No. 19-1124

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UMG RECORDINGS, INC., *ET AL.*

Plaintiff–Appellants,

v.

TOFIG KURBANOV, *ET AL.*

Defendant–Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia at Alexandria,
Case No. 1:18-cv-00957

OPENING BRIEF OF PLAINTIFF–APPELLANTS UMG RECORDINGS, INC., ET AL.

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellants make the following disclosures:

Plaintiff-Appellant UMG Recordings, Inc. discloses that Vivendi S.A. is a parent corporation of UMG Recordings, Inc. Plaintiff-Appellant UMG Recordings, Inc. further discloses that Vivendi S.A. owns 10% or more if its stock.

Plaintiff-Appellant Capitol Records, LLC discloses that Vivendi S.A. is a parent corporation of Capitol Records, LLC. Plaintiff-Appellant Capitol Records, LLC further discloses that Vivendi S.A. owns 10% or more if its stock.

Plaintiff-Appellant Warner Bros. Records, Inc. discloses that Warner Music Group Corporation and Access Industries, Inc. are parent corporations of Warner Bros. Records, Inc. Plaintiff-Appellant Warner Bros. Records, Inc. further discloses that there are no publicly held corporations that own 10% or more if its stock.

Plaintiff-Appellant Atlantic Recording Corporation discloses that Warner Music Group Corporation and Access Industries, Inc. are parent corporations of Atlantic Recording Corporation. Plaintiff-Appellant Atlantic Recording Corporation further discloses that there are no publicly held corporations that own 10% or more if its stock.

Plaintiff-Appellant Elektra Entertainment Group, Inc. discloses that Warner Music Group Corporation and Access Industries, Inc. are parent corporations of Elektra Entertainment Group, Inc. Plaintiff-Appellant Elektra Entertainment Group, Inc. further discloses that there are no publicly held corporations that own 10% or more if its stock.

Plaintiff-Appellant Fueled by Ramen LLC discloses that Warner Music Group Corporation and Access Industries, Inc. are parent corporations of Fueled by Ramen LLC. Plaintiff-Appellant Fueled by Ramen LLC further discloses that there are no publicly held corporations that own 10% or more if its stock.

Plaintiff-Appellant Nonesuch Records, Inc. discloses that Warner Music Group Corporation and Access Industries, Inc. are parent corporations of Nonesuch Records, Inc. Plaintiff-Appellant Nonesuch Records, Inc. further discloses that there are no publicly held corporations that own 10% or more if its stock.

Plaintiff-Appellant Sony Music Entertainment discloses that Sony Corporation is a parent corporation of Sony Music Entertainment. Plaintiff-Appellant Sony Music Entertainment further discloses that Sony Corporation owns 10% or more if its stock.

Plaintiff-Appellant Sony Music Entertainment US Latin LLC discloses that Sony Corporation is a parent corporation of Sony Music Entertainment US Latin

LLC. Plaintiff-Appellant Sony Music Entertainment US Latin LLC further discloses that Sony Corporation owns 10% or more if its stock.

Plaintiff-Appellant Arista Records LLC discloses that Sony Corporation is a parent corporation of Arista Records LLC. Plaintiff-Appellant Arista Records LLC further discloses that Sony Corporation owns 10% or more if its stock.

Plaintiff-Appellant LaFace Records LLC discloses that Sony Corporation is a parent corporation of LaFace Records LLC. Plaintiff-Appellant LaFace Records LLC further discloses that Sony Corporation owns 10% or more if its stock.

Plaintiff-Appellant Zomba Recording LLC discloses that Sony Corporation is a parent corporation of Zomba Recording LLC. Plaintiff-Appellant Zomba Recording LLC further discloses that Sony Corporation owns 10% or more if its stock.

TABLE OF CONTENTS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATEMENT OF JURISDICTION 4

STATEMENT OF ISSUES ON APPEAL 4

STATEMENT OF THE CASE 5

I. Factual Background 6

A. Stream-Ripping 6

B. Appellee's websites 7

C. Appellee's contacts with Virginia and the United States 8

1. The number of users and extent of data exchanged 8

2. Geo-targeted advertisements 10

3. Business contacts 11

4. Terms of Use 12

II. Procedural History 13

SUMMARY OF ARGUMENT 15

ARGUMENT 19

I. Standard of Review 19

II. The District Court in Virginia, and Courts in the United States, Can Constitutionally Exercise Jurisdiction over Appellee. 20

A. Appellee has purposefully availed himself of the privilege of doing business in the United States and Virginia. 25

1. Appellee has multiple and sustained contacts with the United States and Virginia. 25

2. The District Court erred in concluding that the Constitution foreclosed suit against appellee in Virginia or, indeed, anywhere in the United States. 39

B. Appellants' claim arises directly out of appellee's contacts with the United States and Virginia. 46

C. The exercise of personal jurisdiction over appellee is constitutionally reasonable. 46

III. The District Court Erred by Denying Appellants Any Opportunity to Conduct Jurisdictional Discovery. 50

TABLE OF AUTHORITIES

CASES

Adams v. Unione Mediterranea Di Sicurta, 364 F.3d 646 (5th Cir. 2004) 23

Alitalia-Linee Aeree Italiane S.p.A. v. Casinoalitalia.Com, 128 F. Supp. 2d 340 (E.D. Va. 2001).....30

ALS Scan, Inc. v. Digital Service Consultants, Inc., 293 F.3d 707 (4th Cir. 2002) 21, 24, 26, 30, 31, 34, 41, 46

Base Metals Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory", 283 F.3d 208 (4th Cir. 2002) 22, 23

be2 LLC v. Ivanov, 642 F.3d 555 (7th Cir. 2011).....29

Benham v. City of Charlotte, 635 F.3d 129 (4th Cir. 2011) 51

Bird v. Parsons, 289 F.3d 865 (6th Cir. 2002) 30, 40

Bright Imperial Ltd. v. RT MediaSolutions, S.R.O., No. 1:11-CV-935, 2012 WL 1831536 (E.D. Va. May 18, 2012) 27, 31

Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017).....25, 46

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).....2, 15, 25

Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc., 334 F.3d 390 (4th Cir. 2003) 19, 20, 26, 29, 30, 50, 51

CFA Institute v. Institute of Chartered Financial Analysts of India, 551 F.3d 285 (4th Cir. 2009) 20, 25, 47, 48

Christian Science Board of Directors v. Nolan, 259 F.3d 209 (4th Cir. 2001) 24, 49

Combs v. Bakker, 886 F.2d 673 (4th Cir. 1989) 19

Consulting Engineers Corp. v. Geometric Ltd., 561 F.3d 273 (4th Cir. 2009) 21, 26

Graduate Management Admission Council v. Raju, 241 F. Supp. 2d 589 (E.D. Va. 2003) 23, 27

GTE New Media Services Inc. v. BellSouth Corp., 199 F.3d 1343 (D.C. Cir. 2000) 20, 52, 53

Hanson v. Denckla, 357 U.S. 235 (1958) 26

Holland America Line Inc. v. Wartsila North America, Inc., 485 F.3d 450 (9th Cir. 2007) 23

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 2, 24

Intercarrier Communications LLC v. WhatsApp Inc., No. 3:12-CV-776, 2013 WL 5230631 (E.D. Va. Sept. 13, 2013) 45

ISI International, Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548 (7th Cir. 2001) 23

Keeton v. Hustler Magazine, Inc. 465 U.S. 770, 773 (1984) 16, 28, 29

Mavrix Photo, Inc. v. Brand Technologies, Inc., 647 F.3d 1218 (9th Cir. 2011) 30, 34, 38

Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) 32, 33, 35

Mwani v. bin Laden, 417 F.3d 1, 11 (D.C. Cir. 2005) 23

Mylan Laboratories, Inc. v. Akzo, N.V., 2 F.3d 56 (4th Cir. 1993) 51

Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883 (6th Cir. 2002) 28

Nintendo of America, Inc. v. Aeropower Co., Ltd., 34 F.3d 246 (4th Cir. 1994) 49

Oldfield v. Pueblo De Bahia Lora, S.A., 558 F.3d 1210 (11th Cir. 2009) 23

Plixer International, Inc. v. Scrutinizer GmbH, 905 F.3d 1 (1st Cir. 2018) 3, 28, 35

Saudi v. Northrop Grumman Corp., 427 F.3d 271 (4th Cir. 2005) 22

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) 49

Spanski Enterprises, Inc. v. Telewizja Polska, S.A., 883 F.3d 904 (D.C. Cir. 2018) 35, 49

Tire Engineering & Distribution, LLC v. Shandong Linglong Rubber Co., Ltd., 682 F.3d 292 (4th Cir. 2012) 20, 47, 48, 49

Touchcom, Inc. v. Bereskin & Parr, 574 F.3d 1403 (Fed. Cir. 2009) 23

Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446 (3d Cir. 2003) 20, 36, 53, 54

Triple Up Ltd. v. YouKu Tudou Inc., No. 17-7033, 2018 WL 4440459 (D.C. Cir. July 17, 2018) 35

uBID, Inc. v. GoDaddy Group, Inc., 623 F.3d 421 (7th Cir. 2010) 36, 40, 44

United States v. Swiss American Bank, Ltd., 191 F.3d 30 (1st Cir. 1999) 23

Universal Leather, LLC v. Koro AR, S.A., 773 F.3d 553 (4th Cir. 2014) 19, 20

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).....3

Zaletel v. Prisma Labs, Inc., 226 F. Supp. 3d 599 (E.D. Va. 2016).....45

Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) 14, 26, 38, 44

STATUTES

17 U.S.C. § 512(c) 12, 36

OTHER AUTHORITIES

Fed. R. Civ. P. 4(k)(1).....21

Fed. R. Civ. P. 4(k)(2).....21, 22

ConcurrencyLabs, *Save Yourself a Lot of Pain (and Money) by Choosing Your AWS Region Wisely*, https://www.concurrencylabs.com/blog/choose-your-aws-region-wisely/ (last visited Mar. 7, 2019) 37

Copyright.gov, *DMCA Designated Agent Directory*, https://www.copyright.gov/dmca-directory/ (last visited Mar. 7, 2019) 36-37

INTRODUCTION

FLVTO.biz and 2conv.com are music piracy websites owned and operated by appellee Tofig Kurbanov that engage in, and enable, illegal copyright infringement on a massive scale. Those websites provide users with an easy and virtually instantaneous means of isolating the audio portion of a music video from a site such as YouTube, and converting the audio into a file that users can download—a process known as "stream-ripping." Stream-ripping allows both the websites and their users to access copyrighted sound recordings without permission and without compensating the copyright owners. Unsurprisingly, the websites are wildly popular with users in Virginia and across the United States. In 2018, alone, the websites had almost 32 million United States users who, collectively, conducted over 96 million stream-ripping sessions and downloaded hundreds of millions of songs from defendants' servers to their own personal devices in the United States. That makes the United States one of appellee's most important global markets, ranked third both by number of users and number of sessions.

