

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

**REPLY BRIEF OF
PLAINTIFF-APPELLANTS UMG RECORDINGS, INC., ET AL.**

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REPLY BRIEF

The exercise of personal jurisdiction over appellee here would violate due process *only* if appellee's contacts with the United States and Virginia were "random, fortuitous, or attenuated." In fact, appellee's contacts with the United States and Virginia are exactly the opposite—extensive, intentional, and direct.

Appellee knows *down to the person* the geographic location of the 32 million U.S. users and more than half-a-million Virginian users who visited the Flvto.biz and 2conv.com websites in 2018. Those users engaged in almost one hundred million stream-ripping sessions. During a substantial number of those sessions, the websites transmitted illegal copies of appellants' sound recordings to users' home computers in the U.S. and Virginia. Indeed, the United States is appellee's third-largest market globally, both by number of users and number of stream-ripping sessions conducted.

Moreover, appellee earns huge revenues from the advertisements his U.S. users view while conducting their stream-ripping sessions—advertisements specifically targeted to users' geographic location in the U.S. because of the geo-targeting technology that appellee uses. Appellee knows full well this geo-targeting is occurring. Appellee advises users that the websites "provide targeted advertising based on your country of origin and other personal information." J.A. 176, 178. Indeed, the websites' Terms of Use *require* as a condition for using the websites that

users consent to the receipt of geo-targeted advertisements. *See id.* All the while, appellee makes no effort to use that same location data to block U.S.-based users from his websites or otherwise stanch the massive copyright infringement in the U.S. that appellee knows of and profits from. To the contrary, although appellee touts that his websites are “available in 23 different languages,” Appellees’ Br. at 2, when U.S. users use the sites in the United States, the websites’ default language is English.

Appellee’s brief seriously disputes none of this—no surprise, as these facts are clear from the exhibits attached to appellee’s own declaration in the district court. Nor does appellee contest that the district court’s rule will give carte blanche to pirates to set up shop outside the U.S. and earn huge revenues from U.S. users, safe in the knowledge that they will never be held to account for their actions in U.S. courts.

Instead, appellee contends that the Constitution protects him and his pirate websites from suit in the United States. To make this argument, appellee isolates each of his extensive contacts with the U.S., and then argues that each contact—viewed in isolation—is insufficient to justify the exercise of jurisdiction. Settled law forecloses appellee’s gambit.

For one, as the Supreme Court and this Court have made clear, personal jurisdiction involves a holistic inquiry that assesses the sum total of all of a

defendant's business contacts with a jurisdiction to determine whether the defendant has "fair warning that a particular activity may subject [him] to the jurisdiction of a foreign sovereign." *CFA Inst. v. Inst. of Chartered Fin. Analysts of India*, 551 F.3d 285, 293 (4th Cir. 2009) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (bracket in original)). Appellee cites no case in which courts have found jurisdiction lacking on facts that—taken together—look remotely like these: the United States is the defendant's third biggest global market; the U.S. market is massive in terms of the number of users and visits; the defendant earns substantial revenues from advertisements targeted to the U.S. market; those revenues are earned precisely because the defendant entices users with the availability of U.S. plaintiffs' popular sound recordings; the defendant has designed his websites and operations so they are attractive to U.S. users in particular; and the defendant has registered a DMCA agent with the U.S. Copyright Office, the purpose of which is to invoke the protections of U.S. copyright law in the U.S. courts. Nor should there be such a case. The consequences would be devastating for U.S. victims of foreign copyright infringement and contrary to the intent of Congress when it enacted Rule 4(k)(2). Both law and logic foreclose appellee's approach.

Appellee's more granular arguments fare no better. He claims, for example, that appellants are basing jurisdiction on non-claims-related contacts. That is nonsense. All of the contacts described in appellants' brief relate directly to

appellee's business of making money from his users' downloading of audio files (many of which are appellants' copyrighted sound recordings), and it is precisely the alleged illegality of those downloads that is at issue here. Likewise, appellee attempts to distance himself from the commercial aspects of his websites by shifting the responsibility for the advertising revenue to others: the third parties that appellee hired to place the advertisements, and the users that view the advertisements when downloading files. But those artificial distinctions make a mockery of the ways in which commerce functions in the Internet age, and appellee's brief simply ignores circuit court cases like *Plixer International Inc. v. Scrutinizer GmbH*, 905 F.3d 1 (1st Cir. 2008), and *uBid, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421 (7th Cir. 2010), that demonstrate the flaws in his approach.

