No. 19-56452

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LANG VAN, INC.

Plaintiff-Appellant,

v.

VNG CORPORATION.

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
CASE NO. 14-CV-0100 AG (JDEX)

BRIEF OF THE MOTION PICTURE ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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Date: June 29, 2020

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, The Motion Picture Association, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock. The only law firm appearing for The Motion Picture Association Inc. is Mitchell Silberberg & Knupp LLP.

Respectfully submitted,

Dated: June 29, 2020

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STATEMENT OF INTEREST

The Motion Picture Association, Inc. ("MPA") is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry.[1] Since that time, MPA has served as the voice and advocate of the film and television industry around the world, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and bringing entertainment and inspiration to audiences worldwide. MPA's member companies are Walt Disney Studios Motion Pictures, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and disseminators of filmed entertainment, which consumers enjoy via subscription and ad-supported services, by viewing discs or downloaded copies from online retailers, and by visiting theaters.[2]

[1] No counsel for a party authored this brief in whole or in part and no person other than MPA and its counsel made a monetary contribution to its preparation or submission. On April 1, 2020, Appellant's counsel consented to the filing of this brief. On April 3, 2020, Appellee's counsel consented to the filing of this brief. (Before September 2019, MPA was known as the Motion Picture Association of America, Inc. ("MPAA").)

[2] One model provides consumers in-home and remote access via television bundle providers, such as Comcast, which owns Universal City Studios; DirecTV, which is affiliated with Warner Bros. Entertainment; and Sony's PlayStation Vue, which is operated by an affiliate of Sony Pictures Entertainment. Another model involves access via digital subscription streaming services, like Netflix and Disney+. For other products, like discs and downloads from online retailers, consumers pay one-time prices to acquire temporary or permanent access to digital copies of content. Services like Movies Anywhere facilitate access to consumers' libraries of content across digital platforms by making movies from participating studios purchased from one participating online retailer available across the platforms of all participating retailers. Other

MPA's members can continue to deliver high-quality content only if effective legal protection exists to guard against the devastating harm that results from digital piracy. MPA members thus rely on copyright law's exclusive rights of reproduction, adaptation, public performance, public display, and distribution, *see* 17 U.S.C. § 106; on legal protections against circumvention of technological measures used to prevent unauthorized access to, and infringement of, copyrighted works, *see* 17 U.S.C. § 1201; as well as on other legal protections, including trademark and unfair competition laws, *see, e.g.*, 15 U.S.C. § 1125.

Invoking well-established principles governing the exercise of personal jurisdiction in the United States, MPA members and affiliated organizations increasingly rely on the ability to bring cases to enforce their rights against illicit profiteers operating *outside* the United States as the means of limiting the infringement of copyrighted works *in* the United States. *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (copyright infringement lawsuit commenced in Central District of California against Australian and Dutch defendants that distributed free software products to facilitate "sharing" infringing files through peer-to-peer networks); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013) (infringement action against illegal Canadian

services, like the websites of the ABC and NBC television networks, CNN, and Pluto TV, which are all affiliated with MPA members, offer ad-supported access to streams of audiovisual works. MPA members also license content to YouTube, which offers ad-supported streaming.

torrent-site operator commenced in Southern District of New York and transferred to Central District of California); *Disney Enters., Inc. v. Hotfile Corp.*, 798 F. Supp. 2d 1303 (S.D. Fla. 2011) (infringement case in Southern District of Florida against a Panamanian defendant); *Advanced Access Content Sys. Licensing Adm'r, LLC v. Shen*, No. 14-cv-1112 (VSB), 2018 WL 4757939 (S.D.N.Y. Sept. 30, 2018) (section 1201 claim brought against Chinese defendant).[3] Accordingly, MPA has an interest in preserving copyright owners' ability to pursue actions in U.S. courts against copyright infringers that purposefully direct their infringing activities to the United States, regardless of where those infringers reside.

MPA thus writes not only to identify the legal errors committed below, but also to highlight for the Court the importance of these issues. MPA's members have extensive experience combatting the proliferation of infringing offshore, commercial enterprises that target the United States and profit from infringement occurring in the United States. Unfortunately, copyright infringement continues to be rampant on the internet, and foreign infringers are often the culprits. There were an estimated 46.9 billion online instances of piracy of movies, and 183.4 billion instances of piracy of television programming in 2017 alone. DAVID

[3] Conversely, MPA members are frequently defendants in lawsuits, including lawsuits that allege copyright infringement. They defend these cases on a variety of grounds, including, where appropriate, lack of personal jurisdiction. MPA members' experience as both plaintiffs and defendants brings a balanced perspective to this *amicus curiae* brief.

