

No. 19-56452

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

LANG VAN, INC.

Plaintiff-Appellant,

v.

VNG CORPORATION

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 8:14-cv-00100-AG-JDEx
Hon. Andrew J. Guilford

**BRIEF OF THE COPYRIGHT ALLIANCE *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, *amicus curiae* the Copyright Alliance states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Date: June 29, 2020

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Table of Contents

Corporate Disclosure Statement i
Table of Authorities iii
Statement of Interest 1
Summary of Argument 2
Argument..... 5
 I. The District Court Erred in Disregarding Important Forum Contacts 5
 A. Lang Van’s Infringement Claims Arise from VNG’s Forum Contacts..... 10
 B. VNG’s Acts are the But-For Cause of Well-Pleaded Allegations of
 Copyright Infringement..... 15
 II. The District Court’s Decision Threatens to Undermine Copyright
 Enforcement in the United States 17
Conclusion 22
Certificate of Compliance 23

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Capitol Records, Inc. v. MP3tunes, LLC</i> , 48 F. Supp. 3d 703 (S.D.N.Y. 2014)	17
<i>China Central Television v. Create New Technology (HK) Ltd.</i> , No. CV 15-01869 MMM, 2015 WL 3649187 (C.D. Cal. June 11, 2015)	16
<i>Diversey v. Schmidly</i> , 738 F.3d 1196 (10th Cir. 2013)	12
<i>Gorman v. Ameritrade Holding Corp.</i> , 293 F.3d 506 (D.C. Cir. 2002).....	6
<i>Hoteling v. Church of Jesus Christ of Latter-Day Saints</i> , 118 F.3d 199 (4th Cir. 1997)	12
<i>Int’l Shoe Co. v. Washington</i> , 326 U.S. 310 (1945).....	6
<i>Mavrix Photo, Inc. v. Brand Techs., Inc.</i> , 647 F.3d 1218 (9th Cir. 2011)	6
<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 243 F. Supp. 2d 1073 (C.D. Cal. 2003)	15
<i>Motown Record Co. v. DePietro</i> , No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007).....	13
<i>Schwarzenegger v. Ford Motor Co.</i> , 374 F.3d 787 (9th Cir. 2004)	6
<i>Terracom v. Valley Nat’l Bank</i> , 49 F.3d 555 (9th Cir. 1995)	15
<i>UMG Recordings, Inc. v. PMD Technologie UG</i> , No. 2:16-cv-7210-AB (C.D. Cal.)	20

Statutes

17 U.S.C. § 106.....4

Rules

Fed. R. Civ. P. 4(k)(ii)8

Legislative Materials

H.R. REP. NO. 94-1476 (1976).....14

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2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON
COPYRIGHT (2020).....13

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Piracy*, Technology Policy Institute (Feb. 2, 2016), [https://
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Is the DMCA’s Notice-and-Takedown System Working in the 21st Century?, Hearing before the Subcomm. on Intellectual Prop. of the S. Comm. on the Judiciary (June 2, 2020), (Statement of Jonathan Berroya, Interim President and CEO of the Internet Association)19

Jane C. Ginsburg, Comments Submitted in Response to U.S. Copyright Office’s July 15, 2014 Notice of Inquiry (Sept. 3, 2014)14

U.S. Register of Copyrights, *The Making Available Right in the United States* (Feb. 2016), https://www.copyright.gov/docs/making_available/making-available-right.pdf12, 13

Office of the United States Trade Representative, *2014 Out-of-Cycle Review of Notorious Markets* (Mar. 5, 2015), https://ustr.gov/sites/default/files/2014%20Notorious%20Markets%20List20-%20Published_0.pdf7

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WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997).....11

WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 (1997).....11

Pursuant to Federal Rule of Appellate Procedure 29(a), *amicus curiae* the Copyright Alliance respectfully submits this brief in support of appellant Lang Van, Inc. (“Lang Van”). This brief is submitted with consent of all parties.¹

STATEMENT OF INTEREST

The Copyright Alliance is a non-profit, non-partisan, public interest and educational organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. The Copyright Alliance represents the copyright interests of more than 1.8 million creators and 13,000 organizations across the United States. Copyright Alliance members participate in the entire spectrum of creative industries—they are writers, musical composers and recording artists, journalists, documentarians and filmmakers, graphic and visual artists, photographers, and software developers—and also include the many large and small businesses that are affected by the unauthorized use of their works. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright and to protecting the rights of creators and innovators.