In short, nothing in the Constitution requires that U.S. copyright holders travel to Rostov-on-Don, Russia to sue for violations of U.S. law that occur in the United States and that generate huge profits for appellee from ads targeted at U.S. users.

The decision of the district court should be reversed.

ARGUMENT

I. APPELLEE HAS PURPOSEFULLY AVAILED HIMSELF OF DOING BUSINESS IN THE U.S. AND VIRGINIA.

The critical inquiry when assessing whether the exercise of personal jurisdiction comports with constitutional due process is whether a defendant's contacts with a forum are "random," "fortuitous," or "attenuated," such that

jurisdiction is improper, *Burger King*, 471 U.S. at 462, 475, or whether a defendant has “continuously and deliberately exploited the [forum] market” such that it should reasonably anticipate suit based on a “substantial number” of contacts, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984). Appellee’s attempts to characterize its contacts with the U.S. and Virginia as “lacking” under these governing standards, Appellees’ Br. 3, fail on multiple grounds.

1. Appellee begins by deeming appellants’ “obsession with the raw number of visitors to the Websites . . . misplaced.” Appellees’ Br. 27.¹ Appellee’s wish to deflect from the raw number of U.S.-based users and sessions on his websites is understandable given the implausibility of a defendant’s claiming it has not availed itself of a jurisdiction in which it annually engages almost 32 million users in over 96 million transactions. *See, e.g., Keeton*, 465 U.S. at 774 (“[R]egular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous.”); *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 891 (6th Cir. 2002) (finding personal jurisdiction based on the “absolute

¹ Appellee claims that appellants “proffered only unverified and inaccurate statistics.” Appellees’ Br. 27. All of the statistics appellants cited regarding the number of users and sessions on appellee’s websites, however, come directly from data appellee attached to his declaration before the district court. *See, e.g.,* Appellants’ Br. 8-9 (citing J.A. 78-79, 87-88). Appellants used the “SimilarWeb” data that appellee criticizes only to estimate that FLVTO.biz and 2conv.com were, respectively, the 264th and 829th most popular websites on the Internet. *See id* at 7-9. No one seriously disputes the immense popularity of the websites.

amount of business” conducted by the defendant in the forum). But try as he might, appellee cannot avoid the jurisdictional consequences of his massive base of U.S. customers.

First, appellee suggests that his U.S. users are not downloading popular music at all. But that is farcical. Appellee’s websites are among the most popular in the world (with over 350 million discrete users in 2018 alone) not because they provide students the ability to “download the audio portions of video lectures for later reference,” or give parents the ability to retain “the audio portion of a school concert they recorded.” Appellees’ Br. 1-2. Instead, the websites are enormously popular, in the U.S. and elsewhere, precisely because they facilitate the illegal stream-ripping of popular music. *See, e.g.*, J.A. 19-20, 22-23 (Compl. ¶¶ 41, 46) (2conv advertises how to get “your favourite [sic] tracks . . . for free”). The tutorials on the websites make no mention of “video lectures” or “school concert[s].” Appellees’ Br. at 1-2. Instead, they feature sound recordings by artists such as Michael Jackson, Justin Bieber and Madonna. J.A. 24. As appellants have alleged, a substantial portion of that music is covered by appellants’ copyrights and the websites thus “inflict[] tremendous and irreparable damage on [appellants’] businesses and erode[] authorized sales and distribution of sound recordings.” J.A. 10 (Compl. ¶ 6). The United States government agrees. *See* Office of United States Trade Representative, *2018 Out-of-Cycle Review of Notorious Markets*, at 18

(2019), https://ustr.gov/sites/default/files/2018_Notorious_Markets_List.pdf (highlighting flvto.biz and 2Conv.com as “examples of the stream-ripping phenomenon that continues to threaten legitimate streaming audio and video services, music performers, and composers”).²

Second, appellee seeks to shift focus from the absolute number of U.S. users to the relative prominence of those U.S. users in the websites’ global operations. *See, e.g.*, Appellees’ Br. 13 (noting that “90% of the users of the flvto.biz website come from outside the United States”). But that effort puts him in no better position. According to the exhibits attached to his own declaration, the United States is the websites’ *third-largest* global market, and although Brazil and Turkey account for a slightly larger share of users and sessions,³ that hardly makes appellee’s contacts with the United States “random” or “attenuated.” Indeed, appellee’s argument boils down to the striking assertion that a globally popular entity with users everywhere cannot consistent with due process be sued anywhere. Unsurprisingly, appellee cites

² Contrary to appellee’s accusations, *see* Appellees’ Br. 4, appellants are not anti-technology, but instead are anti-piracy. As the U.S. Trade Representative report, *supra*, indicates, appellee’s websites are pirate websites that enable massive copyright infringement.

