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

PETITION FOR REHEARING EN BANC

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STATEMENT REQUIRED BY FEDERAL RULE OF APPELLATE PROCEDURE 35(B) AND FOURTH CIRCUIT LOCAL RULE 40

Pursuant to FRAP 35(b) and LR 40, Defendant Tofig Kurbanov respectfully requests rehearing *en banc*. Rehearing *en banc* is warranted for six reasons:

1. The panel's decision – specifically the finding that personal jurisdiction could be premised on the Websites' failure to geoblock visitors from the U.S. (and allowing advertising brokers to geotarget visitors) – is an issue of exceptional importance and is in conflict with Supreme Court precedent (*J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011)) and a D.C. Circuit Court decision, *Triple Up, Ltd. v. Youku Tudou, Inc.*, 2018 U.S. App.LEXIS 19699 (D.C. Cir. July 17, 2018).

In *J. McIntyre Mach.*, the Supreme Court rejected the idea that personal jurisdiction could be based on a defendant's failure to "take some reasonable step to prevent the distribution of its products in this State." *Id.* at 879. This rejected premise is precisely what the panel endorsed here.

And, in *Triple Up*, the D.C. Circuit upheld the district court's finding that personal jurisdiction could *not* be premised on a website's failure to geoblock U.S visitors. The district court's opinion there warned that accepting Plaintiff's geoblocking argument would result in a "sea change in the law of internet personal jurisdiction," that would be "at odds with existing personal jurisdiction principles." *Id.* at 25.

If allowed to stand, the panel's decision here would effectuate precisely the "sea change" warned of. If this Court truly intends to effectuate a wholesale change in the law of personal jurisdiction, it should be done by the full court.[1]

2. The panel treated as interchangeable the (irrelevant) raw number of visitors to the Websites and the (jurisdictionally relevant) number of visitors to the websites who downloaded copyrighted music belonging to Plaintiffs. This error presents an issue of exceptional importance and is in conflict with the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S.Ct. 1773, 1778 (2017) (finding jurisdictionally irrelevant the fact that Bristol-Myers Squibb Co., "sold almost 187 million Plavix pills in [California] and took in more than $900 million from those sales" because the majority of plaintiffs were not from California).

3. The panel's decision – finding personal jurisdiction over Kurbanov because the Websites are utilized by residents of Virginia and the U.S. – is in conflict with another recent decision by a Fourth Circuit panel, *Fidrych v. Marriott, Int'l.*, 952 F.3d 124 (4th Cir. 2020) and presents an issue of exceptional importance.

[1] Legal commentators have noted the significance of the panel's decision concerning geoblocking and geotargeting. *See*, *e.g.*, *"Running Geotargeted Advertising Confers Personal Jurisdiction–UMG Recordings v. Kurbanov,"* Goldman, Eric, attached hereto at Tab 1.

In *Fidrych*, this Court rejected personal jurisdiction over Marriott despite the fact that Marriott used its website to enter into commercial transactions with forum residents because the website did not specifically *target* "residents for commercial transactions any more than it targets any other state." *Id.* at 141.

The panel's decision here would result in *de facto* universal jurisdiction anywhere a popular website is accessed. Given that the Supreme Court has yet to weigh in on (and has reserved "for another day") the proper handling of "virtual contacts" in the minimum contacts context,[2] an *en banc* rehearing is of exceptional importance.

4. The panel's holding finding jurisdictionally relevant the fact that the websites named a DMCA agent is in conflict with decisions from this circuit, other federal circuits, and the Supreme Court, all of which have held that the appointment of an agent for service of process is irrelevant. *See*, *e.g.*, *Fidrych*, 952 F.3d at 135-37; *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745,748 (4th Cir. 1971); *King v. Am. Fam. Mut. Ins. Co.*, 632 F.3d 570,572 (9th Cir. 2011); *Chipman, Ltd. v. Thomas B. Jeffery Co.*, 251 U.S. 373,379 (1920).

