doc. 72 at *14 (“Whether the Websites are highly interactive or semi-interactive, however, is not determinative for purposes of personal jurisdiction”). The most salient problem is

that the test—now more than two decades old—overlooks significant nuances and complexities of modern technology. *See* Zoe Niesel, *#personaljurisdiction: A New Age of Internet Contacts*, 94 Ind. L.J. 103, 125 (2019) (“The basic problem with the *Zippo* test is that its facial ease of application does not comport with how the technology it is attempting to classify actually operates.”); Trammell, 100 Cornell L. Rev. at 1147 (“[I]nteractivity is a poor proxy for whether a defendant has purposefully availed itself of the benefits and protections of a state.”); *Kurbanov*, Doc. 72 at *14 (“Were we to ‘attach too much significance on the mere fact of interactivity, we risk losing sight of the key issue in a specific jurisdiction case—whether the defendant has purposefully directed [his] activities at the residents of the forum.’” (quoting *Fidrych v. Marriott Int’l, Inc.*, 952 F.3d 124, 141 n.5 (4th Cir. 2020))); *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F. Supp. 2d 1154, 1160 (W.D. Wis. 2004) (“Even a ‘passive’ website may support a finding of jurisdiction if the defendant used its website intentionally to harm the plaintiff in the forum state.” (citing *Panavision International, LP v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir.1998))). In fact, any rigid analysis is unsuited for personal jurisdiction, especially in the context of internet-based actions where the form and impact of contacts is constantly evolving. *See, e.g., Pervasive Software Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 227 n.7 (5th Cir. 2012) (declining to follow a “mechanical” approach to personal jurisdiction, finding that “internet-based jurisdictional claims

must continue to be evaluated on a case-by-case basis, focusing on the nature and quality of online and offline contacts to demonstrate the requisite purposeful conduct that establishes personal jurisdiction.”).

Given the many and diverse virtual contacts the Defendant has engaged in with California and the United States, this case presents an excellent opportunity for the Court to revisit and provide clarity to specific personal jurisdiction in internet-based actions. AAP encourages the Court to take this opportunity to reverse the lower court’s decision that would unduly limit copyright holders’ access to courts, and adopt an approach that requires an analysis of the totality of the circumstances surrounding a defendant’s forum-related contacts. *See Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993) (noting that the Supreme Court in *Calder* considered “the totality of the circumstances surrounding the events” to determine whether the actions were expressly aimed at the forum state); *compare Lamparello v. Falwell*, 420 F.3d 309, 319 (4th Cir. 2005) (addressing a totality of the circumstances assessment for examining whether the Defendant possessed a bad faith intent to profit under the Anticybersquatting Consumer Protection Act when registering, using, or trafficking-in an Internet domain name).

The District Court considered online infringer’s contacts individually and discarded them one by one because they did not fit within its narrow view of what would constitute relevant contact. In so doing, the court overlooked how the

individual contacts fit into the larger whole of profiting off of the California-based Plaintiff's intellectual property in the California market. *See Kurbanov*, Doc. 72 at *18 (describing the internet infringer's "intricate network" of forum contacts from which he directly profited, and from which he "cannot now disentangle himself"). A more accurate analytical approach—one that also addresses the public policy concerns about implicitly encouraging cyberpiracy by providing clear avenues to avoid liability—would be to consider the totality of contacts, and how they relate to, facilitate, and/or allow a defendant to benefit from its infringement. *See, e.g., Hunter Killer Prods. v. Zarlish*, No. 19-cv-00168 LEK-KJM, 2020 WL 2064912, at *6 (D. Haw. Apr. 29, 2020) (finding that a defendant's contractual relationship with U.S.-based entities, U.S.-based advertisements, and invocation of rights under the DMCA all related to the operation of a site promoting the infringing application, and therefore justified the exercise of personal jurisdiction under the federal long-arm statute); *Lindora, LLC v. Isagenix Int'l, LLC*, 198 F. Supp. 3d 1127, 1139-40 (S.D. Cal. 2016) ("The alleged infringement has occurred not in a vacuum devoid of economic context, but rather as part of [the defendant's] efforts to exploit an important consumer base for commercial gain.").

II. **THE DISTRICT COURT’S FAILURE TO CONSIDER THE PLAINTIFF’S RULE 4(K)(2) ARGUMENT SUBSTANTIALLY DILUTES AN IMPORTANT MECHANISM FOR HOLDING FOREIGN ACTORS ACCOUNTABLE FOR ACTIONS TARGETING THE UNITED STATES.**

In perhaps its most striking error, after finding that there was no jurisdiction in California, the District Court failed to even address the Plaintiff’s alternative argument that the Defendant was subject to jurisdiction based on its contacts with the United States as a whole. This failure threatens to undermine important protections for American interests under U.S. intellectual property laws. Federal Rule of Civil Procedure Rule 4(k)(2) provides a separate basis for exercising jurisdiction in cases involving federal claims where: (1) the defendant is not subject to jurisdiction in any state’s courts of general jurisdiction; and (2) exercising jurisdiction is consistent with the United States Constitution and laws. *See* Fed. R. Civ. P. 4(k)(2). The rule is designed to provide jurisdiction where a defendant is directing its activities at the United States as a whole, even if it is not targeting any jurisdiction in particular. The United States has an interest in providing a forum for companies whose rights are violated by foreigners as long as doing so complies with due process.