³ According to appellee’s data, Brazil and Turkey account for 9.9% and 9.6% of the websites’ sessions and 10% and 9.2% of the websites’ users, respectively. The United States accounts for 9.6% of the websites’ sessions and 8.9% of the websites’ users. *See* J.A. 78, 80, 87.

no case in support of this theory. Likewise, appellee's parade of unpublished, out-of-circuit district court cases, *see* Appellees' Br. 27-29, does not help his case: none of the cases has remotely comparable facts, and none stands for the proposition that the number of users in a jurisdiction is irrelevant to the minimum contacts analysis.⁴

Third, appellee argues that appellants' jurisdictional allegations rely on "non-claim related contacts." *See* Appellees' Br. 29-32. But appellee entirely misunderstands what renders a contact "non-claim related." The very Supreme

⁴ In *Liberty Media Holdings, LLC v. Letyagin*, No. 11-62107-CV, 2011 WL 13217328 at *4 (S.D. Fla. Dec. 14, 2011), plaintiffs could not satisfy the high burden of obtaining a temporary restraining order because they had failed even to allege "that *anyone* from the United States made a purchase on Defendant's website." In *Fraserside IP L.L.C. v. Hammy Media, Ltd.*, No. C11-3025-MWB, 2012 WL 124378, at *9 (N.D. Iowa Jan. 17, 2012), the district court concluded the defendant had "a total absence of contacts with the State of Iowa," and the plaintiff apparently never raised the possibility of jurisdiction based on the defendants' contacts with the United States. In *Fraserside IP, L.L.C. v. Youngtek Solutions., Ltd.*, No. C11-3005-MWB, 2013 WL 139510, at *11-*12 (N.D. Iowa Jan. 10, 2013) and *Fraserside IP L.L.C. v. Netvertising Ltd.*, No. C11-3033-MWB, 2012 WL 6681795, at *11 (N.D. Iowa Dec. 21, 2012), the court did *not* rule on the legal question of what constituted sufficient minimum contacts, but rather found that the evidence proffered by the plaintiff regarding the defendants' contacts with the United States was non-authenticated and should not be considered. In *Fraserside IP L.L.C. v. Youngtek Solutions. Ltd.*, No. C11-3005-MWB, 2012 WL 2906462, at *6-*7 (N.D. Iowa July 16, 2012), the district court *granted* the plaintiffs' motion for jurisdictional discovery to determine whether the defendant's contacts were sufficient to demonstrate personal jurisdiction. And, in the one published district court case appellee cites, *Fraserside IP L.L.C. v. Letyagin*, 885 F. Supp. 2d 906, 918, 921 (N.D. Iowa 2012), the court found "defendants have a notable complete absence of contacts with the State of Iowa," and that even though the plaintiff's "allegations might support specific jurisdiction over defendants, [plaintiff] has not provided me with an adequate evidentiary basis to accept them."

Court case upon which appellee relies is instructive. In *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1778-79 (2017), non-resident plaintiffs sought to bring suit in California against a non-resident defendant alleging that one of the defendant's pharmaceuticals, Plavix, violated various provisions of California law. In finding that specific jurisdiction did not exist over the defendant, the Court found no connection between plaintiffs' claims and California:

[T]he nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. . . . Nor is it sufficient—or even relevant—that BMS conducted research in California on matters unrelated to Plavix. What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.

Id. at 1781 (first and third emphases added).