¹ Pursuant to Federal of Appellate Procedure 29(a)(4)(E), the Copyright Alliance states that no counsel for any party authored this brief in whole or in part; no party nor party’s counsel made a monetary contribution intended to fund preparing or submitting this brief; and no person other than the Copyright Alliance, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

Amicus and its members embrace the use of new technologies—especially the lawful distribution of copyright-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 Copyright Alliance members’ ability to exploit that marketplace and protect their livelihood. Copyright Alliance 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 the Copyright Alliance also represents companies and associations whose members engage in online commerce and therefore is interested in balanced rules that establish personal jurisdiction in appropriate circumstances with reasonable limiting principles.

SUMMARY OF ARGUMENT

Internet piracy costs United States copyright owners billions of dollars annually, and copyright law is the primary vehicle to protect copyright owners against websites that facilitate piracy. The District Court’s opinion endangers U.S. copyright owners’ ability to bring infringement claims in U.S. federal court against foreign websites and apps that facilitate infringement in this country.

Defendant-Appellee VNG Corporation (“VNG”) uploaded thousands of copyrighted songs owned by Lang Van to VNG’s Zing MP3 Website and App. It does not claim, nor did it have, authorization from Lang Van to do so. VNG made its Zing MP3 Website and App available throughout the United States. The App has been downloaded by hundreds of thousands of U.S.-based users, and the Website has millions of U.S.-based visits. Lang Van has demonstrated that U.S.-based users are able to download and stream unauthorized copies of its songs via VNG’s App and Website. Taken together, these forum contacts are sufficient for a U.S. federal court to exercise specific jurisdiction over VNG for claims that it infringed Lang Van’s right to distribute and publicly perform its musical works by making them available in the United States over the Website and App and by streaming and sending copies of them to U.S.-based consumers over the Internet.

The District Court, however, refused to consider VNG’s acts of providing the Zing MP3 App and Website to millions of users in the United States as relevant forum contacts in its personal jurisdiction analysis. Instead, the District Court determined that VNG’s providing the App and Website to users in the United States was not sufficiently connected to the infringement alleged by Lang Van in this case to be relevant to the question of personal jurisdiction. That was reversible error for at least two reasons.

First, Lang Van’s copyright claims arise, at least in part, from VNG’s acts of making Lang Van’s copyrighted songs available in the United States via the Zing MP3 Website and App, regardless of whether Lang Van can prove specific instances of downloads or streams of its songs. A copyright owner’s “making available” right is enshrined in international treaties that the United States has joined and is implemented in U.S. copyright law through the exclusive rights of distribution and public performance contained in 17 U.S.C. § 106. Lang Van alleged that VNG infringed copyright by making songs available to users in the United States without authorization, in violation of Lang Van’s rights to distribute and publicly perform its copyrighted songs. Because making Lang Van’s songs available in the United States was itself a complete act of infringement, the District Court erred by disregarding evidence relating to VNG’s making the songs available in its personal jurisdiction analysis.

Second, even with respect to claims arising from actual unauthorized streaming and downloading of protected songs, in violation of Lang Van’s distribution and public performance rights, VNG’s providing its Website and the App to U.S.-based users is a “but for” cause of the alleged infringement and therefore relevant to the personal jurisdiction analysis. Without the Website and App to make the works available in the United States, the alleged distributions and public performances of Lang Van works would not have been possible. These forum

contacts are therefore essential steps in the alleged infringement and should have been considered as part of the jurisdictional analysis under long-standing Ninth Circuit precedent.