5. The panel's holding that Defendant was subject to personal jurisdiction based on certain minimal internet-related factors such as having registered a website in the U.S. and the existence (at one point) of servers in the

[2] *Walden v. Fiore*, 571 U.S. 277, 290 n.9 (2014).

U.S. conflicts with decisions from other Fourth Circuit panels and other circuits, meriting a rehearing *en banc*. *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003); *GreatFence.com, Inc. v. Bailey*, 726 Fed.Appx. 260, 261 (5th Cir. 2018).

6. Finally, this Court has noted that, given changes in technology, it may be time to revisit the "*Zippo* approach" outlined in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1123 (W.D. Pa. 1997) and adapted in *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 713-14 (4th Cir. 2002). *See Fidrych*, 952 F.3d at 141,n.5 ("Given the pace of technological advancement since *Zippo* and the changes in the way the internet is used, a re-evaluation of the utility of the *Zippo* approach may be prudent.") This case presents the proper opportunity for the full court to reconsider the ongoing wisdom of the *Zippo* approach.

BACKGROUND

Kurbanov was born in Rostov-on-Don, Russia, where he lives to this day. J.A.382; J.A.67, ¶2. He has *never* been to the United States (including Virginia). J.A.68, ¶3.

Kurbanov operates flvto.biz and 2conv.com (the "Websites"). *Id.*, ¶4; J.A.382. The Websites allow visitors to save the audio track from online videos to their computers without saving the video content as well. J.A.68, ¶5. The

Websites are content-neutral and have substantial non-infringing uses.[3] *Id.*, ¶6. For example, professors or students can download the audio portions of lectures for later reference and playback, bands can capture the audio tracks from their live performances captured on video, and parents can save the audio of a school concert they recorded. J.A.68, ¶6.

All of the work that Kurbanov has done on the Websites has been in Russia. J.A.68, ¶8; J.A.385. Kurbanov has never done any work for the Websites from the U.S. J.A.68, ¶¶9-10; J.A.385.

Kurbanov has never done business in Virginia or the U.S., nor has he solicited business in Virginia or the U.S. J.A.69, ¶11; J.A.385. Kurbanov has never had employees in Virginia or the U.S. J.A.69, ¶12. Kurbanov has never held a bank account in Virginia or the U.S. *Id.*, ¶13; J.A.385. Kurbanov has never owned or leased real estate in Virginia or the U.S. J.A.69, ¶14. Kurbanov has never had a telephone number in Virginia or the U.S. *Id.*, ¶15. Kurbanov has never paid taxes in Virginia or the U.S. *Id.*, ¶16; J.A.385. And, Kurbanov has

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[3] *See*, *Techdirt*, "Music Industry Is Painting A Target On YouTube Ripping Sites, Despite Their Many Non-Infringing Uses" (Sep 15, 2017) https://tdrt.io/gpJ ("[T]here are a ton of legitimate uses outside of the music business to use these sites. I use them all the time. I primarily use them for videos that are essentially speech-based content so I can listen to them on the go. History lectures, public debates, reviews: they're all on YouTube, they're all perfectly listenable in audio format....").

never derived revenue from services rendered in Virginia or the U.S. J.A.69, ¶18; J.A.384.

The Websites are not specifically targeted at visitors from Virginia or the U.S., rather they are targeted at the entire world of internet users. J.A.69, ¶20; J.A.384. Indeed, the Websites are available in 23 different languages, including Italian, Portuguese, Polish, Turkish, Japanese, Korean, Russian, and Arabic. *Id.*, ¶21; J.A.383.