The difference between the *Bristol-Myers* plaintiffs' allegations and appellants' allegations is obvious: Appellants' allegations are focused directly on the "connection between the forum and the specific claims at issue," namely the nearly hundred million stream-ripping sessions the websites have facilitated with U.S. users in the U.S. in 2018, including more than half a million in Virginia. *See* J.A. 9, 17 (Compl. ¶¶ 1, 37 and Compl. Ex. A, ECF No. 1-2) (describing appellee's infringement of appellants' copyrighted sound recordings in the U.S. and Virginia). Appellants' allegations are not based on "non-residents' claims"—such as the

violation of U.S. copyrights in Brazil—but instead on appellee’s violation of their copyrights in the U.S. *See id.* Moreover, appellants do not premise specific jurisdiction in the U.S. on actions “unrelated” to appellee’s violation of their copyrights, such as the operation of a Russian tea room in Alexandria or a gallery displaying the works of Kandinsky in Richmond. To the contrary, appellants’ allegations are based on appellee’s violation of their copyrights.

Properly understood, appellee’s argument regarding “non-claim related contacts” reduces to the suggestion that appellants have not quantified precisely how many of appellee’s users used the websites to copy appellants’ copyrighted works illegally. *See* Appellees’ Br. 32 (“While Plaintiffs point simply to the raw number of visitors to Kurbanov’s Websites, they do not allege (nor can the[y] allege) how many of those visitors (if any) they claim used the Websites to download Plaintiffs’ copyrighted works.”). But purposeful availment does not require such a specific accounting. Appellants attached to the Complaint several hundred of their copyrighted sound recordings as “a small sampling of the numerous and rapidly growing number of sound recordings . . . that Defendants have infringed.” J.A. 24(Compl. ¶ 49). And appellants have alleged that the websites’ almost 100 million contacts with the U.S. in 2018 relate overwhelmingly to appellants’ copyrighted sound recordings in the form of audio files ripped from videos on YouTube (and other sites) and then delivered from the websites’ servers to U.S. users. *See, e.g.*

J.A. 9, 17 (Compl. ¶¶ 1, 37).⁵ Thus, many millions of the user visits and downloaded audio files *are* “claim-related,” and demonstrate that appellee is “engage[d] in business” with the U.S. *See ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002). The exact number of those downloaded files that are infringing has no bearing on whether appellee has purposefully availed himself of the privilege of doing business in the U.S. *See, e.g., uBID, Inc.*, 623 F.3d at 427 (finding specific jurisdiction over a website based on the number of domains the website registered in Illinois, not the number of potentially infringing domain names registered).⁶

Finally, appellee repeats the district court’s mistake in arguing that the large number of U.S. users on his websites is irrelevant because “[t]he contact that users have with the Websites is unilateral in nature and as such cannot be the basis for

⁵ Appellee never explains how it is relevant that “music related videos account for only 2.5% of all of YouTube’s traffic.” Appellees’ Br. 30. Appellee and his websites are the defendants in this case, not YouTube, and the websites themselves identify their purpose as providing users with “the ultimate listening experience with high-quality mp3 tracks.” J.A. 18 (Compl. ¶ 40).

⁶ Amicus Electric Frontier Foundation (“EFF”) similarly argues that the websites are not violating appellants’ copyrights. *See* EFF Br. 3-8. As noted, that is incorrect; regardless, that is a merits issue that is irrelevant to the jurisdictional question here. In addition, EFF suggests that the enforcement of a default judgment against third-party service providers is unfair and somehow requires finding no jurisdiction here. *Id.* at 13-19. Putting the dubious merits of that argument aside, that is a red herring given that appellee has *not* defaulted and in fact successfully raised the issue of personal jurisdiction in the district court.

jurisdiction without more.” Appellees’ Br. 33 (quoting J.A. 393). As appellants previously explained, there is much “more” here beyond merely the number of U.S. visitors of appellee’s websites. Regardless, the district court’s concept of “unilateral” contact is misguided. *See* Appellants’ Br. 44-45 & n.6. Almost *all* contacts between a website’s users and the website are initiated unilaterally by the users from whatever location the users choose. Were that enough to defeat personal jurisdiction, websites would never be subject to personal jurisdiction based on Internet activity. For this reason, courts since *Zippo* have found that the “unilateral contact” argument “misconstrues the concept of fortuitous contacts,” *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1126 (W.D. Pa. 1997), and have uniformly rejected it. *See, e.g., uBID, Inc.*, 623 F.3d at 428-29 (rejecting defendant’s efforts to blame 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’” (citation omitted)).⁷

2. Appellee next turns to the district court’s analysis of the websites’ “interactivity” and claims appellants “take issue with the District Court’s well-