BLACKBURN, ET AL., IMPACTS OF DIGITAL VIDEO PIRACY ON THE U.S. ECONOMY 5 (2019), https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf. Not only does digital copyright infringement steal revenue that legitimate copyright holders could use to produce and distribute new works of authorship, but such infringement also deprives copyright owners and their licensees of the ability to determine where, when, and how to make their works available through legitimate offerings. Widespread infringement undermines copyright's core incentive to disseminate creative works for the benefit of the consuming public. *See Twentieth Century Music Corp. v. Aiken*, 422 US 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."). Because the district court's order granting the motion to dismiss was erroneous and could cause significant damage to copyright holders and their licensees in the United States, and ultimately to U.S. consumers, MPA submits this brief urging reversal.

SUMMARY OF ARGUMENT

Copyright owners' ability to enforce their rights in U.S. courts against foreign defendants who commit infringement in the United States is critical in stopping digital piracy. All too often, foreign jurisdictions fail to enforce intellectual property rights, leaving American courts as the only forum in which

copyright owners can vindicate their rights. An important tool in this enforcement scheme is Federal Rule of Civil Procedure 4(k)(2), which permits a court to assert jurisdiction over federal claims involving foreign defendants who are outside the jurisdiction of any particular state court.[4]

The evidence and allegations presented below establish that Defendant-Appellee VNG Corporation ("VNG") provides a highly interactive website that purposefully directs its allegedly infringing conduct and business model at the United States. VNG's highly interactive English-language Zing MP3 website and application ("app") are, in essence, digital valets that deliver to consumers (including to consumers in the United States) access to copies of creative works. Zing MP3 users enter into agreements with VNG to access the website or download the software necessary to carry out the allegedly infringing conduct, namely, the knowing and repeated transmission of computer files. In addition, VNG purposely obtains financial benefit in the United States through digital advertising directed at individual American consumers. By virtue of these actions, VNG unquestionably targets the United States and causes effects in the United

[4] MPA is aware that Plaintiff/Appellant Lang Van asserts that California has jurisdiction over VNG. MPA focuses instead on the district court's failure to address the Rule 4(k)(2) arguments (which provide a sound basis for exercising personal jurisdiction) and on the importance of Rule 4(k)(2) in addressing the problem of foreign infringers who target the U.S. market. MPA notes, however, that the recently decided *UMG Recordings, Inc. et al. v. Kurbanov*, No. 19-1124 (4th Cir. June 26, 2020), has particular relevance to the state jurisdiction issue.

States, and is therefore subject to jurisdiction in the United States under Rule 4(k)(2). In holding otherwise, the district court erred in several ways.

First, the district court ignored Rule 4(k)(2), instead focusing only on whether VNG could be subject to personal jurisdiction in the State of California. In so doing, the district court failed to consider the important role that Rule 4(k)(2) plays in stopping digital infringement by foreign infringers.

Second, in holding that VNG supposedly did not purposefully direct claim-related activities in its jurisdiction, the district court misapplied *Walden v. Fiore*, 134 S.Ct. 1115 (2014). More specifically, the court ignored the sliding-scale test for commercial, interactive websites and platforms first enunciated in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), and subsequently adopted by the Ninth Circuit. Under the *Zippo* line of cases, where, as here, a website is highly interactive, a court may exercise personal jurisdiction consistently with the holding in *Walden*. By disregarding approximately hundreds of thousands (or more) instances in which U.S. users accessed the Zing MP3 website or downloaded the Zing MP3 app—and instead focusing only on the alleged absence of *proven* infringing downloads of Plaintiff Lang Van's own songs—the district court substituted substantive copyright infringement analysis for jurisdictional analysis. Ninth Circuit law requires *not* that a plaintiff prove *infringement* to establish jurisdiction in the first instance, but rather that the

plaintiff show that *the defendant aimed claim-related conduct at the forum*. Here, the record indicates that Appellant Lang Van both alleged and established that VNG aimed such conduct at the United States.

Moreover, even where a website or app is only semi-interactive, courts in the Ninth Circuit will analyze the extent to which a website or app is *commercial*. The more commercial the website or app, the more appropriate for the court to exercise personal jurisdiction. But rather than analyzing Zing MP3's commerciality, the court below ignored the issue completely, concluding that "[b]ecause Plaintiff isn't suing Defendant over the display or content of any advertising on Zing MP3, these contacts aren't relevant to jurisdiction."

The fact that Zing MP3 is highly commercial weighs heavily in favor of exercising personal jurisdiction, as this and other courts have held. Using interactive websites and apps, foreign infringers purposefully attract users from the United States by, in part, ensuring that the only cost to those consumers of accessing unlicensed public performances and downloads of copyrighted works is exposure to individualized, targeted advertisements. Put differently, geo-targeted advertising makes the infringer's targeting of a particular location more lucrative.[5]

[5] Digital technology has also enabled more efficient and successful advertising for lawful websites that provide *licensed* content. *See* ORGANIZATION FOR ECONOMIC COOPERATIVE DEVELOPMENT, ONLINE ADVERTISING: TRENDS, BENEFITS AND RISKS FOR CONSUMERS, *OECD Digital Economy Papers* 23 (OECD Publishing, No. 272 2019) (hereinafter "OECD Rep.")