Visitors do not pay to use the Websites or the services available thereon. J.A.69, ¶22; J.A.384. Instead, virtually all revenue derived from the Websites comes from advertisements. J.A.70, ¶23; J.A.384. Kurbanov does not sell advertisements himself, nor does he interact with advertisers, but instead he has agreements with advertising brokers. J.A.70, ¶¶24-25; J.A.384. Other than providing space on the Websites for these brokers, Kurbanov plays no role in the advertisements that appear on the Websites. An advertiser buys (from the broker) the right to display an ad in the space provided on the Websites, as long as the advertisements comply with the law. J.A.70,¶26; J.A.384. Kurbanov does not direct the advertisements himself and does not himself take any steps to target the residents of either Virginia or the U.S.[4] J.A.70,¶27; J.A.393.

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[4] It is possible for advertisers, working with an advertising broker, to aim advertisements to viewers in specific locations. This process is known as "geotargeting." To the extent that there is any geotargeting of advertisements on

The Websites have visitors from over 200 countries. J.A.71, ¶34; J.A.383. For the 2conv.com website, only 5.87% of visitors to the website are from the U.S. The website has more visitors from Italy (8.89%), Brazil (9.78%), and Mexico (8.83%). J.A.71-72,¶36. This means that *over 94% of the visitors to 2conv.com come from outside America*. With respect to the flvto.biz website, only 9.92% of the visitors to the website are from the U.S. The website has more visitors from Turkey (11.21%) and Brazil (10.19%). J.A.72,¶39. This means that *over 90% of the visitors to flvto.biz come from outside America*.

When respect to the various states in the U.S., only 1.75% of 2conv.com and 1.70% of flvto.biz's U.S. based visitors come from Virginia, making it the 11th and 13th state in terms of users, respectively. *This means that 0.1% of 2conv.com's visitors come from Virginia and 0.17% of flvto.biz's visitors come from Virginia.*

Visitors to the Websites do not create an account, register, or sign in to use their services. J.A.72,¶41; J.A.384. As with almost every modern website, the Websites automatically record the IP addresses and country of origin of visitors, but they do not collect or store *any* personal information of visitors to the sites.[5]

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the Websites, it is done by the advertisers and the broker without any input from Kurbanov. J.A.70-71,¶¶28-29.

[5] Although the Panel's opinion initially acknowledged that the Websites collected *only* non-personal information, it later incorrectly stated that the websites "collect certain personal information from visitors." *Compare* Opinion, pp. 5 and 13.

As of the filing of the Complaint, the Websites were not (and currently are not) hosted in Virginia or the U.S. J.A.73,¶42. Instead, the servers hosting the Websites are based in Germany, utilizing a German hosting provider. *Id.*,¶42; J.A.384-85.

ARGUMENT

I. The Panel Erred in Finding Personal Jurisdiction Based on a Lack of Geoblocking and on Third-Party Geotargeting.

The panel incorrectly concluded that Kurbanov was subject to personal jurisdiction either because the Websites failed to *block* visitors from the U.S. ("geoblocking") or because the Websites allowed advertising brokers to direct advertisements to specific locations if they chose to do so ("geotargeting").

With respect to geoblocking, the panel's opinion conflicts with the Supreme Court's decision in *J. McIntyre Mach.*, where the court rejected the notion that personal jurisdiction could be based on a defendant's failure to "take some reasonable step to prevent the distribution of its products in this State." *Id.* at 879. This is consistent with the vast body of law on personal jurisdiction. As the D.C. District Court held (and the D.C. Circuit upheld):

> The operative test, after all, is whether the defendant has committed 'some act' by which it 'purposefully avails itself of the privilege of conducting activities within the forum.'... The Court is unaware of any authority suggesting that a failure to act might constitute purposeful availment.

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

Addressing the issue presented here directly, the *Triple Up* court held:

> The Court, however, is unpersuaded that the possibility of "geoblocking" warrants a different result here.... To hold otherwise would invite a sea change in the law of internet personal jurisdiction.... Triple Up's proposed rule – which equates a *failure to geoblock* with purposeful availment – would effectively mandate geoblocking for any website operator wishing to avoid suit in the United States. To say the least, such a rule would carry significant policy implications reaching beyond the scope of this lawsuit ... and, indeed, could limit U.S. residents' access to what is appropriately called the *World* Wide Web.