Allowing the District Court's decision to stand will seriously threaten copyright owners' ability to enforce their rights in U.S. federal courts. Internet piracy is an enormous problem for U.S. copyright owners. Internet pirates are frequently located outside of the United States, often establishing operations abroad for the specific purpose of avoiding jurisdiction in this country. The District Court's decision erects unnecessary and burdensome barriers to U.S. copyright owners who wish to enforce their copyrights against infringing foreign websites in U.S. courts and leaves them without effective protection for their valuable intellectual property. If left standing, the District Court's decision will serve as a roadmap for future pirates to exploit, causing needless harm to countless creators and copyright owners throughout the United States.

For these reasons, as well as those stated in Appellant's opening brief, the district court's decision should be reversed.

ARGUMENT

I. The District Court Erred in Disregarding Important Forum Contacts

In analyzing personal jurisdiction, courts are guided by principles of fairness, and ultimately must assess "whether it comports with 'fair play and substantial

justice’” to hail the defendant into court in the jurisdiction. *See Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). In the specific jurisdiction context, the analysis focuses on whether the defendant has sufficient “minimum contacts” with the jurisdiction, whether the claims in the case arise out of those contacts, and whether the exercise of personal jurisdiction would be reasonable. *Id.* at 1227-28; *see Schwarzenegger v. Ford Motor Co.*, 374 F.3d 787, 802 (9th Cir. 2004). These fundamental principles apply just as strongly in the Internet context as they do in other cases. *See, e.g., Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510-11 (D.C. Cir. 2002).

The District Court wrongly limited its personal jurisdiction analysis in this case by refusing to consider key allegations and evidence of VNG’s forum contacts. Specifically, Lang Van demonstrated that VNG specifically targeted Lang Van’s songs in creating its online library, searching for and uploading thousands of unauthorized copies of Lang Van’s works to its Zing MP3 Website and App. ER 1021-3; 660-92. VNG chose to offer the Zing MP3 App in English and to make it available in the United States from the Apple and Android App stores, when it could have chosen not to distribute the App in this country or to translate it. ER 1053-4; 764-5. VNG also entered into contracts with U.S. businesses relating to providing content over the Zing MP3 Website and App. The App has been downloaded in the

United States hundreds of thousands of times; and has been used tens of millions of times by individuals in the United States. ER 322-8; 707-27. Similarly, Google Analytics data indicate that between 2011 and 2014, there were more than 16 million U.S.-based visits to the Zing MP3 Website, ER 729; and Google AdSense, which geotargets advertising based on website users' locations and for which service VNG specifically contracted with Google, placed advertisements for U.S. companies on the Zing MP3 Website, ER 701, 862. VNG thus clearly made an intentional choice to provide the App and Website to U.S. users, and to make unauthorized copies of Lang Van protected works available to users in the U.S. via those services.

Lang Van also pled that substantial infringement of its works occurs via the Zing MP3 App and Website in the United States. Lang Van's Chief Operating Officer demonstrated that U.S. users are able to download and stream infringing copies of Lang Van's protected songs via VNG's App and Website. ER 859-67. Moreover, VNG is well-known for engaging in infringing conduct. The United States Trade Representative's Out-of-Cycle Review of Notorious Markets has noted that VNG "continues to facilitate access to unauthorized music files." Office of the United States Trade Representative, *2014 Out-of-Cycle Review of Notorious Markets* (Mar. 5, 2015), https://ustr.gov/sites/default/files/2014%20Notorious%20Markets%20List%20-%20Published_0.pdf. Coca-Cola and Samsung pulled advertisements from the Zing MP3 Website, citing infringement concerns. *See*

Brummitt, Chris, *US Record Company Sues Vietnam Site for Copyright*, Associated Press (Jan. 28, 2014), <https://apnews.com/6f559c7216fa43c69074cf299fdd7a2f>.