While no money might directly change hands between the purveyors of the unlawful streams and downloads and the recipients of the infringing content, advertising networks geo-target using consumers' locations and browsing histories—giving the infringer a financial incentive to target a particular location. As a result, the unlawful conduct directly generates revenue in a particular location: residents of the United States who access infringing content through VNG's Zing MP3 app and website platforms are exposed to specific ad impressions appropriate for their regions that generate the ill-gotten revenue. Under the sliding-scale analysis, given the highly commercial nature of Zing MP3, VNG would be subject to personal jurisdiction even if the website and app were deemed semi-interactive rather than highly interactive.

Contrary to the district court's holding, therefore, the relationship between a service-and-software-application provider like VNG and its individual users in the United States is purposeful, thus supporting the exercise of personal jurisdiction. Notably, on June 26, 2020, three days before *Amicus* filed this brief, the Fourth Circuit decided *UMG Recordings, Inc. et al. v. Kurbanov*, No. 19-1124 (4th Cir. June 26, 2020) ("*Kurbanov*"), in which a foreign defendant operated two free, advertising-based, "stream-ripping" websites that allowed users to extract,

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https://doi.org/10.1787/1f42c85d-en. This fact actually underscores the commercial nature of advertising via advertising brokers.

reproduce, and download copyrighted songs. The Fourth Circuit held that the defendant had purposely availed himself of Virginia's protections, making an analysis of the sufficiency of nationwide contacts under Rule 4(k)(2) unnecessary. *Id.*, *Kurbanov*, slip op. at 18-19. However, as a matter of law, the relevant due process analysis under the federal long-arm statute is nearly identical to traditional state personal jurisdiction analysis, the key difference being that under the federal long-arm statute, the court considers contacts with the nation as a whole rather than only those with a particular state. *See* note 9 *infra*. Because the facts in this case are highly analogous to those in *Kurbanov*, the Fourth Circuit's analysis is compelling and supports reversal of the district court's order under, at a minimum, Rule 4(k)(2) based on VNG's targeting of the U.S. market as a whole.

If, despite the well-reasoned *Kurbanov* opinion, this Court were to affirm and the lower court's approach were widely adopted, the end result could be a roadmap that guides foreign infringers on how to exploit the U.S. market and U.S. intellectual property while evading jurisdiction in the United States, thus depriving aggrieved U.S. copyright owners of an efficacious—and often the only—forum in which to enforce their rights. MPA therefore urges that the district court's order be reversed.

ARGUMENT

I. Copyright Owners Must Be Able to Enforce Their Rights in U.S. Courts Against Foreign Infringers.

Digital piracy remains a devastating problem for copyright owners, including MPA's members. Frequently, infringers set up shop abroad and then intentionally reap financial benefits from consumers within the United States. Suing these foreign infringers in their "home" countries is often legally and practically ineffective. Moreover, these infringers sometimes target their unlawful activity not toward one particular state, but toward the United States as a whole. The Federal Rules of Civil Procedure therefore provide a way to sue such infringers in U.S. courts. *See* Fed. R. Civ. Pro. 4(k)(2). It is critical that U.S. courts exercise their authority to enable copyright owners to hold foreign infringers accountable for the harm they cause and for their ill-gotten profits.

A. U.S. Courts Are Frequently the Only Forum in Which to Vindicate Copyright Infringement that Occurs in the United States but that Is Initiated from Abroad.

If, as the court below erroneously held, alleged infringers like VNG are not subject to personal jurisdiction in the United States unless a plaintiff has already identified specific evidence of infringement, infringers who cannot be brought to justice elsewhere will continue to harm U.S. copyright owners, while hiding behind evasive tactics, destroyed evidence, and willful blindness. Often, the United States is the only available forum in which a U.S. copyright holder can

effectively pursue an infringement claim against a foreign website that profits from infringement of U.S. intellectual property through activities both directed at and occurring in the United States. *See, e.g.*, OFFICE OF UNITED STATES TRADE REPRESENTATIVE, 2020 SPECIAL 301 REPORT AND THE IDENTIFICATION OF NOTORIOUS MARKETS FACILITATING GLOBAL PIRACY REPORT 66 (2020), https://ustr.gov/sites/default/files/2020_Special_301_Report.pdf ("2020 Notorious Markets Report") (Vietnam remains on the notorious markets watch list; in Vietnam "online piracy, including the use of piracy devices and applications to access unauthorized audiovisual content, book piracy, and cable and satellite signal theft persist, while both private and public sector software piracy remains a concern."); OFFICE OF UNITED STATES TRADE REPRESENTATIVE, 2018 REPORT ON THE IMPLEMENTATION AND ENFORCEMENT OF RUSSIA'S WTO COMMITMENTS 47 (2019), https://ustr.gov/sites/default/files/Russia-2018-WTO-Report.pdf ("[T]he government of Russia has not acted against those sites that, while located in Russia, target users outside of Russia."). As discussed in the declaration of Neil Turkewitz submitted below (ECF 191), despite complaints about Zing MP3 from copyright owners, the government of Vietnam took no action against VNG. As of April 2020, the United States Trade Representative's Section 301 report listed Vietnam as a country that did not adequately or effectively enforce intellectual property rights. *See* 2020 Notorious Markets Report at 66.