Id.

The panel's finding erroneously works precisely the jurisdictional "sea change" warned of in *Triple Up*. If allowed to stand, it would subject website operators to personal jurisdiction in *every* location where their website is accessible (and where they haven't blocked access), regardless of whether any minimum contacts exist to support an exercise of jurisdiction.

The panel's holding that Kurbanov was subject to personal jurisdiction because the Websites automatically collected data concerning visitors' location and allowed advertising brokers to utilize that information to geographically direct the advertisements of *their* customers is similarly erroneous. The District Court below properly held:

> Plaintiffs make the contention that Defendant's tracking of where the users are located and use of geo-targeted advertisements demonstrates that he was targeting Virginians and Americans. This is an attenuated argument as tracking the location of a user does not show targeting of

> the user or their location; instead it is merely a recording of where the user's unilateral act took place.... 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.... It is clear that Defendant did not take any actions which purposefully targeted Virginia or the United States.

J.A.393-94.

Under similar facts, the D.C. Circuit Court rejected a personal jurisdiction based on the placement of geotargeted ads by a third-party ad broker, finding that such ads did not constitute purposeful availment:

> Triple Up argues that Youku purposefully availed itself of the United States forum by passively permitting the videos to be streamed in the United States along with "geographically targeted" advertisements. Youku indisputably derives revenue from advertisements that accompany its videos, but Triple Up has not shown that Youku was in control of the advertisements' placement with particular films or "purposefully directed" them toward United States viewers.... Advertisers purchase Youku's online advertising services through third-party agencies. So while Youku "act[s] to maximize usage of [its] websites," ... Triple Up has not alleged facts plausibly showing that Youku played a material role in pairing advertisements with specific videos based on viewership....

2018 U.S. App. LEXIS 19699 at *7-8.

The full court should similarly find that third-party geotargeting of advertisements by advertising brokers does not support personal jurisdiction.

II. The Panel Erred in Focusing on Raw Numbers of Visitors to the Websites and Not the Number of Visitors That Were Alleged to Have Violated Plaintiffs' Copyrights.

In focusing solely on the raw number of viewers that the Websites draw

from Virginia or the U.S., the panel improperly considered non-claim related contacts with Virginia and the U.S.

The fact that an individual visited one of the Websites is *not* necessarily an indication that the visitor utilized the Websites' functionality. As with any website, some visitors come to the website because they are curious as to what the website does, but then leave without ever utilizing its functionality. Of those visitors that *do* seek to save an audio track, any number are accessing videos that have nothing to do with music at all. Indeed, according to Youtube, music related videos account for only 2.5% of its traffic.[6]

Nor does this mean that 2.5% of YouTube's traffic involves *Plaintiffs'* music, rather music *as a whole* constitutes 2.5% of YouTube's traffic. This includes copyrighted music, music subject to a Creative Commons license, and music freely offered to the public without restriction. And, given YouTube's international reach, much of that music is likely from outside the U.S. and not owned by Plaintiffs.

Ultimately, the raw number of visitors to the Websites from Virginia and the U.S. is irrelevant as it does not speak to ***claim-related contacts*** with the forum.

[6] See *Digital Music News*, "YouTube Says Just 2.5% Of Its Traffic Is Music-Related" (April 29, 2016), https://www.digitalmusicnews.com/2016/04/29/youtube-says-just-2-5-of-its-traffic-is-music-related.

The panel's focus on these non-claim-related contacts conflicts with *Bristol-Myers*. In *Bristol-Myers*, "more than 600 plaintiffs, most of whom are not California residents, filed [a] civil action in a California state court against Bristol-Myers Squibb Company (BMS), asserting a variety of state-law claims based on injuries allegedly caused by a BMS drug called Plavix." 137 S.Ct. at 1777.