This massive U.S. customer base is no surprise to appellee—he is well aware of the location of his users and the extent of their piracy. But rather than using that information to block or otherwise limit the access of U.S. users, appellee instead operates his websites to profit handsomely from that U.S. customer base. Like many other successful online ventures—both legitimate and illegitimate—appellee's

websites and their advertisers track the location of their users, which in turn allows the advertisers on appellee's websites to target viewers in (for example) a specific country or state, tailoring the content of advertisements to maximize their relevance and appeal. The websites thus can, and do, earn substantial revenues through advertising targeted specifically to tens of millions of annual users in the United States.

Seeking to restrict this massive infringement, U.S. record companies that collectively own the copyrights to the vast majority of sound recordings licensed and sold in the United States sued Kurbanov, a Russian national, in the Eastern District of Virginia.[1] Kurbanov contended that the exercise of personal jurisdiction, not just in Virginia but anywhere in the United States, would "offend traditional notions of fair play and substantial justice," *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks and citations omitted), that are designed to ensure that a defendant is not "haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated,' contacts." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citation omitted). Remarkably, the district court agreed, concluding that appellee could not "reasonably anticipate being haled into court" in

[1] Appellants also filed suit against 10 Doe defendants whom the record companies allege, on information and belief, are involved with the operation of the websites. J.A. 3, 15. Because these defendants have not appeared and have yet to be identified, appellants will refer solely to Appellee Kurbanov for simplicity.

Virginia or, indeed, anywhere in the United States. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

That was error. There is nothing random, fortuitous, or attenuated about appellee's contacts with Virginia or with the United States. And appellee cannot seriously contend that he lacks "fair warning" that he might be sued in U.S. courts under U.S. law when he violates U.S. copyrights by transmitting hundreds of millions of infringing files to U.S. devices on U.S. soil, and then profits from ads targeted to his U.S. customer base. Appellee has "used [his] website to engage in sizeable and continuing commerce with United States customers," and as a result "should not be surprised at United States-based litigation." *Plixer Int'l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 8 (1st Cir. 2018). There is no other case holding that it violates due process to assert specific jurisdiction over a defendant with such deep contacts in what he knows to be his third-biggest market world-wide, and there is no case holding unconstitutional the assertion of personal jurisdiction over a defendant with contacts that are so numerous and substantial.

For good reason. The result of the district court's ruling is that the *only* court in which U.S. record companies can bring suit to challenge millions of instances of U.S.-based online piracy is in Rostov-on-Don, Russia, where Kurbanov purportedly resides. The district court's decision thus gives carte blanche to Internet pirates to set up shop outside of the United States, safe in the knowledge that they are

effectively immune from the reach of U.S. courts seeking to vindicate the rights of U.S. plaintiffs for violations of U.S. copyright law, even as they cater to U.S. users. The law of personal jurisdiction is not intended to support such a result. *International Shoe* and its progeny are intended to prevent a state from overreaching by asserting jurisdiction over entities with little or no connection to the State; they were never intended to insulate a massive, unlawful, on-line business from liability anywhere in the United States for harms arising out of its commercial transactions with tens of millions of U.S. users. That is not fair play and substantial justice, but rather lawlessness and injustice.

The judgment of the district court should be reversed.

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291. The district court exercised jurisdiction over the underlying copyright dispute pursuant to 28 U.S.C. §§ 1331 and 1338(a). J.A. 12. On January 22, 2019, the district court granted Kurbanov's motion to dismiss for lack of personal jurisdiction—a final and appealable order—and entered final judgment the same day. J.A. 395-96. Appellants timely filed their Notice of Appeal on January 29, 2019. J.A. 397.

STATEMENT OF ISSUES ON APPEAL

1. Whether the district court erred in finding it lacked specific personal jurisdiction over a foreign-based defendant whose websites not only infringe U.S.

copyrights, but also enable massive infringement by U.S. users, transmit hundreds of millions of files onto U.S. devices, and generate substantial revenues from advertising that targets U.S. users.

2. Whether the district court erred by refusing to grant appellants an opportunity to conduct jurisdictional discovery.

STATEMENT OF THE CASE

Appellants are twelve record companies that produce, distribute, and license 85% of all legitimate commercial sound recordings in the United States. *See* J.A. 14, 115. Appellee is a Russian national who owns and operates two of the most notorious music piracy websites in the world, FLVTO.biz and 2conv.com ("FLVTO" and "2conv" or, together, the "websites"). J.A. 15, 67-68. Through these websites, appellee offers users a "stream-ripping" service through which audio tracks are extracted from videos streamed over the Internet, converted into downloadable files (such as mp3s), and then transmitted to users. In light of the enormous harms caused by appellee's stream-ripping services, appellants sued appellee under the federal Copyright Act in the U.S. District Court for the Eastern District of Virginia.

I. Factual Background

A. Stream-Ripping

Appellants license the rights to perform their copyrighted works to Internet-based streaming services, which allow users to listen to sound recordings online but do not give users access to a permanent digital copy of the works. J.A. 10, 14-15. These services have different business models—some based on advertising and others on paid subscriptions—but all have in common that the licensee pays appellants for the right to use their works. Appellants have reached licensing agreements with popular streaming services such as Apple Music, Pandora, Spotify, and, most relevant here, YouTube (www.youtube.com), an online video-streaming service that is also the largest on-demand music service in the world. J.A. 15.

YouTube and other streaming services employ sophisticated technology to prevent users from downloading or copying the videos available on its website. But Internet pirates, including appellee, have found ways to illegally circumvent these safeguards. J.A. 16-24. And, once the control measures are circumvented, pirates can gain access to the audiovisual files, make unauthorized copies of the audio portions of those files, and then distribute those copies over the Internet. This process of capturing the music portion of digital videos streamed over the Internet is known as "stream-ripping." J.A. 9, 17.

Stream-ripping services offer permanent, downloadable, copies of songs that users could otherwise only stream on websites like Spotify and YouTube, and they offer users a free alternative to paying for physical copies of sound recordings or digital downloads available on services such as iTunes. J.A. 17. For that reason, stream-ripping services cause record companies to lose substantial revenues. J.A. 17-18. The scale and scope of the problem is astounding. Stream-ripping has quickly become the most popular form of music piracy in the world. J.A. 9, 17. Nearly *half* of all Internet users between the ages of 16 and 24 regularly use stream-ripping to acquire music, and stream-ripping services illegally copy and distribute tens of millions—or even hundreds of millions—of tracks every month. *Id.*

B. Appellee's websites

FLVTO and 2conv are two of the most popular stream-ripping websites in the world; indeed, they are among the most popular websites of any kind on the Internet. J.A. 10. For the three-month period running from July to September 2018, FLVTO and 2conv were (respectively) the 264th and 829th most popular out of the hundreds of millions of websites on the Internet. J.A. 144-56.

The reason for the websites' popularity is not hard to understand. Like other stream-ripping services, appellee's websites make online piracy available at the click of a button. J.A. 18-23, 76. As appellee himself boasts, in English, the websites

"make[] converting streaming videos to MP3 online easier and faster than ever." J.A. 76.

To begin, a user enters a publicly available web address for a YouTube video at the FLVTO homepage or on the FLVTO mobile app. J.A. 18-23, 76. The user then chooses the desired file format (*e.g.*, mp3, mp4, or avi) and clicks "Convert." *Id.* In a matter of seconds, FLVTO reaches out to YouTube's servers, circumvents YouTube's technological safeguards, and illegally copies the file. It then converts the audio track into the type of file selected by the user. J.A. 21-22, 76. The result is a permanent and unauthorized copy of the sound recording found in the video. J.A. 22. FLVTO then presents the user with a "download" link, and, when the user clicks on that download link, FLVTO transmits the resulting copy directly from its servers to the user's phone or home computer. J.A. 21-22, 76. 2conv uses the same basic process for its music piracy. J.A. 20, 22.

C. Appellee's contacts with Virginia and the United States

Appellee's websites operate on a massive scale in Virginia and the United States as a whole, and appellee has taken steps specifically to exploit these markets.