Historically, the United States courts have played a crucial role in enforcing the rights of copyright holders faced with rampant global digital piracy directed at the U.S. market by foreign infringers. For example, in the landmark *Grokster* opinion, the United States Supreme Court held that Dutch and Australian defendants who sold software that allowed the transmission of massive amounts of copyrighted works over peer-to-peer networks were liable for inducing infringement. 545 U.S. at 941.

Similarly, in *Fung*, 710 F.3d at 1036-37, the defendant, a resident of Canada, operated websites that induced users to share infringing motion pictures over a peer-to-peer network. The Ninth Circuit affirmed the district court's order holding that Fung had engaged in contributory copyright infringement and enjoining Fung from further infringement.[6] *Id.* at 1049.

In *Hotfile Corp.*, 798 F. Supp. 2d at 1307, the Panamanian defendant operated a website that automatically, at the direction of users, allowed uploading and downloading of studios' copyrighted films. The Southern District of Florida exercised jurisdiction and denied a motion to dismiss, holding that the plaintiffs had stated a claim for copyright infringement under the U.S. Copyright Act. *Id.* at 1305. And in *Shen*, 2018 WL 4757939, the defendants, residents of China,

[6] In both *Grokster* and *Fung*, the defendant website operators, like VNG, generated most, if not all, of their revenue from advertisements.

trafficked in products designed to circumvent the plaintiff's encryption technology. *Shen* at *1. The Southern District of New York enjoined defendants' violation of section 1201 of the DMCA. *Id.* at *2. *See also* Austin Siegemund-Broka, *MPAA Wins $10.5 Million and Injunction in MovieTube Lawsuit*, HOLLYWOOD REPORTER (Nov. 24, 2015), https://www.hollywoodreporter.com/thr-esq/MPA-wins-105-million-injunction-843803 (default judgment in Central District of California against Canadian defendant who operated website containing links to infringing audiovisual works); Ted Johnson, *Judge Grants Default Judgment to Shut Down PubFilm*, VARIETY (Jan. 18, 2018), https://variety.com/2018/politics/news/pub-film-MPAA-piracy-1202668821/ (default judgment in Southern District of New York against operators of "large-scale piracy sites" located in Vietnam); Maddy Fry, *Hollywood Takes Megaupload to Court*, TIME (Apr. 8, 2014), http://time.com/53381/hollywood-takes-megaupload-to-court/ (lawsuit in the Eastern District of Virginia against an operator of a website that permitted massive numbers of infringing digital downloads of copyrighted works); Consent Judgment, *Twentieth Century Fox Film Corp. v. Ssupload.com*, No. CV 07-6258 GW (MANx) (C.D. Cal. Jan. 20, 2009) (ECF No. 40) (judgment in Central District of California against a Canadian defendant whose website contained links to infringing audiovisual works).

The ability of rights holders to sue foreign digital infringers in the United States remains critical to limiting digital piracy. If infringing businesses can steal from U.S. copyright owners and profit from infringement by users located in the United States, yet evade jurisdiction in the United States, piracy will cause even greater widespread harm and threaten to decrease the output of the entertainment industry, which suffers significant losses when it is forced to compete with lawless exploitation of copyrighted works. *See generally* Stephen E. Siwek, *The True Cost of Copyright Industry Piracy to the U.S. Economy* (2007), https://www.ipi.org/docLib/20120515_CopyrightPiracy.pdf.[7]

Consumers can access legitimate content distributed by MPA's members and their licensees, via subscriptions, rentals, or paid downloads.[8] It stands to reason that some consumers will not pay for lawful services or will not view ads on legitimate websites if they can obtain unauthorized copies from pirate websites. Pirate websites thus deprive copyright owners and their licensees of the ability to determine where, when, and how to make their works available. Possessing exclusive rights that underpin those business decisions is the foundation of MPA

[7] Another study concluded that revenues lost to online piracy of movies and television shows will rise to almost *$52 billion* by 2022. Press Release, *Online TV & Movie Piracy Losses to Soar to $52 Billion*, DIGITAL TV RESEARCH (Oct. 30, 2017), https://www.digitaltvresearch.com/ugc/press/219.pdf.

[8] *See* note 2, *supra*.

members' businesses. The success or failure of these businesses depends upon carefully designed strategies to build demand for motion pictures. So, the effects of piracy are deeply felt, and the effects of the outcome of this appeal might be, as well.

B. Federal Rule of Civil Procedure 4(k)(2) Plays an Important Role in Stopping Foreign Digital Infringers that Target the U.S. Market.

Federal Rule 4(k)(2) provides:

> For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.