Although the Supreme Court found that Bristol-Myers "engages in business activities in California and sells Plavix there," it nonetheless held that the California courts could not exercise personal jurisdiction over the claims brought by non-California residents despite the fact that, "between 2006 and 2012, it ***sold almost 187 million Plavix*** pills in the State and took in more than $900 million from those sales." *Id.* at 1778 (emphasis added).

The Supreme Court rejected the argument that these contacts could be considered for specific jurisdiction purposes because the contacts did not relate directly to the claims brought by the non-resident plaintiffs:

> For a court to exercise specific jurisdiction over a claim there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.... When no such connection exists, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State.... What is needed is a connection between the forum and the specific claims at issue.

Id., at 1776.

III. The Panel's Opinion Conflicts with *Fidrych* and Would Result in *De Facto* Universal Jurisdiction.

In *Fidrych*, the Fourth Circuit properly recognized that:

> While Marriott obviously uses its website to engage in commercial transactions, the website does not target South Carolina residents for commercial transactions any more than it targets any other state. Instead of targeting any particular state, the website makes itself available to anyone who seeks it out, regardless of where they live. In our view, the mere fact that the website is accessible in a given state does not mean that Marriott is targeting its activities at that state.

Fidrych, 952 F.3d at 141.

In so holding, the *Fidrych* panel properly avoided the result obtained here: the imposition of *de facto* universal jurisdiction over any person operating a popular website. If, as the panel held, jurisdiction is proper in Virginia (where fewer than 0.2% of the Websites' overall traffic originates), it is surely proper in every state and each of the 200 different countries from which the Websites receive visitors. As the Seventh Circuit Court of Appeals held:

> The creation of such *de facto* universal jurisdiction runs counter to the approach the Court has followed since *International Shoe*, and that it reaffirmed as recently as February 2014 in *Walden*.

Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc., 751 F.3d 796,801-02 (7th Cir.2014).

The panel's decision conflicts with both *Fidrych* and *Advanced Tactical* on an issue of exceptional importance that should be reviewed by the full court.

IV. The Panel Improperly Found Jurisdictionally Significant the Appointment of an Agent to Receive DMCA Complaints.

The panel's holding that it was jurisdictionally relevant that the Websites had a DMCA agent to receive infringement conflicts with decisions from this circuit, other circuits, and the Supreme Court, which have held the appointment of an agent for service of process to be irrelevant. *See*, *e.g.*, *Fidrych*, 952 F.3d at 136-8; *Ratliff*, 444 F.2d at 748 ("the appointment of an agent for service to fulfill a state law requirement is of no special weight in the present context."); *King*, 632 F.3d at 572 ("The constitutional standard of 'minimum contacts' has practical meaning in the context of personal jurisdiction. Mere appointment of an agent for service of process cannot serve as a talismanic coupon to bypass this principle."); *Chipman*, 251 U.S. at 379 ("Unless a foreign corporation is engaged in business with the state, it is not brought within the state by the presence of its agents....").

V. The Panel Improperly Elevated the Importance of Certain Insignificant Internet-Related Factors.

The panel improperly elevated the importance of certain insignificant internet-related factors such as having registered the Websites with a U.S. based registrar, utilization of "top level" domains, and the existence (at one point in time) of servers in the U.S.

This Court previously recognized that the registration of a domain name is insufficient to support personal jurisdiction. *Harrods Ltd. v. Sixty Internet Domain*

Names, 302 F.3d 214,223 (4th Cir.2002) ("[T]he mere act of registering the Domain Names in Virginia was deemed insufficient to provide personal jurisdiction over Harrods BA."). District Courts where some of the largest registrars are located have rejected basing personal jurisdiction on domain name registration, which would result in millions of individuals and businesses being subject to jurisdiction based on the minor ministerial action of registering a domain name. *See*, *e.g.*, *Proprietors of Strata Plan No. 36 v. Coral Gardens Resort Mgmt., Ltd.*, 2009 U.S. Dist. LEXIS 97704, at *15 (E.D.Va. Oct. 16, 2009) ("'[M]ere registration of the domain name with a company located in Virginia does not support personal jurisdiction in this state.'"); *EZScreenPrint LLC v. SmallDog Prints LLC*, 2018 U.S. Dist. LEXIS 131611, at *8 (D.Ariz. Aug. 6,2018) ("GoDaddy is apparently the largest domain registrar in the world and maintains over 50 million domain names worldwide, as of 2013.... The argument Plaintiff advances could allow millions of companies with domain names registered through GoDaddy to be subject to general personal jurisdiction in the state of Arizona.").