The District Court did not address the Plaintiff’s Rule 4(k)(2) argument, instead focusing exclusively on the “connections between Defendant and California,” Op. 6. In so doing, the court failed to recognize that the Defendant

purposefully directed its activities toward the United States in numerous substantial ways. Each of the contacts summarized in Section I.A., *supra*, is relevant to the Rule 4(k)(2) analysis, as well as others that are directed toward the United States as a whole.

One major factor that the District Court overlooked was the Defendant's efforts to ensure that its pirated copies of the Plaintiff's goods were accessible to the U.S. market. The Defendant affirmatively chose to make its infringing application available in the United States. ER 1053-55; 1057-88; 1089-92. Additionally, although the Defendant had the ability to geoblock its infringing website to prevent U.S. customers from accessing it, it chose not to do so. ER 757-58; 767-68. This failure reflects a conscious decision by the Defendant not to utilize a common mechanism to control the geographic reach of its online contacts, *see* Marketa Trimble, *The Role of Geoblocking in the Internet Legal Landscape*, IDP Revista d'Internet (2016) (discussing the increasing ubiquity of geoblocking technology and the improved functionality, allowing companies to not only choose the locations their websites are available but also customize the content based on location), and is indicative of an "intent to serve customers in the U.S. market and thereby profit," *Plixer Int'l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 9 (1st Cir. 2018) ("[Defendant's] failure to implement such restrictions, coupled with its substantial U.S. business, provides an objective measure of its intent to serve customers in the U.S. market and

thereby profit.”); *see also* *Kurbanov*, Doc. 72 at *17 (noting that the infringer “knew the Websites were serving Virginian visitors and yet took no actions to limit or block access”); *Wilson v. PTT, LLC*, 351 F. Supp. 3d 1325, 1334 (W.D. Wash. 2018) (“Where a defendant directly controls whether consumers in the forum can complete purchases from their website or app, they cannot later claim to have merely inserted their goods into the stream of commerce.”).² Further, both the infringing application and website were made available in English, demonstrating that the Defendant wished to make its application and website attractive to a primarily English-speaking market. ER 764-65, 818. Thus, the Defendant was not only aware that it was attracting, but took steps to attract, U.S. users to its application and site housing thousands of the Plaintiff’s copyrighted songs.

Another highly relevant contact was Defendant’s decision to file a trademark application with the U.S. Patent & Trademark Office. The District Court discounted this evidence, seemingly because the application was physically filed in Vietnam under the Madrid Protocol. Op. 7. By focusing on the traditional notion of where

² Although the U.S. District Court for the District of Columbia recently refused to adopt a mandatory geoblocking requirement, that court was not presented with the same indicia that the defendant had taken other efforts to target the United States for the activities at issue in the case. *See Triple Up Ltd. v. Youku Tudou Inc.*, 235 F. Supp. 3d 15, 25 (D.D.C. 2017), *aff’d*, No. 17-7033, 2018 WL 4440459 (D.C. Cir. July 17, 2018). Moreover, the D.C. Circuit subsequently identified removal of geoblocking as one of a number of facts supporting a finding of intentional copyright infringement. *See Spanski Enters. Inc. v. Telewizja Polska S.A.*, 883 F.3d 904, 917 (D.C. Cir. 2018).

the application was physically filed, the District Court overlooked the substance of the application, and in particular, what it demonstrates about the Defendant's U.S. business. In prosecution and maintenance of its registration, the Defendant *swore under oath* that its mark was in use in U.S. commerce with the goods and services articulated therein. ER 779-858 (declaration under oath at ER 833). And to evidence that use in the United States, the Defendant submitted a screenshot of the infringing website in English. ER 818. The trademark application and maintenance are clear, affirmative acts by the Defendant to reach into the United States, and the description of goods and services and specimens filed therewith directly tie those acts to the Plaintiff's infringement allegations. *Cf. Kurbanov*, Doc. 72 at *16 (finding that the infringer's choice to register a Digital Millennium Copyright Act agent with the U.S. Copyright Office, thereby qualifying it for U.S. intellectual property law protections, was relevant to jurisdiction).

Finally, when considering the U.S. as a whole, the number of individuals using the infringing application is even more dramatic than that of California. More than 320,000 U.S. users downloaded the Defendant's infringing application, and U.S. users engaged in over 25 million sessions between 2011 and 2014. ER 322-28; 706-34.

Taken together, these facts reveal the same tactics that AAP's members and many other copyright holders have faced time and again: a concerted effort by a

willful infringer to reach into the United States in order to benefit from its market and protections. Moreover, the facts reveal that this Defendant succeeded in that effort, successfully attracting hundreds of thousands of U.S. users who engaged in millions of sessions. If Rule 4(k)(2) is not applicable here, it is hard to imagine a scenario in which copyright holders *could* employ the rule to demonstrate personal jurisdiction over a foreign internet infringer. Thus, a finding that Rule 4(k)(2) is inapplicable here effectively strips copyright holders like AAP's member-publishers of a crucial tool in protecting their rights.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's grant of the Defendant's motion to dismiss and remand the case for further proceedings.

Respectfully submitted,

s/ Megan L. Brown

Megan L. Brown

David E. Weslow

Ari S. Meltzer

Adrienne J. Kosak

WILEY REIN LLP

1776 K Street, N.W.

Washington, D.C. 20006

(202) 719-7000

mbrown@wiley.law

Counsel for Amicus Curiae

Association of American Publishers

June 29, 2020

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2020, the foregoing brief was filed electronically using the Court's CM/ECF system, which will send notification of such filing to party counsel, all of whom are registered ECF filers.

s/ Megan L. Brown

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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