⁷ As appellees have already explained, both *Intercarrier Communications LLC v. WhatsApp Inc.*, No. 3:12-cv-776, 2013 WL 5230631 (E.D. Va. Sept. 13, 2013) and *Zaletel v. Prisma Labs, Inc.*, 226 F. Supp. 3d 599 (E.D. Va. 2016), *see* Appellees’ Br. 33-34, are easily distinguishable given that in neither case did the defendants use users’ locations to geo-target advertising. *See* Appellants’ Br. 45 n.6.

considered conclusion that the Websites are ‘semi-interactive’ under this Court’s holding in *ALS Scan*, which adopted a modified version of the sliding scale of interactivity outlined in *Zippo*.” Appellees’ Br. 35. Not so. As appellants explained at length, the district court erred principally by misapplying the *Zippo* framework and treating that characterization as determinative of the jurisdictional analysis. *See* Appellants’ Br. 39-40. This Court’s governing jurisdictional standard requires a careful inquiry into the “nature and quality of the commercial activity that an entity conducts over the Internet.” *ALS Scan*, 293 F.3d at 713 (quotation marks omitted). The “interactivity” of a website is part of that analysis but not, as the district court mistakenly believed, the entirety of it. In other words, the conclusion that the website was semi-interactive should have started the analysis, not ended it.

That said, appellee has no response to the undisputed fact that his websites “involve the knowing and repeated transmission of computer files over the Internet,” the very grounds for jurisdiction identified by this Court in *ALS Scan*. *See* 293 F.3d at 713 (quotation marks omitted). Regardless of whether the Washington Post’s online publication of articles within a particular forum could, alone, form the basis for personal jurisdiction, *see* Appellees’ Br. 36, appellee’s websites are no Washington Post. As alleged in the Complaint, after a user inputs a particular YouTube URL into one of the websites, the website “extracts the audio track from the YouTube video, converts it to an audio file, copies the file to its servers . . . [and

then] distributes the audio file directly from Defendant's servers to the user's computer." J.A. 21-22. This process is interactive by any measure, and appellee does not dispute that appellants have accurately described the operation of his sites.

Moreover, although appellee may be correct that multiple visits by a user do not transform a "passive" website into an "active" one, that point is a red herring. The district court found it relevant that "there is no evidence that users exchanged multiple files with the Websites," a determination that is mathematically impossible to square with appellee's own data, which show over three times as many U.S.-based sessions on his websites as there were U.S.-based users. *See* J.A. 149, 154, 392. As appellants argued, it is the combination of these multiple repeated visits, with the exchange of files over the Internet, pursuant to a "contract" (to use appellee's own words, *see* J.A. 158, 168) between the websites and their users that renders the websites the opposite of "passive." Other than arguing that the level of interactivity is not the sole determinant in the jurisdictional analysis, appellee has no response.

3. The district court found "the Websites are free to use" for users and thus deemed the websites' relationships with their users "non-commercial." J.A. 393. To the extent the websites' commercial nature is relevant to the jurisdictional

analysis,⁸ appellants have explained why the district court's conclusion that the websites are "non-commercial" misapprehends the nature of commerce on the Internet today. *See* Appellants' Br. 42-43.

Appellee does not disagree that revenue derived from users' viewing of advertisements manifests a commercial relationship just as much as if he charged users a fee for each audio file downloaded. *See* Appellees' Br. 39. He argues, however, that other websites that use an advertising revenue model, such as Google, Facebook, and ESPN, are not "subject to universal jurisdiction everywhere that the sites may be accessed, which would certainly be the result if Plaintiffs' position were adopted." *Id.* But appellants have never argued for a per se rule of "universal jurisdiction"; indeed, the jurisdictional analysis required by this Court is precisely the opposite—a fact-specific inquiry into the particular nature of a defendant's contacts with a forum. *See, e.g., ALS Scan*, 293 F.3d at 714; *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 399 (4th Cir. 2003). Thus, whether Google or ESPN would be subject to jurisdiction in a particular forum will turn on facts specific to their contacts with that forum. The only point here is that to the

⁸ Appellee asserts that the question of whether the websites are commercial is not "relevant to Plaintiffs' specific jurisdiction arguments." Appellees' Br. 38 at n.12. If that is so, it redounds to appellants' benefit by *removing* one of the district court's preconditions for finding jurisdiction.

extent the *commercial* nature of a website is relevant, appellee's relationship with his users is indisputably commercial.