A key purpose of the rule is to allow lawsuits against foreign defendants that target the United States as a whole, even in the absence of jurisdiction in a particular state. The digital-piracy ecosystem is rife with foreign infringers. Not surprisingly, courts have applied Rule 4(k)(2) to exercise personal jurisdiction in actions involving copyright infringement and infringement of other forms of intellectual property. *See, e.g., Hydentra HLP Int. Ltd. v. Sagan Ltd.*, 783 F. App'x. 663, 664 (9th Cir. 2019) (jurisdiction proper under Rule 4(k)(2) where residents of Seychelles, Barbados, and Canada allegedly committed intentional copyright infringement expressly aimed at the United States that caused harm that they likely knew would be suffered by plaintiffs in the United States); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd*., 243 F. Supp. 2d 1073, 1094 (C.D.

Cal. 2003) (exercise of jurisdiction over copyright claims against foreign defendant where sufficient contact with U.S. residents alleged, even without sufficient contact with any single state to justify jurisdiction in that state); *Graduate Mgmt. Admission Council v. Raju*, 241 F. Supp. 2d 589, 596-599 (E.D. Va. 2003) (citizen of foreign country not subject to jurisdiction in any state and who operated website selling materials to U.S. residents in violation of U.S. copyright and trademark laws, was subject to jurisdiction through nationwide service of process under Rule 4(k)(2) because his website contacts with the United States as a whole satisfied "due process" requirements). Yet, the district court here failed to address Rule 4(k)(2) even though Appellant asserted the Rule as a basis for personal jurisdiction.

II. Because VNG Targeted its Allegedly Infringing Conduct at the United States, this Is an Archetypal Case for Finding Jurisdiction Under Rule 4(k)(2).

The district court ignored Rule 4(k)(2) and focused only on California-specific contacts. This was error; all three of the preconditions for applying the rule exist here. First, Lang Van's claim for copyright infringement arises under federal law. Second, VNG appears to contend that no court in any individual state has jurisdiction. Third, as discussed below, exercising jurisdiction over VNG in the United States would comport with due process.[9]

[9] The due process analysis under the third part of the federal long-arm statute "is nearly identical to traditional personal jurisdiction analysis." *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 462 (9th Cir. 2007). The key difference is that under the federal long-arm statute,

A. Zing MP3 Is Highly Interactive.

Under *Zippo*, as applied in *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997), and other Ninth Circuit and district court opinions, a court may exercise jurisdiction over a highly interactive website. VNG operates a highly interactive service through which "the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer [files that] justifies a court's exercise of personal jurisdiction." *SGII, Inc. v. Martin*, No. SACV1900541JVSKESX, 2019 WL 6840788, at *4 (C.D. Cal. July 1, 2019) (trademark infringement claim involving sale of photographs on defendants' website); *Hydentra*, 783 F. App'x. at 665 (copyright infringement claim involving the unauthorized display of copyrighted videos on defendants' website).

Moreover, VNG's forum-related activity—providing an English-language website and app through which the claimed infringement occurs—is intimately related to Lang Van's copyright infringement claim: if the Plaintiff's allegations prove true, the proliferation of Zing MP3 in the United States is the means by which VNG engages in direct infringement by virtue of its streaming and distributing of infringing works (*see, e.g., Spanski Enters. v. Telewizja Polska*,

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rather than considering contacts between the defendant and the forum state, the court considers contacts with the nation as a whole. *Id.*

S.A., 883 F.3d 904 (D.C. Cir. 2018)); and as a secondary infringer that provides a service allowing its users to infringe by downloading works. *See e.g., A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020-24 (9th Cir. 2001).

The Fourth Circuit's recent *Kurbanov* opinion is on point. Like VNG, the defendant in *Kurbanov* characterized raw numbers of users and so-called "attenuated" contractual relationships with U.S.-based businesses as non-claim related. *Kurbanov*, slip op. at 17. The Fourth Circuit disagreed, concluding: "[T]he [defendant's] Websites' large audience in Virginia for alleged music piracy and the sale of visitors' data to advertising brokers are what gave rise to Appellants' copyright infringement claims." *Id.* 17-18. Similarly, here, VNG's activity in the United States regarding Zing MP3 is what gives rise to Lang Van's copyright claims. Proper application of the *Zippo* sliding scale mandates a finding of personal jurisdiction under Rule 4(k)(2).

The district court's order—rendered, of course, without the benefit of the *Kurbanov* opinion—failed to consider the level of Zing MP3's interactivity and commerciality and instead concluded that Lang Van did not sufficiently connect its claims with VNG's forum contacts because Lang Van apparently failed to identify any illegal downloads or streams of its own works. This ruling confused jurisdictional facts with substantive infringement and also fundamentally misunderstood copyright law. As the foregoing authority establishes, it is

sufficient for personal jurisdiction that Zing MP3 users entered into agreements with VNG to access the website or download the software necessary to carry out the allegedly infringing file transfers.