1. The number of users and extent of data exchanged

According to appellee's own data, FLVTO had 26.3 million users in the United States between October 2017 and September 2018. J.A. 87. That includes 448,426 users in Virginia. J.A. 88. 2conv had 5.37 million users in the United States

and 94,342 users in Virginia during the same period. J.A. 78-79. Collectively, appellee's websites had nearly 32 million users in the United States (nearly 10% of the country's population) and more than half a million users in Virginia (more than 6% of the commonwealth's population) in the past year alone. J.A. 78-79, 87-88. Between October 2017 and September 2018, the United States was the third largest market for appellee's websites in terms of total number of users and total number of visits. *See* J.A. 78, 87. Within the United States, Virginia was FLVTO's 13th largest market, and 2conv's 11th largest market. J.A. 78-79, 87-88.

The websites' users visit frequently, resulting in a staggering amount of data exchanged between the websites and users in the United States and Virginia. Based on appellee's own data, FLVTO attracted 84.1 million visits from its users in the United States between October 2017 and September 2018, including 1.17 million visits from users located in Virginia. J.A. 87-88. Over the same period, 2conv attracted 12.1 million visits from users in the United States and 187,486 visits from users in Virginia. J.A. 78-79. According to SimilarWeb estimates, between July 2018 and September 2018, the average FLVTO user spent six minutes and fifty-two seconds on the FLVTO website, visiting over eight pages each visit. J.A. 149. Given that the process for ripping an individual song takes only seconds, the time users actually spent on FLVTO was sufficient to download multiple audio files. *See* J.A. 18-20. 2conv users displayed similar behavior. J.A. 154.

Assuming conservatively that the average user downloaded only one file per visit, appellee's websites sent more than *96 million* files into the United States in the past year alone. Likewise, assuming that Virginia users downloaded one file per visit, the websites sent more than 1.35 million files into the Commonwealth during this same period. *See* J.A. 78-79, 87-88, 149, 154. Appellants have alleged that all or substantially all of these file transfers involve infringing copies of copyrighted sound recordings. J.A. 10, 17, 23-24. As is evident from the granular location-based data, appellee has full knowledge of where his users are located. J.A. 78-94.

2. Geo-targeted advertisements

Although users do not pay money for appellee's stream-ripping services, FLVTO and 2conv are very much commercial enterprises. Like many websites, FLVTO and 2conv derive their revenue from the advertisements they host. J.A. 11, 25, 41, 70. Based on their investigation, appellants alleged the websites featured advertisements that targeted users based on the users' specific location, including the United States and Virginia. J.A. 11. This form of advertising, known as "geo-targeting," is intended to maximize the number of visitors who click on an advertisement appearing on appellee's websites (the "click-through rate"), *id.*, the theory being that Virginians (for example) are more likely to click on ads that are specifically targeted to a Virginia audience. The higher the click-through rate, the

more valuable the advertising space on appellee's websites and thus the greater appellee's revenues. *Id.*

Appellee conceded that third-party advertisers may be targeting specific advertisements to users in specific locations. J.A. 70. Although appellee insists that he has no role in *selecting* the particular advertisements on his websites, the record indicates that appellee plays an instrumental role in collecting the location data needed for geo-targeting. J.A. 70, 176, 178. In the privacy policies that appear on FLVTO and 2conv, appellee represents to users that he may collect "your IP address, country of origin and other non-personal information about your computer or device" and that the information may be used "*to provide targeted advertising based on your country of origin and other personal information*." J.A. 176, 178 (emphasis added). In other words, the privacy policies indicate that appellee himself collects location data about his users and then passes that information on to advertisers. J.A. 11, 176, 178. To the extent those advertisers place geo-targeted advertisements on the websites, the underlying location data comes from appellee. J.A. 176, 178.

3. Business contacts

In addition to knowingly transmitting millions of files into the United States and Virginia and facilitating geo-targeted advertising to the millions of Americans and Virginians downloading these files, appellee has numerous other contacts—including with the U.S. government—to facilitate his online piracy operations.

First, appellee has registered a DMCA agent with the U.S. Copyright Office. *See* J.A. 164, 172. The sole purpose for such a registration is to seek to qualify for the DMCA's safe harbor defense if a defendant is sued for copyright infringement under U.S. law in U.S. courts. 17 U.S.C. § 512(c).

Second, appellee does business with at least one American advertising broker to sell space on his websites for targeted advertisements—Advertise.com, based in Sherman Oaks, California. J.A. 118, 151, 154, 183, 185.

Third, appellee registered the domain names "FLVTO" and "2conv" through GoDaddy.com—an American domain-name registrar. J.A. 187. Appellee also selected top-level domains (the suffixes ".com" and ".biz") that are administered by companies headquartered in Virginia. *Id.*

Fourth, until recently, appellee contracted with Amazon Web Services to host his websites on front-end servers in the United States. J.A. 73, 118, 132-33. For a significant period of time, including within the three-year limitations period that applies to the record companies' claims, those front-end servers were located in Ashburn, Virginia. J.A. 12, 73, 118, 132-33.

4. Terms of Use

Finally, although users do not have to register to use appellee's websites, they must agree to the websites' Terms of Use before they can download any audio files. J.A. 19, 20, 76, 158, 168. The websites explain that the Terms of Use "constitute a

contractual agreement between you [the user] and us" and that they give appellee "the right to take appropriate action against any user . . . including civil, criminal, and injunctive redress" against the user. J.A. 158, 168. Users further agree that "[f]or any claim brought by us against you, you agree to submit and consent to personal jurisdiction in and the venue of the courts in the Russian Federation *and anywhere else you can be found*." J.A. 166, 174. In other words, appellee reserves the right to file suit against his users in Virginia courts and in the courts of the United States.

II. Procedural History

On August 3, 2018, appellants filed suit in the United States District Court for the Eastern District of Virginia, alleging five separate violations of the Copyright Act. J.A. 4, 8, 25-32. In their complaint, appellants alleged the district court had specific jurisdiction under both Federal Rule of Civil Procedure 4(k)(1) because of appellee's contacts with Virginia and, in the alternative, under Rule 4(k)(2), because of appellee's contacts with the United States as a whole. *See* J.A. 12. Appellee appeared through counsel and filed a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2). J.A. 5, 35-36, 38-39. In the alternative, appellee asked the district court to transfer the case to the Central District of California. J.A. 39, 59-64.

The district court (Hilton, J.) granted appellee's motion to dismiss and ignored (and thus denied) appellants' alternative request for jurisdictional discovery. J.A. 135, 382-96. Purporting to apply the framework originally set forth in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), the district court held the websites were "semi-interactive" rather than "highly interactive" because there was no "ongoing, developed relationship between users and the Websites." J.A. 392. The district court reasoned "there is no evidence that users exchanged multiple files with the Websites." *Id.* The district court also found "the number of users cannot make a website highly interactive, there must instead be numerous transactions between the site and a user evidencing an ongoing relationship." *Id.*

Next, the district court found that appellee and his users did not have a "commercial relationship." J.A. 393. The district court recognized appellants' allegation that appellee used tracking technology to identify the specific location of all his users and that this information was available to advertisers for the purposes of geo-targeted advertising. The district court nevertheless found the existence of advertising irrelevant: "The revenue from the advertisements cannot be the basis for finding a commercial relationship with the users because they are separate interactions and the due process analysis must only look at the acts from which the cause of action arises, here, the alleged aid in music piracy." *Id.*

Finally, the district court held that appellee "took no action through the Websites that would demonstrate purposeful targeting of Virginia or the United States." J.A. 393. The court observed that users initiate contact with the websites and thus deemed this use "unilateral in nature and as such cannot be the basis for jurisdiction without more." J.A. 393. As the district court put it, "[u]sers may access the websites from anywhere on the globe and they select their location when they use the Websites . . . Even if the Websites' servers knew exactly where the users were located, any interaction would still be in the unilateral control of the users as they initiate the contacts." J.A. 393-94.

Appellants filed this timely appeal. J.A. 397-98.

SUMMARY OF ARGUMENT

Appellants have established a prima facie case that the district court had specific personal jurisdiction over appellee under Rule 4(k)(1) or, in the alternative, 4(k)(2). Appellee's contacts with Virginia and the United States simply cannot be characterized as "random, fortuitous, or attenuated." To the contrary, appellee has more than purposefully availed himself of the privilege of conducting business in these fora, and thus had "fair warning" that his activities could "subject [him] to the jurisdiction of a foreign sovereign." *Burger King*, 471 U.S. at 472. In concluding that appellee could not "reasonably anticipate being haled into court" in Virginia or

the United States, the district court misapplied basic rules regarding the scope of personal jurisdiction and reached a result that is as erroneous as it is unjust.

First, in determining whether a foreign defendant has "purposefully availed" itself of the privilege of doing business within a jurisdiction, courts look to the quantity of the defendant's contacts with that jurisdiction. The extent of appellee's contacts is extraordinary: In 2018, alone, the websites had nearly 32 million users in the United States conducting 96.2 million sessions, and 542,768 users in Virginia conducting 1.4 million sessions. Absolute numbers aside, the United States is appellee's third biggest market globally, a fact well known to appellee as is evident from the exhibits *he* entered into the record in the district court. As the Supreme Court recognized in *Keeton*, there is nothing unfair or surprising about requiring a defendant to defend himself in a jurisdiction in which he knows he has thousands (as in *Keeton*) or millions (as here) of contacts. *Keeton v. Hustler Magazine, Inc.* 465 U.S. 770, 773-74 (1984). Other courts have routinely found personal jurisdiction based on far fewer contacts.

Second, not only does appellee have millions of users in the United States and hundreds of thousands in Virginia, but those users' contacts with the websites are repeated and interactive. Far from a "passive" website that simply makes information generally available on the Internet, the websites here engage in a back-and-forth with users resulting in the transmission of substantial amounts of computer

files and data from defendant's servers to users' personal devices. Moreover, as a condition of engaging in a stream-ripping session, users must agree to what the websites term "a contractual agreement," only further demonstrating the substantial nature of the websites' contacts with users in the United States and Virginia.