Next, appellee argues that the fact that his websites facilitate the "geo-targeting" of advertisements, and that he receives substantial revenues precisely *because* advertisers can tailor their advertisements to users in a specific location, is "jurisdictionally irrelevant." Appellees' Br. 39. But appellee's efforts to separate himself from his advertisers is unavailing. Appellee does not (and cannot) dispute that the advertisements on his websites are geo-targeted and that the technology he uses facilitates this geo-targeting. In fact, the websites' Terms of Use specifically inform users that the websites may collect "your IP address, country of origin and other non-personal information about your computer and device" in order "to provide targeted advertising based on your country of origin and other personal information." J.A. 176, 178.

Appellee's only answer to the geo-targeted ads is to claim that "advertising brokers with whom Defendants have a relationship" actually do the soliciting of users and the contracting with advertisers. Appellees' Br. 39. But that cannot be a valid response. As amici have pointed out, "because outsourcing of [the] advertising-sales function is often more efficient, digital pirates like Kurbanov frequently hire advertising 'networks' or 'brokers' to serve as middlemen. . . . This advertising model allows infringing website operators to focus on delivering illegal

content rather than on cultivating relationships with a vast, incalculable number of potential advertisers.” MPAA Amicus Br. 10-12. While appellee has outsourced to others the role of finding advertisers for his sites, the fact remains that appellee earns substantial revenues precisely because the ads on his site are targeted to users in their specific jurisdictions, including the United States, and because appellee is able to sell advertising space by enticing users with free content—appellants’ popular sound recordings. Appellee has designed the legal and technological aspects of his site to make all of this happen efficiently and effectively. Having done so, he cannot disclaim responsibility for that advertising by pointing to his business decision to hire advertising brokers who can yield him maximum advertising revenue.

Nor can appellee benefit by citing the D.C. Circuit’s unpublished decision in *Triple Up Ltd. v. Youku Tudou Inc.*, No. 17-7033, 2018 WL 4440459 (D.C. Cir. July 17, 2018), to suggest that geo-targeted advertising is irrelevant. In *Triple Up*, a Seychelles corporation that owned the exclusive right to broadcast three Taiwanese movies in the U.S. sued Youku, a Chinese corporation, in the United States. For Youku, “less than one quarter of one percent of its monthly viewers comes from the United States.” *Id.* at *1. The *only* viewer alleged to have viewed the three movies in the U.S. was plaintiff’s lawyer, and when plaintiff informed Youku that the videos were available in the U.S., Youku removed all versions of the films within twenty-four hours. *Id.* In assessing whether Youku had purposefully availed itself of doing

business in the U.S., the court noted there was no “plausible allegation that Youku designed its websites even to make them generally usable by viewers in the United States, let alone to purposefully target them. The text on its websites is entirely in Mandarin Chinese.” *Id.* at *2. Moreover, Youku had not registered an agent with the Copyright Office. *Id.* In light of these indicators that Youku had *not* purposefully availed itself of doing business within the U.S, the court found that the existence of geo-targeted advertising on the website could not alone create jurisdiction.

Thus, *Triple Up* stands not for the extraordinary proposition that targeted advertising is irrelevant, but rather for the unremarkable proposition that geo-targeted advertising is but one factor to be considered in the holistic analysis of a defendant’s contacts with a forum. And as to that holistic analysis, appellee could not be more differently situated from Youku: Instead of having less than .025% of his users come from the United States, the United States is appellee’s third largest market constituting almost 9% of his user base. Instead of having three infringing movies viewed only by a plaintiff’s lawyer and then taken down immediately, appellee’s websites continue to facilitate tens of millions of stream-ripping sessions that infringe appellants’ copyrights. Instead of not having registered with the Copyright Office, appellee has designated a DMCA agent and invokes the DMCA in the websites’ Terms of Use. And instead of a website in Mandarin Chinese,

appellee's websites appear in English in the U.S., and the ads that appear on them are likewise in English and targeted at U.S. users.