Given the foregoing activity, it would have been perfectly fair for the District Court to exercise specific jurisdiction over Defendant-Appellee. Indeed, just last week, the Fourth Circuit, addressing strikingly similar facts, reversed a finding of lack of personal jurisdiction over a foreign-based “stream-ripping” website that enabled U.S.-based users to stream and download copyrighted music files without authorization. *See UMG Recordings, Inc. v. Kurbanov*, No. 19-1124, *slip op.*, at 14-16 (4th Cir. Jun. 26, 2020) (emphasizing, *inter alia*, the foreign website’s substantial volume of U.S. visitors, the commercial nature of their use of the website, which generated significant geotargeted advertising revenue, and the website’s contracting with U.S.-based advertising brokers to place advertising directed at U.S. users).

In this case, however, the Court refused even to consider the evidence of U.S. downloads of the Zing MP3 App and U.S. visits to the Zing MP3 Website, finding that these activities were not sufficiently related to the alleged infringement to be relevant to the jurisdictional analysis, because Lang Van had “fail[ed] to link the defendant’s forum contacts with the allegedly infringing activity.”² ER 6. The

² Lang Van asserts that jurisdiction is proper under Fed. R. Civ. P. 4(k)(ii), which permits a plaintiff to establish jurisdiction over a foreign 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. It is unclear whether the District Court properly applied Rule 4(k)(ii) in this case, as it

District Court reasoned that Lang Van “identifies no specific allegations in the SAC or evidence 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.” *Id.*; *but see Kurbanov, slip op.* at 17 (Fourth Circuit focusing its jurisdictional analysis on the facts that “Kurbanov knew the Websites were serving Virginian visitors and yet took no actions to limit or block access, all while profiting from [advertising revenue generated using] the data harvested from the same visitors”); *id.* at 17-18 (holding that personal jurisdiction could be asserted because “the Websites’ large audience in Virginia for alleged music piracy and the sale of visitors’ data to advertising brokers are what gave rise to Appellants’ claims”).

By disregarding this critical evidence of VNG’s U.S. forum contacts, the District Court committed reversible error. For at least two fundamental reasons, it was not necessary for Lang Van to identify specific instances of unauthorized downloading or streaming of Lang Van works via the Zing MP3 App or Website for the District Court to assert personal jurisdiction over VNG. *First*, under U.S. copyright law, the act of making a copyrighted work available to the public over the Internet, as VNG did here, falls within the scope of the copyright owner’s exclusive rights of distribution and public performance in the Copyright Act and therefore is

does not mention the rule in its Order and frequently employs language suggesting that its personal jurisdiction analysis was limited to contacts between VNG and California.

itself a form of infringement. The plaintiff does not need to establish that the works were actually distributed or publicly performed in the traditional sense so long as users had the unrestricted opportunity to download or stream them. *Second*, to the extent that the copyright claims are separately based on actual downloading and streaming, VNG's providing the App and Website to U.S.-based users was a "but-for" cause of the alleged infringement because the App and Website gave users with both the access to Lang Van's songs and the means to download or stream them. Providing the App and Website was thus forum-directed conduct that gave rise to the claims at issue in this case.

At the very least, the District Court should have considered VNG's actions as part of its personal jurisdiction analysis, along with the other forum contacts that the District Court incorrectly ignored, which are set forth in detail in Appellant's brief.

A. Lang Van's Infringement Claims Arise from VNG's Forum Contacts

U.S. downloads of the Zing MP3 App and U.S. visits to the Zing MP3 Website are more than just "tenuously" related to Lang Van's allegations of copyright infringement, as the District Court put it. By providing the App to U.S. users, and allowing U.S. users to access the Website without restriction, VNG "made available" unauthorized copies of Lang Van's songs throughout the United States. As a party to the WIPO Internet Treaties, the United States agreed to implement a "making available" right in U.S. copyright law. Congress has taken the position, later

confirmed by the Copyright Office, that existing provisions of Section 106 of the Copyright Act are sufficient to protect the “making available” right without amending U.S. law. Accordingly, making protected works available digitally without authorization, in itself, constitutes copyright infringement. The District Court therefore erred by refusing to consider VNG’s acts of making Lang Van’s songs available to the public without authorization, when those actions constituted forum-directed conduct by the Defendant that gave rise to Lang Van’s copyright claims and were sufficient for that reason to support the assertion of personal jurisdiction.