B. Even if Zing MP3 Were Deemed only Semi-interactive, its Commercial Nature Would Mandate Exercise of Personal Jurisdiction.

Where a website is semi-interactive rather than highly interactive, courts will analyze the extent to which the website is commercial to determine whether personal jurisdiction exists. *E.g.*, *Capitol Records, LLC v. VideoEgg, Inc.*, 611 F. Supp. 2d 349, 358-60 (S.D.N.Y. 2009) (jurisdiction found where website fell "in the middle of [the interactivity] spectrum" due to advertising). Zing MP3 is "ad supported" and thus commercial. Yet, the district court concluded that VNG's advertising was "not relevant" to personal jurisdiction. This, too, was erroneous.

Many users visit illicit, ad-supported websites in order to access a wide swath of unauthorized digital content. "Ad revenue is the oxygen that allows content theft to breathe." Digital Citizens Alliance, *Good Money Still Going Bad: Digital Thieves and the Hijacking of the Online Ad Business*, 1 (2015), https://www.motionpictures.org/wp-content/uploads/2018/03/66692a61-cd18-4c14-bede-f09ce3d84b53.pdf. Indeed, "[a]d-supported piracy is extensive. According to one report, online advertising supports up to 86 percent of IP infringing websites that allow web users to download or stream infringing content

for free to the end-user." OFFICE OF INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR, U.S. JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT: FISCAL YEARS 2017-2019 63 (2016) (hereinafter "IPEC Joint Strategic Plan"), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/IPEC/2016jointstrategicplan.pdf. Many pirate website operators are based outside the United States and, like VNG has, intentionally target U.S. consumers, who represent a profitable advertising demographic. *See* OFFICE OF UNITED STATES TRADE REPRESENTATIVE, 2017 OUT OF CYCLE REVIEW OF NOTORIOUS MARKETS 5 (2018) https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf ("Again this year, the [Notorious Markets] List highlights online piracy sites that are funded by advertising revenue.").

The U.S. Supreme Court cogently described how pirates rely on advertising to profit from infringement:

> The business models employed by Grokster and StreamCast confirm that their principal object was use of their software to download copyrighted works. Grokster and StreamCast receive no revenue from users, who obtain the software itself for nothing. Instead, both companies generate income by selling advertising space, and they stream the advertising to Grokster and Morpheus users while they are employing the programs. As the number of users of each program increases, advertising opportunities become worth more. While there is doubtless some demand for free Shakespeare, the evidence shows that substantive volume is a function of free access to copyrighted work. Users seeking Top 40 songs, for example, or the latest release by Modest Mouse, are certain to be far more numerous than those seeking a free Decameron, and Grokster and StreamCast translated that demand into dollars.

Grokster, 545 U.S. at 926.

Recently, the U.S. Intellectual Property Enforcement Coordinator (located in the White House), described the problem of ad-supported piracy as follows:

> Whereas the rogue website operator pays nothing for a downloaded or streamed movie or song, for example, the ads that appear beside the misappropriated content generate revenue for the website operator—generally in the form of pure profit. The artist, label, and studio do not see a penny. The ad network that delivered ads to the website dedicated to offering infringing content also generates revenue, while again, the artist, label and studio receive no compensation for their work. Everyone profits, except the creator and/or authorized distributor of the original content.

IPEC Joint Strategic Plan, *supra*, at 63. *See also* U.S. DEPARTMENT OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 68-70 (2013), https://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf ("Many websites that sell or provide access to pirated content profit from advertisers paying for banner ads . . . . Denying infringing websites access to lucrative advertising has the potential to starve them of funds and substantially curtail infringement.").[10]

[10] The Department of Justice has prosecuted operators of copyright infringing websites that utilized and profited from online advertising. *See, e.g.*, U.S. Department of Justice, *Founder of NinjaVideo Pleads Guilty to Criminal Copyright Conspiracy* (Sept. 23, 2011), https://www.justice.gov/opa/pr/founder-ninjavideo-pleads-guilty-criminal-copyright-conspiracy. Some such defendants have been based outside the United States. *See* David Kravets, *Feds Shutter Megaupload, Arrest Executives*, WIRED (Jan. 19, 2012, 3:14 PM), https://www.wired.com/2012/01/megaupload-indicted-shuttered/; *United States v. Batato*, 833

Sometimes, website operators sell space on their websites directly to advertisers. However, because outsourcing of this advertising-sales function is often more efficient, digital pirates frequently hire advertising "networks" or "brokers" to generate advertising revenue via targeted users. *See Bose v. Interclick, Inc.*, No. 10 Civ. 9183 (DAB), 2011 WL 4343517, at *1-2 (S.D.N.Y. Aug. 17, 2011) (describing advertising networks); *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 503-04 (S.D.N.Y. 2001) (same); FEDERAL TRADE COMMISSION, SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING 2-3 (2009) (hereinafter "2009 FTC Rep."), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadreport.pdf.[11] That VNG used ad brokers rather than sold advertising directly does not obviate the commerciality of Zing MP3. If anything, the opposite is true. Website operators receive increased revenues through this approach because ad brokers efficiently connect the websites with companies seeking to advertise online. *See Understanding Online Advertising*, NATIONAL ADVERTISING INITIATIVE (last visited June 27, 2020) https://www.networkadvertising.org/faq ("Websites and

F.3d 413 (4th Cir. 2016) (appeal involving asset seizures from operators of the "Mega Conspiracy").