Third, appellee earns substantial revenue precisely because of his targeting of the United States and Virginia. The fact that the websites are "free" to users is irrelevant. By visiting the websites tens of millions of times, users form an important dedicated audience from whom appellee profits through the sale of geo-targeted advertisements. As his own terms and conditions make clear, appellee requires users to agree that he can collect information on their location for the purpose of "provid[ing] targeted advertising." And as appellants have alleged, he does precisely that—facilitating the targeting of specific ads to specific geographies. Equally revealing is what appellee does *not* do: use the information he has regarding the location of his users to block users in the United States or Virginia.

Fourth, beyond his sustained contacts with his U.S.- and Virginia-based users, appellee has a host of additional contacts with these jurisdictions. Appellee has, for example, registered a DMCA agent with the U.S. Copyright Office—the only purpose of which is to seek to qualify for the DMCA's safe harbor defense to claims of copyright infringement in U.S. courts. In addition, appellee has used a U.S.-based advertising firm, U.S.-based domain and top-level domain registers and, until

recently, U.S.-based servers. Moreover, as a condition of using the websites, appellee requires users to consent to jurisdiction "anywhere else you can be found," *i.e.*, the courts of the United States for almost 32 million Americans. These actions provide only further proof, if it were needed, that appellee cannot claim surprise at being haled into U.S. or Virginia courts.

Because the district court erroneously determined that appellee had not purposefully availed himself of the privilege of conducting business in the United States or Virginia, the court did not address the remaining two prongs of the test for personal jurisdiction. These are easily satisfied. Appellants' claims arise from activities directed at the United States and Virginia; namely, the massive violations of the Copyright Act in these fora facilitated by the websites. And, exercise of jurisdiction here is reasonable. Appellee has not only conducted a highly successful business in the United States and Virginia, but has also secured able counsel who have defended him with success to date. Virginia and the United States have a strong interest in the subject matter of this litigation and in preventing foreign pirates from violating U.S. copyrights with impunity within their borders. And, appellants have a strong interest in resolving this dispute in the United States or Virginia given that this case involves the violation of U.S. copyrights, by U.S. users, on U.S. soil. It simply cannot be that the only court in which appellants can vindicate their U.S. copyright claims is located in Rostov-on-Don, Russia.

Finally, should this Court have any doubt that personal jurisdiction is properly exercised over appellee, it should remand the case for the district court to conduct jurisdictional discovery. The record contains a wealth of information regarding appellee's contacts with the United States and Virginia. This is certainly enough to make out a prima facie case of personal jurisdiction and thus provides a sufficient basis upon which to order discovery.

The judgment of the district court should be reversed.

ARGUMENT

I. Standard of Review

On a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), the plaintiff generally bears the burden to establish the district court's jurisdiction over the defendant by a preponderance of the evidence. *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989). A plaintiff makes a prima facie showing of personal jurisdiction by presenting facts that, if true, would support jurisdiction over the defendant. *Universal Leather, LLC v. Koro AR, S.A.*, 773 F.3d 553, 561 (4th Cir. 2014). The prima facie standard is a "tolerant" one, under which a court "must construe all relevant pleading allegations in the light most favorable to the plaintiff, assume credibility, and draw the most favorable inferences for the existence of jurisdiction." *Combs*, 886 F.2d at 676-77; *see also Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 396 (4th Cir. 2003). The court must also

construe all disputed factual issues in the plaintiff's favor. *See, e.g.*, *Universal Leather*, 773 F.3d at 560.

This Court reviews a district court's determination that it lacked personal jurisdiction *de novo*. *Tire Eng'g & Distribution, LLC v. Shandong Linglong Rubber Co., Ltd.*, 682 F.3d 292, 300 (4th Cir. 2012); *CFA Inst. v. Inst. of Chartered Fin. Analysts of India*, 551 F.3d 285, 292 (4th Cir. 2009).

This Court reviews a district court's decision to deny plaintiffs an opportunity to conduct jurisdictional discovery for an abuse of discretion. *See, e.g.*, *Carefirst*, 334 F.3d at 402-03. When a plaintiff presents factual allegations that suggest the existence of discovery with reasonable particularity and shows that jurisdictional discovery would supplement its allegations, a district court abuses its discretion by denying the plaintiff an opportunity to conduct any discovery at all. *See Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003); *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1351 (D.C. Cir. 2000).

II. The District Court in Virginia, and Courts in the United States, Can Constitutionally Exercise Jurisdiction over Appellee.

The district court found it lacked personal jurisdiction over appellee because appellee did not "purposefully avail[] [him]self of the privilege of conducting activities in" the United States or Virginia. J.A. 388. That ruling allows two foreign websites to profit by targeting ads at U.S. users who use the websites to infringe U.S. copyrights millions of times by transmitting copyrighted materials onto U.S. soil,

while requiring any copyright lawsuit to be brought not in the websites' third-largest market but instead in appellee's hometown of Rostov-on-Don, Russia. This decision finds no support in logic or in law.

Appellants asserted jurisdiction under Rule 4(k)(1) and, in the alternative, under Rule 4(k)(2). *See* Fed. R. Civ. P. 4(k)(1), (2). Rule 4(k)(1) provides that "a federal court may exercise personal jurisdiction over a defendant in the manner provided by state law." *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 710 (4th Cir. 2002). Thus, a court may exercise jurisdiction over a foreign defendant "if such jurisdiction is authorized by the long-arm statute of the state in which it sits and the application of the long-arm statute is consistent with the due process clause of the Fourteenth Amendment." *Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 277 (4th Cir. 2009). Under Virginia's long-arm statute, personal jurisdiction is proper "if the asserted cause of action 'aris[es] from' the non-resident defendant's '[t]ransacting business' in Virginia." *Id.* (quoting Va. Code Ann. § 8.01-328.1(A)(1)) (alterations in original). "Because Virginia's long-arm statute is intended to extend personal jurisdiction to the extent permissible under the due process clause," the statutory inquiry "merges" with the constitutional question of whether the exercise of personal jurisdiction over a foreign defendant comports with due process. *Id*. (citing *Young v. New Haven Advocate*, 315 F.3d 256, 261 (4th Cir. 2002)).

Rule 4(k)(2) is an important complement to Rule 4(k)(1). It is "in essence a federal long-arm statute" that closes a jurisdictional loophole that had effectively rendered immune from suit in the United States defendants who had sufficient contacts with the United States as a whole, but not with any one State. *Saudi v. Northrop Grumman Corp.*, 427 F.3d 271, 275 (4th Cir. 2005). To invoke jurisdiction under Rule 4(k)(2), a plaintiff must show (1) that its claim "arises under federal law;" (2) that the defendant is "not subject to the jurisdiction in any state's courts of general jurisdiction;" and (3) that the Court's exercise of jurisdiction is "consistent with the Constitution and laws of the United States." Fed. R. Civ. P. 4(k)(2); *see also Base Metals Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 215 (4th Cir. 2002).

The first two factors are easily met here. As to the first, appellee does not dispute that appellants' claims, brought under the federal Copyright Act, arise under federal law. *See* J.A. 25-32. As to the second, appellants have acknowledged that appellee's contacts with every state in the country "are essentially the same as his contacts with Virginia," and thus if there is no jurisdiction under Rule 4(k)(1) in Virginia, there would be no jurisdiction in any other State. J.A. 130.[2] Moreover,

[2] This Court has held that a plaintiff may not proceed under Rule 4(k)(2) when the plaintiff is both asserting jurisdiction over the defendant in another state and claiming in this Court that no other court has jurisdiction. *See Base Metals*, 283 F.3d

appellee has plainly averred that he is not subject to jurisdiction in any state in the country. *See* J.A. 59 ("Mr. Kurbanov does not believe that personal jurisdiction can be exercised over him in either Virginia or the United States as a whole consistent with the Due Process requirements of the Constitution."). The second factor of Rule 4(k)(2) is thus satisfied.[3] Like the Rule 4(k)(1) inquiry, therefore, the Rule (4)(k)(2) inquiry merges with the due process analysis.

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at 215-16; *Graduate Mgmt. Admission Council v. Raju*, 241 F. Supp. 2d 589, 599-600 (E.D. Va. 2003) ("*GMAC*"). That is not what appellants are doing here, as this is the only case in the United States that appellants have pending against appellee.

[3] There is a split among the Circuits as to the proper framework for deciding that the defendant is "not subject to the jurisdiction of the courts of general jurisdiction of any state" as Rule 4(k)(2) requires. In the majority of Circuits, the burden is on the defendant: "A defendant who wants to preclude use of Rule 4(k)(2) has only to name some other state in which the suit could proceed." *ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001); *see also Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1218 n. 22 (11th Cir. 2009); *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 461 (9th Cir. 2007); *Mwani v. bin Laden*, 417 F.3d 1, 11 (D.C. Cir. 2005); *Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 651 (5th Cir. 2004); *Touchcom, Inc. v. Bereskin & Parr*, 574 F.3d 1403, 1414 (Fed. Cir. 2009). In the First Circuit, by contrast, the plaintiff must "certify" that "the defendant is not subject to suit in the courts of general jurisdiction of any state," and then the burden then shifts to the defendant to show "either that one or more states exist in which it would be subject to suit or that its contacts with the United States are constitutionally insufficient." *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 41 (1st Cir. 1999). Appellants believe that the majority's approach is the correct one. However, that split is not implicated here because the back-and-forth between plaintiff and defendant described in the text satisfies even the First Circuit's more defendant-friendly approach.