Over a generation ago, the WIPO Internet Treaties recognized the prerogative of copyright owners to authorize “the making available to the public of works in such a way that members of the public may access these works from a place and at a time individually chosen by them.” WIPO Copyright Treaty art. 8, Dec. 20, 1996, 36 I.L.M. 65 (1997); see also WIPO Performances and Phonograms Treaty arts. 10, 14, Dec. 20, 1996, 36 I.L.M. 76 (1997). When the United States ratified and implemented these treaties in 1998, it thereby agreed to implement the “making available” right as part of U.S. copyright law. The Copyright Office has explained:

Consistent with the plain language of the Treaties, which defines the making available right in terms of whether members of the public “may access” a copyrighted work, U.S. law should be read to include the offer of public access, including through on-demand services, without regard to whether a copy has been disseminated or received. Doing so is also

consistent with the judicial opinions of foreign jurisdictions on this point.

U.S. Register of Copyrights, *The Making Available Right in the United States* (Feb. 2016), https://www.copyright.gov/docs/making_available/making-available-right.pdf.

In implementing the making available right, Congress made no express changes to the Copyright Act, concluding instead that the exclusive rights enumerated in Section 106 are sufficient. *Id.* at 2. Over the ensuing decades, U.S. government officials have uniformly maintained that the Copyright Act’s exclusive rights, taken together, cover the full range of conduct encompassed by the making available right, meaning that such conduct will implicate and be governed by one or more of the Section 106 exclusive rights, including, for example, the distribution, public display, and public performance rights. *Id.*

The courts similarly have recognized that the making available right is safeguarded by Section 106’s distribution and public performance rights. In the distribution right context, the Fourth Circuit has held that, “[w]hen a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public.” *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997); accord *Diversey v. Schmidly*, 738 F.3d 1196, 1203 (10th Cir. 2013) (distribution right is infringed by unauthorized

listing of a work in a library catalog for public lending). Some courts have expressly permitted plaintiffs to prove infringement of the distribution right by proof of offers to distribute, *i.e.*, making works available. See *Motown Record Co. v. DePietro*, No. 04-CV-2246, 2007 WL 576284, at *3 (E.D. Pa. Feb. 16, 2007) (“[a] plaintiff claiming infringement of the exclusive-distribution right can establish infringement by proof of actual distribution or by proof of offers to distribute, that is, proof that the defendant ‘made available’ the copyrighted work”). Ultimately, as Professor David Nimmer has noted, “[n]o consummated act of actual distribution need be demonstrated in order to implicate the copyright owner’s distribution right.” 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.11[B][4][d] (2020). “[T]he act of making available sound recordings for downloading by the public . . . suffices to show actionable copyright infringement.” *Id.* § 8.11[D][4][c].

Likewise, in the public performance context, the Copyright Office has observed that, reading the Copyright Act “in light of the purposes articulated by Congress indicates that the public performance right encompasses *offers* to stream” digital content. *The Making Available Right in the United States*, at 39 (emphasis added). The Copyright Act’s legislative history, which was written with older technology in mind, makes clear that “a performance made available by transmission to the public at large” is a public performance “even if there is no proof that any of

the potential recipients was operating his receiving apparatus at the time of the transmission.” H.R. REP. NO. 94-1476, at 64 (1976). So, too, with on-demand streaming. The capacity of members of the public to receive on-demand streamed content is sufficient for that stream to fall within the public performance right contained in Section 106 of the Copyright Act, regardless of whether there is evidence that the stream was actually received by the public. *See* Jane C. Ginsburg, Comments Submitted in Response to U.S. Copyright Office’s July 15, 2014 Notice of Inquiry at 8 (Sept. 3, 2014).