[11] In this brief, MPA uses the terms "advertising network" and "advertising broker" interchangeably.

applications work with third-party advertising companies because these companies can more efficiently sell advertising space. This enables websites and applications to make more revenue and continue providing free content and services."); Meredith Halama and Michael Sherling, *Tracking the Past and Present Future of Interest-Based Advertising*, ANTITRUST (2017) (hereinafter "Halama & Sherling").

The ability of an illegal website to expand relationships with advertisers in this way plays a major role in facilitating copyright infringement and other illegality. Indeed, advertising networks allow infringers to earn significant revenues that would otherwise be unobtainable. Selling space to advertisers on unlawful websites or apps via an ad broker is, unfortunately, practical and efficient. Online advertising is largely based on the ability of websites and ad networks to collect data regarding individual consumer browsing habits and to place ads for companies based on whether a given website is likely to attract specific consumers that will be interested in the products and services being promoted. *See generally* George B. Delta & Jeffrey H. Matsuutra, Law of The Internet § 6.05 "Online Advertising" (4th ed. 2019) (hereinafter "Delta & Matsuutra"). A website often places "cookies" on the visiting consumers' web browsers and computers. *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d at 502-04; 2009 FTC Rep. at 2, n.3. Through these cookies, and other technologies, consumers are recognized when they return to the same website after the initial visit; cookies also frequently

enable the websites and their ad brokers to record which other websites consumers visit. Vangie Beal, *What are Cookies and What Do Cookies Do?*, WEBOPEDIA (Sept. 4, 2008), https://www.webopedia.com/DidYouKnow/Internet/all_about_cookies.asp. Over time, a consumer's browsing history and interactions with advertisements provide insight into which ads will be of most interest to that consumer. In that way, advertisers can connect with the individual consumers most likely to value their products and services. *See* OECD Rep. at 23; FEDERAL TRADE COMMISSION, CROSS DEVICE TRACKING 5-6 (2017), https://www.ftc.gov/system/files/documents/reports/cross-device-tracking-federal-trade-commission-staff-report-january-2017/ftc_cross-device_tracking_report_1-23-17.pdf.

Most website operators cannot sell advertising space directly—*i.e.*, without the assistance of an ad network—and at the same time use browsing data to its full potential. Use of an ad broker gives the website owner access to far more data about consumers than any individual website. *See* Delta & Matsuutra, *supra*, § 6.05; Halama & Sherling, *supra*. This advertising model allows infringing website operators to focus on delivering illegal content rather than on cultivating relationships with a vast, incalculable number of potential advertisers. Thus, a website operator can, in many instances, make far more money using an ad broker than the operator could make by directly selling ad space or by charging consumers a fee. *See Why Use Ad Networks?*, THE ONLINE ADVERTISING GUIDE, (last visited

June 3, 2020), https://theonlineadvertisingguide.com/display-advertising-guide/placing-ads-on-your-site/why-use-ad-networks/ (discussing how advertising networks allow particularly smaller websites to earn more money); *see also generally* PricewaterhouseCoopers LLP, *FY 2019 Internet Ad Revenue Report & Coronavirus Impact on Ad Pricing Report Q1 2020* (2020), https://www.iab.com/insights/internet-advertising-revenue-fy2019-q12020/ (detailing digital advertising revenues). In short, VNG and other operators who use third-party advertising networks can efficiently commercialize infringement and other illegal acts.[12]

The district court failed to examine how the extent of VNG's advertising affects the jurisdictional analysis. Under the *Zippo* sliding-scale test, disseminating a highly commercial digital platform or app to forum residents will