Similarly troubling is the panel having found significance to the fact that Verisign, Inc. *oversees* the entire top-level .com domain and Neustar, Inc. *oversees* the entire top-level .biz domain. Currently, there are **148.7 million registered .com domains and an additional 1.43 million .biz domains**. *See* DomainTools, "Domain Count Statistics for TLDs" (last accessed July 10,2020),

http://research.domaintools.com/statistics/tld-counts. Under the panel's holding, every registrant of each of those 150+ million domains is subject to personal jurisdiction in Virginia by virtue of their use of a .com or .biz domain.

Finally, this Court – and the Fifth Circuit – have both found that the use of a server within a jurisdiction an insufficient basis for an exercise of personal jurisdiction. *See Carefirst*, 334 F.3d at 402 ("[W]e have described as 'de minimis' the level of contact created by the connection between an out-of-state defendant and a web server located within a forum."); *GreatFence.com*, 726 Fed.Appx. at 261 (rejecting personal jurisdiction based on the location of defendant's server, "particularly… where, as here, the 'administration, maintenance, and upkeep of …[the] website" occurs outside the jurisdiction).

VI. The Circuit Should Take This Opportunity to Evaluate the Continuing Utility of the *Zippo* Test.

As the *Fidrych* court noted, "the internet we know today is very different from the internet of 1997, when *Zippo* was decided." 952 F.3d at 141,n.5. As the Court stated, "given the pace of technological advancement since Zippo and the changes in the way the internet is used, a re-evaluation of the utility of the Zippo approach may be prudent." *Id.* The *Fidrych* court noted, however, that it was constrained by the rule that the "panels of this Court are generally bound by our precedent, and ... not entitled to reject or alter an earlier panel's ruling, in the absence of a controlling *en banc* ruling or Supreme Court decision." *Id.*

The present case presents the full court with the opportunity to determine whether the *Zippo* framework should be abandoned. This is a question of exceptional importance that the full circuit should address.

CONCLUSION

For the reasons stated hereinabove, this Court should grant rehearing *en banc* to address conflicting decisions between this panel and other Fourth Circuit panels and conflicts between this panel's decision and decisions from the Supreme Court and other circuits. Additionally, *en banc* rehearing should be granted to resolve issues of exceptional importance.

Respectfully Submitted,

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This brief complies with type-volume limits of Fed. R. App. P. 32(a) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 3,898 words.

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Dated: July 10, 2020 /s/ Matthew Shayefar, Esq.

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I certify that on July 10, 2020, I electronically filed the foregoing document 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.

Dated: July 10, 2020 /s/ Matthew Shayefar, Esq.

Tab 1

Running Geotargeted Advertising Confers Personal Jurisdiction–UMG Recordings v. Kurbanov

June 27, 2020 · by Eric Goldman · in Copyright, Derivative Liability

The plaintiffs brought a copyright infringement lawsuit in the Eastern District of Virginia federal court. The defendants include FLVTO and 2conv, two Russian-based websites that enable users to engage in stream-ripping of YouTube videos and other sources (i.e., extracting the audio feed from a video). The site operator outsources the websites' ad inventory to ad brokers, including two in the Ukraine and two in the US. The plaintiffs claim that the ads are geotargeted, though it's unclear if the site operator has control over how and where the geotargeting works.