Lang Van pled its copyright claims in this case, at least in part, as claims that VNG infringed its copyrights by making protected songs available to the public in the United States over the Zing MP3 App and Website, in violation of the distribution and public performance rights. ER 23 (“VNG has further infringed Lang Van’s ownership of the Copyrighted Works by making available for download on its website album compilations comprised of Lang Van’s Copyrighted Works”). For the reasons discussed above, nothing more was needed to articulate a copyright claim. By providing U.S. users access to Lang Van’s songs over the App and the Website, VNG engaged in forum-related contacts that gave rise to the copyright infringement alleged here. Not only should the District Court have considered VNG’s provision of the App and the Website to U.S. users as part of its personal

jurisdiction analysis, that evidence should have led the Court to conclude that it has personal jurisdiction to adjudicate Lang Van's copyright claims against VNG.

B. VNG's Acts are the But-For Cause of Well-Pleaded Allegations of Copyright Infringement

Even if Lang Van's copyright claim is wrongly construed to require actual downloading and streaming of copyrighted songs, VNG's providing its App and Website to U.S. users was still a critical step in the alleged infringement and should therefore have been considered as part of the District Court's personal jurisdiction analysis. "Contacts with a forum . . . are relevant for purposes of specific jurisdiction . . . if they are sufficiently related to the cause of action." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1085 (C.D. Cal. 2003). In the Ninth Circuit, contacts are sufficiently related if "'but for' the contacts between the defendant and the forum state, the cause of action would not have arisen." *Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 561 (9th Cir. 1995).

VNG's providing the App and Website to hundreds of thousands of U.S. users was plainly a "but for" cause of the infringement that Lang Van alleges. Simply put, if it were not for the widespread availability of the App and Website throughout the United States, Lang Van would not have an infringement claim to make against VNG. Nevertheless, the District Court refused to consider evidence of U.S. users visiting the Zing MP3 Website and downloading the Zing MP3 App, finding that Lang Van "fail[ed] to link the defendant's forum contacts with the allegedly

infringing activity” because it “identifie[d] no specific allegations in the SAC or evidence 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.” ER 6.

That finding was a reversible error. Lang Van pled that the App and Website facilitate infringement of its works in the United States. *E.g.* ER 13-15; 22-24. Based on the facts available to the District Court, a reasonable jury could determine that VNG engaged in unauthorized distribution and public performances of Lang Van’s songs in the United States over the Zing MP3 App and Website: both are available widely throughout the United States; both provide access to thousands of unauthorized copies of Lang Van’s copyrighted works (as demonstrated by Lang Van’s investigator); and both have been used many times by individuals located in the United States. Moreover, Lang Van’s inability to allege or otherwise identify specific instances of infringement occurring via the App or Website is the direct result of VNG’s decision not to track the geographic location of its user base until 2017. ER 767-8; 762-4.

Under similar circumstances, courts have allowed plaintiffs to establish copyright claims even without direct evidence of downloading or streaming by third parties. *See, e.g., China Central Television v. Create New Technology (HK) Ltd.*, No. CV 15-01869 MMM (MRWx), 2015 WL 3649187 (C.D. Cal. June 11, 2015) (holding that plaintiffs were likely to succeed on a public performance claim based

on evidence that the plaintiffs and their investigators observed and recorded portions of copyrighted television episodes streamed through the defendant's peer-to-peer streaming service, which was available to the public); *Capitol Records, Inc. v. MP3tunes, LLC*, 48 F. Supp. 3d 703, 719–20 (S.D.N.Y. 2014) (“the jury heard evidence from which it could infer that Sideload.com’s features, including the playback feature, encouraged new users to sign up at MP3tunes.com,” and thus “the jury could conclude reasonably that potential users had likely taken advantage of this feature.”). VNG’s providing U.S.’s user access to the Zing MP3 App and Website was thus not only a critical step in the alleged infringement, but also one that a jury could infer led to infringement by users who took advantage of the access to Lang Van’s songs that VNG provided. Either way, it was evidence of forum-related contacts that gave rise to the infringement alleged by Lang Van that the District Court should have considered as part of its personal jurisdiction analysis.