[12] The MPA has attempted to curtail the ability of copyright infringers to rely on advertising in general, and on advertising brokers specifically, both through appeals to the government and by advocating effective, voluntary initiatives whereby advertising networks endeavor to reduce their relationships with infringers. *See, e.g.*, Neil Fried, *Voluntary Advertising Initiative May Hold a Key to a Responsible Internet* (June 14, 2018), https://www.MPAA.org/press/voluntary-advertising-initiative-may-hold-a-key-to-a-responsible-internet/. Such efforts have been underway for years. *See* MPAA, *MPAA Statement on IPEC Best Practices for Advertising Networks to Combat Online Piracy and Counterfeiting* (July 15, 2013), https://www.MPAA.org/press/MPAA-statement-on-ipec-best-practices-for-advertising-networks-to-combat-online-piracy-and-counterfeitin/; Ginny Martin, *Major Ad Networks Sign Anti-Piracy Best Practices Aimed To Starve Piracy Sites Of Ad Revenues*, MARKETING LAND (July 15, 2013, 4:25 PM), https://marketingland.com/major-ad-networks-sign-anti-piracy-best-practices-aimed-to-starve-piracy-sites-of-ad-revenues-51646; John Glenday, *TAG Anti-Piracy Drive Looks to Block Ad Revenue from Illicit Content*, THE DRUM (Feb. 12, 2019, 9:30 AM), https://www.thedrum.com/news/2019/02/12/tag-anti-piracy-drive-looks-block-ad-revenue-illicit-content. Unfortunately, these non-judicial efforts have not fully solved the problem. *See Study Shows Ad Industry Anti-Piracy Efforts Have Cut Pirate Ad Revenue in Half*, CISION PR NEWSWIRE (Oct. 5, 2017, 8:23 ET), https://www.prnewswire.com/news-releases/study-shows-ad-industry-anti-piracy-efforts-have-cut-pirate-ad-revenue-in-half-300531749.html.

make exercise of jurisdiction appropriate even over a semi-interactive operator. Courts have confronted the ad-based model of piracy in numerous prior cases and have routinely held that advertising on such websites is relevant to determining whether to exercise personal jurisdiction. More specifically, it makes no difference whether VNG targeted U.S. residents or, alternatively, whether its third-party advertisers did so on its behalf and for its benefit: the fact that the advertisements targeted U.S. residents indicates that VNG knows—either actually or constructively—about its U.S. user base, "and that it exploits that base for commercial gain by selling space on its website for advertisements." *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1230–32 (9th Cir. 2011) (Finding a defendant who allegedly posted infringing photos on its website subject to personal jurisdiction in California). As the Fourth Circuit held in *Kurbanov*:

> In addition to the volume of visitors, we also find the nature of the repeated interaction between the Websites and visitors to be a commercial relationship . . . . [T]he mere absence of a monetary exchange does not automatically imply a non-commercial relationship . . . . Kurbanov ultimately profits from visitors by selling directed advertising space and data collected to third-party brokers, thus purposefully availing himself of the privilege of conducting business within Virginia.

Slip op. at 14–15; *see also Universal Music MGB NA LLC v. Quantum Music Works, Inc.*, 769 F. App'x. 445, 446 (9th Cir. Apr. 29, 2019) (infringing authorization of "an advertising campaign which ran throughout the United States" and provision of interactive website conferred jurisdiction); *Arista Records, Inc. v.*

Sakfield Holding Co. S.L., 314 F. Supp. 2d 27, 32-33 (D.D.C. 2004) (offering free downloads prior to charging users conferred jurisdiction where advertising at issue); *VideoEgg, Inc.*, 611 F. Supp. 2d at 360-61 (seeking to, *inter alia*, participate in advertising campaigns targeting users sufficient for jurisdiction); *Cybernet Entm't LLC v. IG Media Inc.*, No. CV 12-01101-PHX-SRB, 2012 WL 12874297, at *6 (D. Ari. Nov. 30, 2012) ("For purposes of personal jurisdiction, the relevant inquiry is whether the third-party advertisements demonstrate that Defendant exploited the United States market for commercial gain.").

The court below should have found jurisdiction under Rule 4(k)(2) because there was nothing "random, fortuitous, or attenuated," *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017) (quoting *Walden*, 134 S. Ct. at 1123), about VNG's purposeful decision to target a highly interactive, commercial website and app at users in the United States who wanted to listen to Lang Van's music (and other, apparently unlicensed music). VNG thereby rendered itself subject to the jurisdiction of the U.S. federal courts.[13]

In sum, in light of Zing MP3's high degree of interactivity, commerciality, and patent targeting of users in the United States, the district court should have found jurisdiction, at a minimum, under Federal Rule 4(k)(2). If widely adopted,

[13] *Walden v. Fiore* is not to the contrary. *See* 134 S.Ct. at 1122–23 (exercise of jurisdiction constitutional when a defendant "deliberately exploits" a state's marketplace).

the district court's erroneous approach, which is at odds with *Mavrix*, *Hydentra*, and the other authorities discussed above, could give non-U.S. copyright infringers free rein to engage in massive piracy, confident in the knowledge that no court exists that will stop the unlawful conduct.

CONCLUSION

Amicus respectfully submits that the Court should reverse the district court's dismissal of Appellant's lawsuit.

Respectfully submitted,

Dated: June 29, 2020

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

I hereby certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the enclosed brief is proportionately spaced, has a typeface of 14-point Times New Roman including footnotes, and contains approximately 5,501 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: June 29, 2020

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CERTIFICATE OF SERVICE

I certify that this **BRIEF OF THE MOTION PICTURE ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL** was timely filed with the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system on June 29. 2020. I further certify that, to my knowledge, all participants in the case are registered CM/ECF users so service will be made on counsel of record for all parties to this case through the Court's CM/ECF system.

Dated: June 29, 2020

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