The sites allegedly pull in major traffic–300M global visitors/year from 200 countries, of which 30M are from the US (ranking 3rd most popular for FLVTO and 4th for 2conv). About 2% of each site's U.S. traffic comes from Virginia, ranking as the 13th most popular state for FLVTO and 11th for 2conv.

The defendants' other ties to Virginia (or the US more generally):

- The domain names are registered with GoDaddy (a tie to the US, not Virginia).
- The domain names' TLDs are run by Virginia-based registries. This fact applies to the millions of domain names in those TLDs.
- The websites had registered DMCA agents (a tie to the US, not Virginia).

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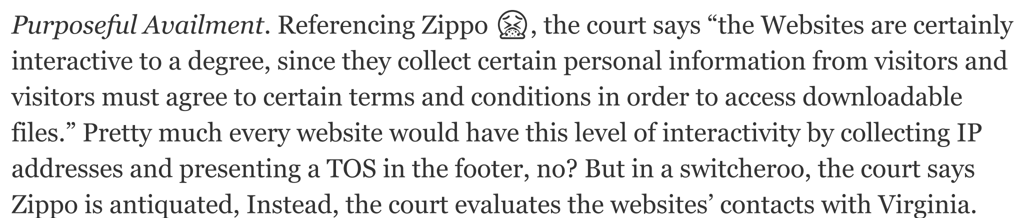
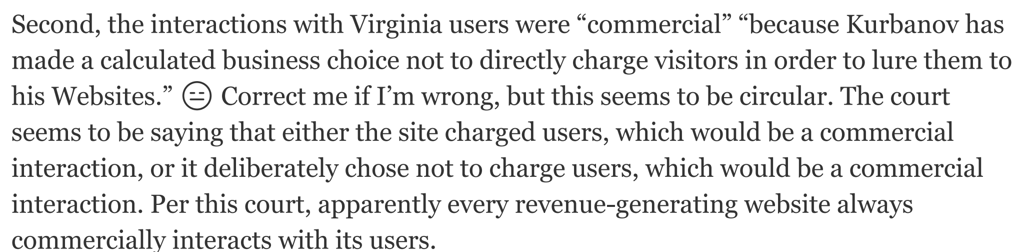
- The websites used Amazon Web Services, which has servers located in Virginia. This fact also applies to thousands of AWS customers; and I'm unclear if the defendants chose to locate on Virginia servers as opposed to other locations in the AWS network. In 2018, the site operator switched to a German host.

I mean, really? This looks like a slam dunk for the defense. A globally available website located overseas has done nothing to specifically engage with Virginia other than to be popular on the web. The lower court sensibly dismissed the case for lack of personal jurisdiction. The Fourth Circuit reverses and remands the case for further consideration.



Purposeful Availment. Referencing Zippo 😫, the court says "the Websites are certainly interactive to a degree, since they collect certain personal information from visitors and visitors must agree to certain terms and conditions in order to access downloadable files." Pretty much every website would have this level of interactivity by collecting IP addresses and presenting a TOS in the footer, no? But in a switcheroo, the court says Zippo is antiquated, Instead, the court evaluates the websites' contacts with Virginia.

First, the site operator's "contacts with Virginia are plentiful. In the relevant period, between October 2017 and September 2018, more than half a million unique visitors went to the Websites, totaling nearly 1.5 million visits. These visits made Virginia one of the most popular states in terms of unique visitors as well as number of visits." Seriously? This just shows that a large web service had users from around the globe.



Second, the interactions with Virginia users were "commercial" "because Kurbanov has made a calculated business choice not to directly charge visitors in order to lure them to his Websites." 😑 Correct me if I'm wrong, but this seems to be circular. The court seems to be saying that either the site charged users, which would be a commercial interaction, or it deliberately chose not to charge users, which would be a commercial interaction. Per this court, apparently every revenue-generating website always commercially interacts with its users.