To meet the constitutional due process requirements for personal jurisdiction, whether under Rule 4(k)(1) or Rule 4(k)(2), a defendant must have sufficient "minimum contacts" with the forum jurisdiction such that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316 (internal quotation marks omitted). Under Rule 4(k)(1), the inquiry focuses on the contacts with the relevant State—here, Virginia; under Rule 4(k)(2) the inquiry focuses on contacts with the United States as a whole.

This Court has distilled the constitutional "minimum contacts" test for specific jurisdiction into a three-part inquiry.[4] *First*, the Court assesses "the extent to which the defendant purposefully availed itself of the privilege of conducting activities in the State." *ALS Scan*, 293 F.3d at 712 (alterations omitted). *Second*, it determines whether "the plaintiffs' claims arise out of those activities directed at the State." *Id.* And, *third*, it requires that the exercise of jurisdiction be "constitutionally reasonable." *Id.*; *see also Christian Sci. Bd. of Dirs. v. Nolan*, 259 F.3d 209, 215 (4th Cir. 2001).

The constitutional test for jurisdiction under Rule 4(k)(1) and Rule 4(k)(2) is largely the same, but the test under Rule 4(k)(2) is more forgiving in one important sense. When deciding under Rule 4(k)(1) whether personal jurisdiction is

[4] As the district court observed, appellants have not argued that appellee's contacts with the state are sufficient to create general jurisdiction. *See* J.A. 389.

appropriate, federalism concerns may affect the due process analysis. *See Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017) ("[T]he Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." (quoting *World-Wide Volkswagen*, 444 U.S. at 294)). Those federalism concerns are entirely absent, however, when the question is whether personal jurisdiction exists in the United States as a whole, and the alternative to finding jurisdiction is that the defendant cannot be held accountable for his wrongdoing in any court in the Nation. In any event, whether the forum is Virginia or the United States, nothing in the Constitution bars the exercise of jurisdiction here.

A. Appellee has purposefully availed himself of the privilege of doing business in the United States and Virginia.

1. Appellee has multiple and sustained contacts with the United States and Virginia.

The "purposeful availment" inquiry is intended to prevent a defendant being "haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts." *Burger King*, 471 U.S. at 475 (internal quotation marks and citations omitted). The central question is whether the defendant has "fair warning that a particular activity may subject [him] to the jurisdiction of a foreign sovereign," *CFA Inst.*, 551 F.3d at 293 (quoting *Burger King*, 471 U.S. at 472), or whether instead the defendant should be surprised at being required to "defend himself in a forum where

he should not have anticipated being sued," *Consulting Eng'rs*, 561 F.3d at 277 (citing *World-Wide Volkswagen*, 444 U.S. at 297).

Recognizing that "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase," *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958), this Court and others have adapted traditional notions of personal jurisdiction to situations in which a defendant's contacts with a forum are in the form of electronic activity directed via the Internet. To determine jurisdiction, this Court in *ALS Scan* "adopt[ed] and adapt[ed]" the framework set forth in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), which situates websites along a spectrum marked by the guideposts "highly interactive," "semi-interactive," or "passive." In so doing, this Court recognized that the governing inquiry is a flexible one, premised not on rigid categorization, but instead on a careful and holistic inquiry into the "nature and quality of the commercial activity that an entity conducts over the Internet." *ALS Scan*, 293 F.3d at 713 (quoting *Zippo*, 952 F. Supp. at 1124). As this Court summarized in *ALS Scan*:

> [A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts.

293 F.3d at 714; *see also Carefirst*, 334 F.3d at 399.

Consistent with this framework, district courts within the Circuit (like courts elsewhere applying the *Zippo* analysis) have sought to determine the "manifest intent" of a website operator by examining a variety of factors, including the quantity of contacts a website has with a forum, the quality and nature of those contacts, and the overarching focus (commercial and otherwise) of a website's activities. *See GMAC*, 241 F. Supp. 2d at 598; *Bright Imperial Ltd. v. RT MediaSolutions, S.R.O.*, No. 1:11-cv-935, 2012 WL 1831536 at *6-7 (E.D. Va. May 18, 2012). Applying this framework, and comparing appellee's activities in the United States and Virginia to those of other defendants in cases concerning Internet jurisdiction, the district court's error becomes plain.

First, in 2018 alone, appellee's websites had nearly 32 million users in the United States, 542,768 of whom were in Virginia. Those U.S. users engaged in 96.2 million sessions on the websites, 1.4 million of which were in Virginia. That usage rendered the U.S. the websites' third-biggest market by number of users and number of sessions.

To be sure, the number of users is not, in and of itself, determinative of the jurisdictional inquiry. But the fact that the United States is appellee's third-biggest market and that the websites have tens of millions of U.S. users conducting almost a hundred million sessions in a single year—all of which is well known to appellee—makes appellee's claim of surprise at being sued in the U.S. hard to take seriously.

Uniform case law makes that clear. In *Keeton*, for example, the Supreme Court held that regular monthly sales of thousands of magazines in New Hampshire sufficed to render a nationwide magazine subject to specific jurisdiction in that state. 465 U.S. at 773-74. As the Court explained, "[t]here is no unfairness in calling [a defendant] to answer for the contents of [its national] publication wherever a substantial number of copies are regularly sold and distributed." *Id.* at 781. In *Neogen Corp. v. Neo Gen Screening, Inc.*, the Sixth Circuit held that Michigan courts could exercise jurisdiction over a Pennsylvania diagnostic testing business that had done business with 14 customers in Michigan. 282 F.3d 883, 891-92 (6th Cir. 2002). The Sixth Circuit reasoned that even when the contacts represented "an insignificant percentage of [defendant's] overall business," jurisdiction was appropriate because "the *absolute amount of business conducted* by [defendant] in Michigan represents something more than 'random, fortuitous, or attenuated contacts' with the state." *Id.* (quoting *Burger King*, 471 U.S. at 475) (emphasis added).

More recently, in *Plixer*, the First Circuit held that courts in Maine could exercise jurisdiction over a German website that sold its software analysis services to 156 residents of the United States. 905 F.3d at 4-5. Citing the Supreme Court's decision in *Keeton*, the First Circuit reasoned that the "regular flow or regular course of sales" in the United States showed that the defendant could have "reasonably anticipated" the exercise of specific jurisdiction in the United States. *Id.* at 10-11.

By contrast, in *Carefirst*, this Court held that Maryland courts could not exercise jurisdiction over an Illinois non-profit, in part, because the organization had received only 0.174% of its donations from Marylanders and exactly *one* donation from Maryland through its website—a donation which was made by the plaintiff's own lawyer. 334 F.3d at 395, 401; *see also be2 LLC v. Ivanov*, 642 F.3d 555, 558-59 (7th Cir. 2011) (finding no purposeful exploitation of the Illinois market where "just 20 persons who listed Illinois addresses had at some point created free dating profiles" on the website at issue). All of these numbers pale in comparison to the millions of knowing transactions appellee has entered into with residents of the United States and Virginia.

Because appellee cannot deny the almost hundred million sessions by U.S. users on his websites, he attempts to downplay the significance of these figures by noting that his online piracy venture is globally popular—available in over 200 countries worldwide—and that the U.S. is "only" his third-biggest market with the majority of the websites users and sessions coming from the rest of the world. *See* J.A. 42. Appellee argues in essence that because his websites are available and popular everywhere he can be sued nowhere (except Rostov-on-Don). Unsurprisingly, no court has accepted this proposition, and multiple courts have explicitly rejected it. *See Keeton*, 465 U.S. at 781 (holding that a publisher of "a national publication aimed at a nationwide audience" must reasonably anticipate

being haled into court "wherever a substantial number of copies are regularly sold and distributed" to answer for its contents); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1231 (9th Cir. 2011) ("[A] website with national viewership and scope appeals to, and profits from, an audience in a particular state, the site's operators can be said to have 'expressly aimed' at that state.").

Second, the nature of users' millions of contacts with the websites confirms that the exercise of jurisdiction is appropriate here. If a website passively "makes information available" on the Internet, that alone is generally not a basis for jurisdiction. *Carefirst*, 334 F.3d at 399; *see also ALS Scan*, 293 F.3d at 714 (finding no jurisdiction over a Georgia-based Internet service provider whose "only *direct* contact . . . with Maryland was through the general publication of its website on the Internet"). By contrast, if a defendant "enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper." *ALS Scan*, 293 F.3d at 713-14 (quoting *Zippo*, 952 F. Supp. at 1124); *see also Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002) (finding website through which users could register domain names a sufficient basis for jurisdiction); *Alitalia-Linee Aeree Italiane S.p.A. v. Casinoalitalia.Com*, 128 F. Supp. 2d 340, 350 (E.D. Va. 2001).

Here, the websites are anything but passive. Users come to the site not just to access information, but to accomplish the "transmission of computer files over the

Internet." *ALS Scan*, 293 F.3d at 713. As alleged in the complaint, a user enters a YouTube (or other) URL into the websites' input bars, and the websites then "extract[] the audio track from the YouTube video, convert[] it to an audio file, cop[y] the file to its servers . . . [and then] distribute[] the audio file directly from Defendants' servers to the user's computer." J.A. 21-22.

While on the site, users often engage in repeated transactions. They view multiple pages and download multiple files in a visit. Users also tend to visit the site over and again. *See, e.g.*, J.A. 149, 154 (noting that there were *three times* as many U.S.-based sessions on the websites as there were U.S. users.).