II. The District Court’s Decision Threatens to Undermine Copyright Enforcement in the United States

In addition to the legal errors described above, as a practical matter the District Court’s ruling creates a significant loophole for foreign entities that facilitate large-scale copyright infringement in this country over the Internet. Under the District Court’s analysis, such foreign entities may make unauthorized copies of thousands of copyrighted works freely available to stream or download in the United States via the Internet—and they may provide their services to tens or hundreds of thousands

of Americans—while eluding the jurisdiction of American courts. All such a foreign entity needs to do to avoid being hailed into court in this country is to willfully blind itself by choosing not to track the geographic location of its users, thereby making it difficult or impossible for copyright owners to point to specific domestic infringing acts occurring via the entity's Internet-based services.

This ruling, if left standing, will exacerbate the problem of Internet piracy by providing a roadmap for foreign pirates to avail themselves of the U.S. market without risk of being hailed into court here to answer for their mass infringement. Internet piracy is an enormous and persistent problem for copyright owners and companies that disseminate 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

Effective enforcement of U.S. copyright law in U.S. courts 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. Like VNG, many other foreign-based websites and apps facilitate copyright infringement in the United States. *See Is the DMCA's Notice-and-Takedown System Working in the 21st Century?*, Hearing before the Subcomm. on Intellectual Prop. of the S. Comm. on the Judiciary (June 2, 2020), at 7 (Statement of Jonathan Berroya, Interim President and CEO of the Internet Association) (emphasizing the importance of enforcement against foreign pirate websites because most digital infringement originates

overseas). If they cannot be sued here based on their operation of services that enable such large-scale infringements, merely because they willfully blind themselves by failing to collect data on the geographic location of their users, a critical enforcement tool against online piracy will be lost.

When copyright owners succeeded in shutting down the largest infringing stream-ripping website 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.). And the United States Trade Representative has identified numerous foreign-based Internet services, including VNG, that engage in and facilitate substantial copyright piracy and trademark counterfeiting in this country. In its Review of Notorious Markets, the Trade Representative has listed foreign-based peer-to-peer networks, torrent sites, cyberlockers, and illegal downloading and streaming sites that are involved in large scale piracy online. *See Office of the U.S. Trade Representative, 2019 Review of Notorious Markets for Counterfeiting and Piracy*, https://ustr.gov/sites/default/files/2019_Review_of_Notorious_Markets_for_Counterfeiting_and_Piracy.pdf. The District Court's opinion 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 2019 Review of Notorious Markets lists a Vietnamese website that hosts and makes available pirated movies; a Dutch cyberlocker that offers links to more than 360,000 unlicensed songs; a Taiwanese torrent site providing links to pirated movies, TV shows, music, and software; Russian websites that make pirated books and academic journals available for download; and numerous other foreign sites that stream or provide access to pirated movies and television programs.” *Id.* 15-32. In many cases, it is difficult even to pin down the precise location of infringing foreign websites because of their use of masking technology. *Id.* For instance, a cyberlocker that is popular in Poland and offers a range of unlicensed songs by U.S. artists is reportedly hosted in the Netherlands, but utilizes a “reverse proxy server” to hide its true location. *Id.* at 18. 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.

Nor is it sufficient to suggest that copyright owners may seek to enforce their rights in foreign courts. Many U.S. copyright owners simply cannot afford to do so. For these individual creators and smaller rights owners, enforcement will simply be impossible as a practical matter under the District Court’s reasoning. 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 a defendant’s foreign-based websites in this country.

CONCLUSION

For all of these reasons and as argued by Appellant in its brief, the decision below should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,065 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted by Microsoft Word 2010.

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