The court continues (emphasis added): "Far from being indifferent to geography, any advertising displayed on the Websites is directed towards specific jurisdictions **like Virginia**. Kurbanov ultimately profits from visitors by selling directed advertising space and data collected to third-party brokers, thus purposefully availing himself of the privilege of conducting business within Virginia." But wait…the court didn't cite any evidence that any advertiser actually bought the right to display ads to Virginia residents; it hypothesizes that such purchases could have happened. The defendants apparently conceded that their ad brokers geotargeted ads, but the appellant brief doesn't try to show that any of those ads were geotargeted to Virginia. Thus, thee court collapsed the distinction between targeted ads and *geotargeted* ads–the revenues surely came from targeted ads, but the court didn't cite any evidence of revenues from *Virginia-geotargeted* ads.

Furthermore, it's possible the defendant websites handed off user data to ad brokers. The defendants' TOS reserves the right to do so, and the appellant brief repeatedly hammers on this contractual provision. However, it's more likely the ad brokers gathered their own data and made all decisions about how to match advertisers and ad inventory. The court collapses the distinction between the websites and ad brokers: "Kurbanov facilitates targeted advertising by collecting and selling visitors' data. While he has outsourced the role of finding advertisers for the Websites to brokers, the fact

- Search Engines (566)
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remains that he earns revenues precisely because the advertising is targeted to visitors in Virginia."

The other facts about U.S. contacts (DMCA registration, domain name registration, AWS, etc.) "might not be individually sufficient to confer specific personal jurisdiction, but when viewed in the context of other jurisdictionally relevant facts, they contradict Kurbanov's contention that he could not have anticipated being haled into court in Virginia."

Claims Arising from the Virginia Contacts. "Kurbanov made two globally accessible websites and Virginia visitors used them for alleged music piracy. In addition, Kurbanov knew the Websites were serving Virginian visitors and yet took no actions to limit or block access, all while profiting from the data harvested from the same visitors." As Prof. Trimble has asked, will the failure to deploy geoblocking be counted against defendants? This court does exactly that.

In summary, the court (futilely) explains why the plaintiffs' arguments don't apply equally to every website:

> this is not a situation where a defendant merely made a website that happens to be accessible in Virginia. Rather, Kurbanov actively facilitated the alleged music piracy through a complex web involving Virginia visitors, advertising brokers, advertisers, and location-based advertising. From Virginia visitors, he collected personal data as they visited the Websites. To the advertising brokers, he sold the collected data and advertising spaces on the Websites. For end advertisers, he enabled location-based advertising in order to pique visitors' interest and solicit repeated visits. And through this intricate network, Kurbanov directly profited from a substantial audience of Virginia visitors and cannot now disentangle himself from a web woven by him and forms the basis of Appellants' claims. Thus, we find these facts to adequately establish an "affiliation between [Virginia] and the underlying controversy."

From my vantage point, the only real distinction between every website and these defendants is that allegedly the defendants intentionally geotargeted ads to Virginia. This is not a new grounds for jurisdiction–remember the LICRA v. Yahoo case from 20 years ago?!–but the prevalence of outsourcing ad sales and geotargeting ads suggests that the court nevertheless is describing pretty much every ad-supported website, whether it intended to or not.

It's pretty clear this panel stretched jurisdiction law to help the copyright owners. This would be a good case for an en banc rehearing. Alternatively, the district court on remand could find that jurisdiction isn't reasonable and find for the defendants. Remember, if the plaintiffs really want to get the defendants, the Russian courts are another choice.

Case citation: UMG Recordings v. Kurbanov, No. 19-1124 (4th Cir. June 26, 2020). The complaint. The district court opinion. The appellant brief.

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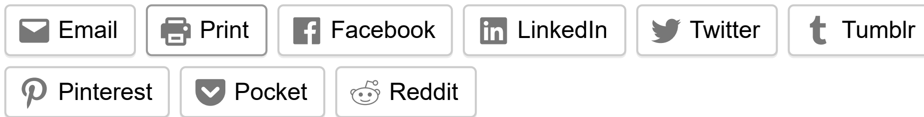

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