Those visits, moreover, are the subject of a formal legal relationship: The websites *require* that prior to engaging in a stream-ripping session, users assent to "a contractual agreement between you [the user] and us [the websites]" setting forth the respective rights and obligations of websites and its users. *See Bright Imperial*, 2012 WL 1831536, at *6 (finding jurisdiction over a foreign defendant in a situation in which users were "required to agree to Terms and Conditions and purchase coins in order to view content on Defendants' website").

The exchange of data between appellee's websites and their users in multiple sessions pursuant to formal contracts, including the websites' delivery of hundreds of millions of files to their users, demonstrates that an active, "ongoing," "relationship" exists between appellee and his millions of users in the U.S. and

Virginia. These factors place appellee's conduct at exactly the *opposite* end of the spectrum from a "passive" website that does little more than post information or news for consumption by the entire Internet-accessing public.

Third, the websites and their U.S. and Virginia users have a quintessential Internet-based *commercial* relationship. To be sure, no cash changes hands between the websites and the users. But that is hardly uncommon. Indeed, many of the Internet's most popular websites generate revenue *not* by directly charging users, but rather by enticing millions of users with "free" content and then selling advertising space to entities wishing to target this captive audience—Google, Facebook, ESPN, CNN, and others come quickly to mind. *See also Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 926-27, 939-40 (2005) ("Streamcast and Grokster make money by selling advertising space, by directing ads to the screens of computers employing their software"). That is exactly how appellee's websites make their money here.

Moreover, for purposes of jurisdiction, it is critical that the advertising at issue here—like the advertising on countless other Internet websites—is targeted to users based on (among other things) their location. On the Internet, websites and their advertisers can track the location of users and then tailor those advertisements accordingly. Users in the United States thus may receive different ads for different products than their counterparts in (for example) France, China, and Brazil, and

users in Virginia may likewise receive different ads for different products than their counterparts in (for example) California and Texas. Such "geo-targeting" of ads based on the location of their users is common.

Geo-targeting of ads is exactly what happens here. Appellants have alleged—and appellee does not dispute—that the websites track the location of users and then sell that information (via ad-brokers) to advertisers who can use it to advertise products targeted specifically at tens of millions of Americans and millions of Virginians. J.A. 11. Appellee profits handsomely from these targeted advertisements. J.A. 11; *cf. Grokster*, 545 U.S. at 940 (relying on links between infringing acts of users and increased ad revenues for defendant to reject efforts of software maker to separate itself from the infringing acts of its users); *see id.* (emphasizing that "the more the software is used, the more ads are sent out, and the greater the advertising revenue becomes").

Nor is any of this a surprise, either to appellee or his users—indeed, users must agree to geo-targeting of advertisements before they can use the websites. Appellee's Terms of Use provide expressly that the websites may collect "your IP address, country of origin and other non-personal information about your computer or device" and that the information may be used "to provide targeted advertising based on your country of origin and other personal information." J.A. 176, 178. Appellee's websites simply do what their contracts with their users say they will.

Other courts have found that websites purposefully avail themselves of the privilege of conducting business within a forum for jurisdictional purposes by using precisely this type of "geo-location" technology. For example, in *Mavrix*, the Ninth Circuit found a California court had specific jurisdiction over an Ohio corporation that ran a website publishing allegedly infringing photographs of celebrities. In addressing the purposeful targeting of California through targeted advertisements, the court observed:

> Brand makes money by selling advertising space on its website to third-party advertisers . . . [and a] substantial number of hits to Brand's websites came from California residents. One of the ways we know this is that some of the third-party advertisers on Brand's website had advertisements directed to Californians. In this context, it is immaterial whether the third-party advertisers or Brand targeted California residents. *The fact that the advertisements targeted California residents indicates that Brand knows—either actually or constructively—about its California user base, and that it exploits that base for commercial gain by selling space on its website for advertisement*s.

647 F.3d at 1230 (emphasis added). Appellee's websites are alleged to target the United States and Virginia in exactly the same way as the defendant in *Mavrix*, and thus appellee earns his substantial advertising revenues through "the privilege of conducting activities" in the United States and Virginia. *ALS Scan*, 293 F.3d at 712.

Fourth, Appellee's purposeful availment is reflected in his failure to take any meaningful actions to block, restrict, or even discourage use of the websites by prospective users in the United States and Virginia. For example, just as tracking

technology can be used to *target* specific populations so, too, can it be used to *exclude* specific populations by blocking access for users from a specific jurisdiction. As the First Circuit recently noted, "[i]f a defendant tries to limit U.S. users' ability to access the website . . . that is surely relevant to the intent not to serve the United States." *Plixer*, 905 F.3d at 9. And, the *failure* to implement such technology is relevant, too: "[The 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." *Id.*; *see also Spanski Enters., Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904, 908 (D.C. Cir. 2018) (imposing liability in the U.S. when a defendant purposefully turned off default territorial restrictions blocking U.S. access to a website); *cf. Grokster*, 545 U.S. at 926-27, 939 (holding that file-sharing service's intention to induce copyright infringement was evidenced by the fact that it "never blocked anyone from continuing to use its software" and never "attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software").

Similarly, websites that truly wish to avoid availing themselves of the U.S. market can tailor their websites to the countries or markets they wish to target. Thus, for example, courts have found a lack of purposeful availment in the United States when the website was not in English. *See, e.g.*, *Triple Up Ltd. v. YouKu Tudou Inc.*, No. 17-7033, 2018 WL 4440459, at *2 (D.C. Cir. July 17, 2018) (per curiam)

(website entirely in Mandarin Chinese); *Toys "R" Us*, 318 F.3d at 450 (website in Spanish, listing prices in Spanish denominations, with goods only permitted to be shipped to Spain). Here, of course, appellee has made his websites available to his users in English.

In short, like the defendant in *Plixer*, appellee knows precisely where his users come from: Exhibits 2 and 3 to his declaration demonstrate *down to the person* how many users the websites had from each country in the world and each of the fifty States. But rather than using this information to *avoid* the U.S. market, he uses this information to sell ads that specifically *target* the market. Appellee doubtless has compelling financial reasons for making this choice. But having done so, he cannot claim surprise when he his forced to defend his facilitation of massive online piracy in U.S. courts. *See uBID, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 428-29 (7th Cir. 2010) ("GoDaddy is aware that it earns many millions of dollars annually from Illinois customers, and it cannot be unhappy to have had such success in the state. Its contacts cannot fairly be described as random, fortuitous, or attenuated.").

Fifth, appellee's claims of surprise at being haled into U.S. courts are even more implausible given his decision to register a DMCA agent with the U.S. Copyright Office. The *sole* purpose for such a registration is to seek to qualify for the DMCA safe harbor defense to claims of copyright infringement under U.S. law. 17 U.S.C. § 512(c); Copyright.gov, DMCA Designated Agent Directory,

https://www.copyright.gov/dmca-directory/ (last visited Mar. 7, 2019) ("[i]n order to qualify for safe harbor protection," service providers "must designate an agent," among other requirements). And appellee's websites reference the DMCA, citing "Title 17, Section 512(c) of the United States Code." J.A. 164, 172. Appellee's decision to register a DMCA agent is simply irreconcilable with his claim that he had no notion that his actions might subject him to suit within the United States.

Sixth, other indicators of appellee's repeated and sustained contacts with the United States and Virginia, when taken together, confirm that appellee has more than "purposefully availed [him]self of the privilege of conducting activities" in his third biggest market globally. For example, appellee does not dispute that, to set up and operate the websites, he has engaged in numerous significant and repeated interactions with U.S.-based companies. Appellee also does not dispute that he has contracted with at least one American advertising firm, Advertise.com, in order to sell space on the websites for the purpose of geo-targeted advertising. J.A. 118, 151, 154, 183, 185. Appellee does not dispute that until recently his websites contracted with Amazon Web Services (an American company) to host the websites on front-end servers based in Virginia. J.A. 73, 118, 132-33.[5] And appellee likewise does

[5] The decision where to locate servers is usually for the client to make. *See, e.g.*, ConcurrencyLabs, *Save yourself a lot of Pain (and Money) by Choosing Your AWS Region wisely*, https://www.concurrencylabs.com/blog/choose-your-aws-region-wisely/.

not dispute that he registered the domain names for the websites with GoDaddy.com, a U.S. company, and selected top-level domains for the websites that are administered by VeriSign, Inc., and Neustar, Inc., two U.S. companies headquartered in Virginia. J.A. 187.

In determining whether a defendant has purposefully availed itself of the privilege of doing business in a particular forum, courts have sensibly looked precisely to the question of whether a defendant has in fact contracted with a forum-based business to operate its website. *See, e.g.*, *Zippo*, 952 F. Supp. at 1126 (finding personal jurisdiction where a California site, *inter alia*, contracted with Pennsylvania ISPs to facilitate operation of news site); *Mavrix*, 647 F.3d at 1222 (finding personal jurisdiction where an Ohio website with 12 million monthly U.S. users and 70 million U.S. page views per month did business with advertising agency in California, a California wireless provider, a California web designer, and a California-based national news site).

Finally, appellee has attempted to avail himself not merely of U.S. consumers and businesses, but of U.S. *courts* as well. Appellee's Terms of Use, which appellee deems a "contractual agreement between you and us" require that "for any claim brought by us against you, you agree to submit and consent to personal jurisdiction in and the venue of the courts in the Russian Federation *and anywhere else you can be found*." J.A. 166, 174. Thus in 2018 alone, almost 32 million Americans agreed

to be sued by appellee in U.S. courts, and over 542,000 Virginians agreed to be sued by appellee in courts within this Circuit. Having by "contract" attempted to secure his right to hale *his users* into U.S. and Virginia courts, appellee can hardly claim surprise when the owners of the copyrights pirated through his websites seek to confront him in those very same courts.

2. The District Court erred in concluding that the Constitution foreclosed suit against appellee in Virginia or, indeed, anywhere in the United States.

Notwithstanding this wealth of contacts with Virginia and the United States, the district court concluded that appellee had not availed himself of either jurisdiction because "the Websites are semi-interactive, the interactions with the users are non-commercial, and there were no other acts by the Defendant that would demonstrate purposeful targeting." J.A. 394. The district court erred in its analysis at every turn.

First, while not disputing that the websites have millions of U.S. users, the district court nevertheless dismissed in a single sentence the significance of those users because "the number of users cannot make a website highly interactive." J.A. 392. But the district court's discussion reflects a fundamental misunderstanding of the relevant analysis. Even assuming the websites are properly deemed to be not "highly interactive," that conclusion is the beginning not the end of the analysis. If a website is neither entirely passive (so that jurisdiction is generally lacking) nor

highly interactive (so that jurisdiction is clear), the court must examine the extent and nature of the contacts to determine whether jurisdiction is appropriate. Treating the *Zippo* analysis as a rigid exercise to determine into which "category" the website falls (as the district court did here) cannot be squared either with *Zippo*, which has always required a fact-intensive inquiry into the extent and nature of the contacts, or with the Supreme Court's due process cases, which likewise make clear the holistic nature of the inquiry.

That error was critical here. The number of contacts between a user and a website is highly relevant to the due process inquiry, yet the district court largely ignored those contacts. *See, e.g.*, *uBID, Inc.*, 623 F.3d at 432-33 ("GoDaddy's contacts with Illinois are extensive. It has hundreds of thousands of customers in the state and earns millions of dollars in revenue from the state each year."); *Bird*, 289 F.3d at 875-76 ("Although the Dotster defendants might face a burden in having to defend a lawsuit in Ohio, they cannot reasonably object to this burden given that Dotster has allegedly transacted business with 4,666 Ohio residents."). The district court never explained how millions (or hundreds of millions) of contacts could be described as "random, fortuitous, or attenuated," nor did the court explain why appellee should be surprised at being haled into court in what appellee knows is his third-biggest market globally.

Second, the district court's analysis of the "ongoing relationship" between appellee's websites and their users was doubly flawed. At the outset, the district court again misapplied *ALS Scan* and *Zippo*, viewing the existence *vel non* of an "ongoing relationship" as relevant only to its determination that the websites were not "highly interactive"—the court never considered whether the nature of the relationship between the websites and their users was such that personal jurisdiction was nevertheless appropriate.

In any event, the district court was wrong to conclude that there is no "ongoing relationship" between the websites and their users. The district noted, for example, that the engagement between the websites and its users is not "prolonged," because "the files transmitted between the Websites and users are only stored until the user has downloaded them." J.A. 392. But it is undisputed that users made multiple visits to the sites, and that they download infringing files from appellee's servers while they are there—collectively hundreds of millions of files. The amount of time a file is stored on a particular server—particularly in an era in which computing and Internet speeds are increasing at exponential rates and speed is a selling point for websites—is simply not relevant to the question of whether the websites are engaged in "the knowing and repeated transmission of computer files over the Internet." *ALS Scan*, 293 F.3d at 713.

Likewise, the district court was wrong to focus on the fact that "users do not need to create an account" to use stream-ripping tools. J.A. 392. As described above, users entered a contractual relationship with appellee's websites, as they were required to agree to appellee's Terms of Use prior to any use of the website. Whether or not users had an "account" is a red herring.

The fact is that users of appellee's websites agree to contractual provisions set forth in the Terms of Use; that users visit the websites for extended periods of time; that the websites transmit multiple files to the users as part of the back-and-forth that is integral to the websites' operation; and that users return again and again to illegally obtain copyrighted content. That is an "ongoing relationship" between the websites and its users that cuts heavily in favor of jurisdiction.

Third, the district court erred in concluding that the websites' relationships with their users was "non-commercial." As the district court saw it, because "the Websites are free to use" for the users, any money the websites derive from the sale of advertising "cannot be the basis for finding a commercial relationship with the users because they are separate interactions." J.A. 393. The district court's analysis, however, is completely at odds with the nature of Internet commerce in the 21st century.

As described above, many of the Internet's most popular sites generate revenue *not* from directly charging users, but rather by enticing millions of users

with "free" content and then selling advertisements to entities wishing to target this captive audience. A typical commercial arrangement on the Internet is thus a three-way relationship: Websites attract users with content; users access content on the websites and make available their "eyeballs" and "data"; and websites and their advertisers send ads to these "eyeballs," often using user-specific data (such as location) to make the ads more effective. To isolate the content from the revenue-generating advertisements as the district court did here would be to say that Google, Facebook, Snapchat, and countless other Internet companies' relationships with their users is non-commercial. That position is absurd.

Fourth, the district court dismissed much of the websites' interactions with their users as irrelevant to the purposeful availment analysis because those actions were initiated by the users themselves. For example, the district court set aside appellee's use of geo-locational information because "[e]ven if the Websites' servers knew exactly where the users were located," J.A. 394, "tracking the location of a user does not show targeting of the users or their location; instead it is merely a recording of where the user's unilateral act took place," *id.* But this reality—that Internet users can log onto a website from whatever location they choose—has sensibly been rejected as a basis for finding a lack of minimum contacts. Indeed, in *Zippo* itself, the defendant argued "its contacts with Pennsylvania residents are fortuitous because Pennsylvanians happened to find its Web site or heard about its

news service elsewhere and decided to subscribe." *Zippo*, 952 F. Supp. at 1126. But because *every* interaction on the Internet is user-initiated, *Zippo* found this argument "misconstrues the concept of fortuitous contacts." *Id.* The defendant in *Zippo* "repeatedly and consciously chose to process Pennsylvania residents' applications and to assign them passwords. . . . The transmission of these files was entirely within [the defendant's] control."

The Seventh Circuit likewise rejected this precise line of argument in *uBID*, 623 F.3d at 428-29. GoDaddy, an Internet domain-registration company with no physical presence but many customers in Illinois, argued that it was not subject to personal jurisdiction in that state because "its sales to Illinois residents are automated transactions unilaterally initiated by those residents." *Id.* at 428. The Seventh Circuit squarely rejected GoDaddy's efforts to pawn off responsibility for its contacts on its users, noting, "GoDaddy itself set the system up this way. It cannot now point to its hundreds of thousands of customers in Illinois and tell us, 'It was all their idea.'" *Id.* Appellee's situation is identical in all relevant respects: it knows it is facilitating millions of online piracy sessions in the U.S., is earning substantial revenue from ads targeted at U.S. users, and is taking no steps to limit U.S. access.

The fact that the reality of the Internet means that users "unilaterally" decide to go to the websites is irrelevant.[6]

Finally, although the district court's conclusion that due process forecloses the exercise of specific jurisdiction here is wrong with respect to appellee's contacts with Virginia, it is especially wrong with respect to appellee's contacts with the United States. For not only are appellee's contacts with the U.S. purposeful, numerous, and substantial, but the federalism concerns that have led the Supreme Court to limit the jurisdiction of one state to avoid interfering with the prerogatives of another are entirely absent. Here, the result of the district court's dismissal is not that the case may proceed in a sister State, but instead that the case may not proceed anywhere in the United States. There is, in short, no U.S. forum at all for U.S. plaintiffs seeking to prevent the massive infringement on U.S. soil that appellee's websites help U.S. users to accomplish. That is precisely the sort of result that Rule

[6] Appellee's use of his tracking information differs sharply from the cases upon which the district court relied. In *Intercarrier Communications LLC v. WhatsApp Inc.*, No. 3:12-cv-776, 2013 WL 5230631, at *4 (E.D. Va. Sept. 13, 2013), the defendant's messaging application "d[id] not require a user to share his location" and there was no allegation that the defendant had ever used this functionality to target advertising at specific users based on their location. In *Zaletel v. Prisma Labs, Inc.*, 226 F. Supp. 3d 599, 610 (E.D. Va. 2016), the defendant "d[id] not know the location of its app users." Here it is undisputed that appellee knew from where his users came.

4(k)(2) was intended to prevent. On the facts here, appellee's purposeful availment is clear, and the first prong of the due process analysis is met.

B. Appellants' claim arises directly out of appellee's contacts with the United States and Virginia.

It is likewise clear that the second prong of the analysis is met because "the plaintiffs' claims arise out of those activities directed at the State," *ALS Scan, Inc.*, 293 F.3d at 712. The district court did not analyze this prong independently, and indeed appellee argued below that appellants' claims did not arise from appellee's contacts with Virginia or the United States because there were no such contacts. As discussed at length above, that argument is demonstrably false, and the district court's failure to construe facts in favor of the appellants on a motion to dismiss was error. *See supra* 26-39. Appellants' claims under the Copyright Act arise from precisely these contacts and there is no reasonable dispute that there is "an affiliation between the forum," be it Virginia or the United States, "and the underlying controversy." *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

C. The exercise of personal jurisdiction over appellee is constitutionally reasonable.

Because it erroneously found appellee had not purposefully targeted either the United States or Virginia, the district court likewise did not engage in a reasonability analysis, the third prong of the jurisdictional due process inquiry. J.A. 394-95. The

reasonability standard ensures that litigation in a given forum is not "so gravely difficult and inconvenient as to place the defendant at a severe disadvantage in comparison to his opponent." *CFA Inst.*, 551 F.3d at 296 (quoting *Burger King*, 471 U.S. at 476) (internal quotation marks omitted); *see also Tire Eng'g*, 682 F.3d at 303. In making that assessment, this Court considers three factors: (1) the burden on the defendant; (2) the interests of the forum; and (3) the plaintiff's interest in obtaining relief. *See id.* Although this inquiry is analytically distinct from the determination of whether a defendant purposefully targeted a particular jurisdiction, the underlying considerations are similar: "the inequity of being haled into a foreign forum is mitigated if it was reasonably foreseeable that the defendant could be subject to suit there." *CFA Inst.*, 551 F.3d at 296. As demonstrated at length above, in light of the appellee's conduct in Virginia and the United States, the exercise of jurisdiction over appellee in the Eastern District of Virginia was more than reasonably foreseeable.

First, as regards the burden on appellee to litigate a case in Virginia or the United States, foreign defendants are "not shielded from civil liability" just because they are located elsewhere. *Id.*; *see also Tire Eng'g*, 682 F.3d at 304-05. Were this the case, U.S. jurisdiction over foreign defendants would never exist and Rule 4(k)(2) would be a nullity. Here, appellee has "repeatedly reached into the Commonwealth [and the United States] to transact business with it," and has faced

no obstacles, practical or otherwise, in contracting with a host of Virginia- and U.S.-based companies in order to engage in his online piracy. *CFA Inst.*, 551 F. 3d at 296. Moreover, appellee has secured able counsel that have been more than successful in defending his interests to date. *See id.* (finding the exercise of jurisdiction over a foreign defendant reasonable in part because the defendant "has been able to secure counsel to represent its interests, and its litigation burden is thus no more substantial than that encountered by other entities that choose to transact business in Virginia"); *Tire Eng'g*, 682 F.3d at 304 (same).

In the district court, appellee noted he did not hold a U.S. visa and that "there are extended wait times to obtain a United States Visa as a result of the closing of a number of consulates within Russia." J.A. 57. But whatever the fluctuating state of U.S.-Russian diplomatic relations may be, appellee's ability to reach millions of U.S. users with his websites has been unhampered as has his counsel's ability—even without appellee's physical presence—to successfully litigate a Rule 12(b)(2) challenge to the district court's jurisdiction. That appellee may currently lack a U.S. visa simply does not suggest that his participation as a litigant in Virginia or U.S. courts would be problematic.

Second, both Virginia and the United States have strong interests in the subject matter of this litigation. As this Court has recognized, even when plaintiffs are "not Virginia companies, the state has an interest in ensuring that the nation's copyright

and trademark laws are not violated within its borders." *Tire Eng'g*, 682 F.3d at 305. The appropriate vindication of copyright laws is particularly important because it "motivate[s] the creative activity of authors" while "giv[ing] the public appropriate access to their work product." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Indeed, for that reason, other courts have recognized the importance of providing fora through which out-of-state plaintiffs can seek a remedy for any in-fora violations. *See, e.g.*, *Christian Sci. Bd. of Dirs.*, 259 F.3d at 218.

Before the district court, appellee's only response was to argue that the Copyright Act generally does not apply extraterritorially. But the presumption against extraterritoriality is a red herring. Appellee is transmitting infringing material from his websites to over 542,000 users *in Virginia* and nearly 32 million users *in the United States*. The copyright violations at issue have occurred, and have effects, in the United States, rendering the application of the Copyright Act here domestic, not extraterritorial. *See, e.g.*, *Nintendo of Am., Inc. v. Aeropower Co., Ltd.* 34 F.3d 246, 249 (4th Cir. 1994) (affirming the finding of copyright infringement where Taiwanese defendants imported unauthorized copies of video game cartridges into the United States); *Spanski*, 883 F.3d at 910-16 (holding that a Polish website was liable under the Copyright Act for directing copyrighted content to U.S.-based viewers on demand).

Third, appellants have a strong interest in resolving this dispute either in Virginia or in the United States. The case involves U.S. intellectual property stolen from U.S. plaintiffs by U.S. website users using websites operated by an appellee who has registered a DMCA agent with the U.S. Copyright Office to protect himself for claims of infringement under U.S. law and whose websites transmit digital files into the U.S. Before the district court, appellee predicted that appellants "would undoubtedly face their own burdens in having to litigate their claims against Mr. Kurbanov in Russia." J.A. 58. That is, at best, a gross understatement. In any event, upholding the district court's ruling would give appellee and every other foreign-based online piracy venture complete immunity from U.S. courts, and the impact on U.S. copyrights in general, and appellants' copyrights in particular, would be devastating. The law not only does not require this incongruous outcome, it mandates the opposite one.

III. The District Court Erred by Denying Appellants Any Opportunity to Conduct Jurisdictional Discovery.

For the reasons discussed above, the district court's decision that it lacked personal jurisdiction over the defendant should be reversed. But, should this Court have any doubt on that score (which it should not), at a minimum this case should be remanded for jurisdictional discovery.

"Discovery under the Federal Rules of Civil Procedure is broad in scope and freely permitted." *Carefirst*, 334 F.3d at 402. Although discovery may be denied

when plaintiffs have offered "only speculation or conclusory assertions" about the potential fruits of jurisdictional discovery, *see id.*, or when plaintiffs have had "ample opportunity to take discovery," *Mylan Laboratories, Inc. v. Akzo, N.V.*, 2 F.3d 56, 64 (4th Cir. 1993), this Court has noted that it would be error to deny jurisdictional discovery where "there was no discovery conducted before the dismissals, even though such discovery might have shed light on the jurisdictional issues." *See Benham v. City of Charlotte*, 635 F.3d 129, 139 (4th Cir. 2011). Other circuits likewise have remanded for jurisdictional discovery in Internet jurisdiction cases under these conditions. *See infra* 53-54.

Here, the record already contains a wealth of information about appellee's electronic contacts with users in Virginia and the United States, his knowledge of those contacts, appellee's efforts to exploit these markets by collecting and using location data for geo-targeted advertising, and appellee's efforts to advance his stream-ripping websites by doing business with various entities in Virginia and the United States. This information suffices to make out a prima facie case of personal jurisdiction; at the very least, it paints a picture of a mass-scale music piracy operation that has facilitated millions of transactions in Virginia and the United States that are anything but random or fortuitous.

Under these circumstances, jurisdictional discovery would very likely reveal additional probative information about appellee's contacts with Virginia and the

United States. *First*, discovery would reveal further information about the nature of appellee's dealings with businesses and the government in Virginia and the United States, including his dealings with American advertisers, not to mention his decision to register a DMCA agent with the U.S. Copyright Office. *Second*, discovery would shed further light on appellee's collection and use of location data, including the extent to which he uses that data for geo-targeted advertising. *Third*, discovery (particularly in the form of internal communications and communications with third-party vendors) would reveal the extent to which appellee consciously exploited the Virginia and United States markets. All of this information would be probative for the district court's purposeful availment inquiry. These are precisely the circumstances under which a district court should grant plaintiffs an opportunity to take discovery. That is all the more true here, given that the district court granted appellee's motion to dismiss without a hearing and before the parties had conducted any discovery at all.

Indeed, courts of appeals have remanded for jurisdictional discovery in situations where the appellant had presented a far weaker prima facie case for personal jurisdiction. For example, in *GTE New Media Services, Inc. v. BellSouth Corp.*, the appellee claimed that the appellants had engaged in a conspiracy "to dominate the Internet business directories' market" by diverting web traffic to their websites. 199 F.3d 1343, 1345 (D.C. Cir. 2000). The appellee also contended that

the appellants were subject to personal jurisdiction in the District of Columbia because they had operated directory websites that were accessible to the District's residents. *Id.* at 1345-46. The D.C. Circuit held that the appellee had failed to make out a prima facie case for jurisdiction given that "[w]e do not even know for certain which defendants own and operate which websites." *Id.* at 1352. Nevertheless, the court held that "[j]urisdictional discovery will help sort out these matters" and that the appellee "is entitled to pursue precisely focused discovery aimed at addressing matters related to personal jurisdiction." *Id.*

Similarly, in *Toys "R" Us, Inc.*, 318 F.3d at 455-57, the Third Circuit held that the district court erred by refusing to allow jurisdictional discovery on the appellees' *non*-Internet contacts, *id.* at 456, such as whether "the [appellee] intentionally and knowingly transacted business with residents of the forum state" or "had significant other contacts with the forum besides those generated by its website." *Id.* at 453. Although the record did not contain sufficient evidence of such contacts for the purposes of appellant's prima facie case, the Third Circuit observed that the record "contained sufficient non-frivolous allegations (and admissions) to support the request for jurisdictional discovery." *Id.* at 456. Accordingly, the Third Circuit held that the appellant should have an opportunity to explore the appellees' "business plans for purchases, sales and marketing" and whether the appellees' non-

Internet contacts "directly facilitate" its alleged trademark infringement and unfair competition. *Id.* at 457.

If this Court does not reverse the district court's decision, appellants should have the same opportunity as parties in the aforementioned cases to conduct jurisdictional discovery.

CONCLUSION

The district court's order granting appellee's motion to dismiss should be reversed or, in the alternative, vacated and remanded for jurisdictional discovery.

Dated: March 12, 2019

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellants UMG Recordings, Inc., *et al.*, respectfully request that oral argument be granted in accordance with Fed. R. App. P. 34 because the Court's decisional process would be aided by oral argument.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this Brief complies with the briefing order filed in this case on January 31, 2019 because this brief has 12,995 words.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in Times New Roman 14-point font using Microsoft Word.

March 12, 2019 /s/ Ian Heath Gershengorn

CERTIFICATE OF SERVICE

I certify that on March 12, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

March 12, 2019 /s/ Ian Heath Gershengorn