By the same token, in light of Youku's near-total lack of contacts with the U.S., it is hardly surprising that Youku's failure to implement geo-blocking did not change the district court's jurisdictional analysis. *See Triple Up Ltd. v. Youku Tudou Inc.*, 235 F. Supp. 3d 15, 25 (D.D.C. 2017), *aff'd*, No. 17-7033, 2018 WL 4440459 (D.C. Cir. July 17, 2018). But that does not mean that a defendant's failure to block is irrelevant. As the First Circuit has noted (in a case that appellee does not even *cite* let alone distinguish), a defendant's "failure to implement [geo-blocking] 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." *Plixer*, 905 F.3d at 9; *see also Spanski Enters., Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904, 908 (D.C. Cir. 2018). Appellee is not "subject to universal personal jurisdiction" based solely on his failure to implement geo-blocking, but his claim that he does not target the U.S. market is all the more implausible given that he employs users' location data to geo-target ads and refuses to use that very same data to avoid the U.S.

4. Finally, appellee creates a strawman in claiming (without citation) that appellants have argued that "random minor contacts" with the U.S., including appellee's registration of a DMCA agent, "are sufficient to establish personal

jurisdiction.” Appellees’ Br. 47, 44. Again, not so. The district court’s error was in finding that appellee lacked “fair warning,” *CFA Inst.*, 551 F.3d at 293, despite the totality of appellee’s connections with the United States. Appellee’s registration of a DMCA agent with the U.S. Copyright Office, his use of U.S.-based advertising brokers, and his prior use of Virginia-based servers might not individually suffice to create specific jurisdiction. But, when viewed in the context of appellee’s extensive U.S. operations, these contacts further belie appellee’s claim that he could not “have anticipated being sued” in the U.S. or Virginia. *Consulting Eng’rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 277 (4th Cir. 2009).

Appellee also tries to dismiss the relevance of his designating a DMCA agent on the basis of the “government contacts” doctrine, but that doctrine has no applicability here. As his cited cases demonstrate, that doctrine does not provide that contacts with government agencies are broadly “out of bounds” when determining whether sufficient contacts exist for the purpose of a personal jurisdiction analysis. Rather, those cases simply hold that contact with a particular federal government agency does not create jurisdiction within whatever State the federal agency happens to be situated. *See, e.g., LG Display Co. Ltd. v. Obayashi Seikou Co., Ltd.*, 919 F. Supp. 2d 17, 27 (D.D.C. 2013) (“[M]ere entry into the District of Columbia by non-residents for the purposes of contacting federal government agencies cannot serve as a basis for in personam jurisdiction.”) (quoting

Rose v. Silver, 394 A.2d 1368 (D.C. 1978)), *aff'd*, 615 F. App'x 954 (Fed. Cir. 2015).

In this case, however, the question is not whether the defendant had contacts with any one State within which he interacted with the federal government, but whether under Rule 4(k)(2) he has contacts with the United States as a whole. As to that question, appellee's designation of a DMCA agent surely bolsters the claim that appellee has sufficient contacts *with the United States*. Moreover, that designation is particularly telling here: if appellee did not anticipate being haled into a U.S. court for copyright infringement, why would he need to designate a DMCA agent, the purpose of which is to seek to qualify for safe harbor protection *under U.S. copyright law*? *See, e.g., Burger King*, 471 U.S. at 474 (defendant purposefully avails itself of the privilege of conducting business in a forum by "invoking the benefits and protections of [the forum's] laws") (internal quotation omitted).⁹

Appellee's attempt to explain away his invocation of U.S. courts in his websites' Terms of Use is similarly unavailing. Appellee argues that although the Terms of Use explicitly preserve his right to sue his users in U.S. courts, that fact is irrelevant because appellee has tried to limit the location of any suit against him to

⁹ Appellee claims appellants' argument "would run counter to public policy and defeat the *protections* provided to rights-holders under the DMCA." Appellees' Br. 46. What actually defeats "protections provided to rights-holders" under U.S. copyright law are the many millions of instances of online infringement facilitated by appellee's pirate websites.

the courts of the Russian Federation. *See* Appellees' Br. 50-51. But the bounds of personal jurisdiction are not set by a defendant's unilateral declaration of where he or she consents to be sued; if it were otherwise, the entire minimum contacts inquiry would be unnecessary. Appellee's Terms of Use are further evidence that he has sought to avail himself of doing business in the U.S. and to preserve his right to seek redress from wrongs allegedly done him in the courts of the U.S. Those undisputed facts, when combined with the wealth of other contacts appellee has in the U.S., make the exercise of jurisdiction over appellee fair and appropriate.

II. THE EXERCISE OF JURISDICTION OVER APPELLEE IS CONSTITUTIONALLY REASONABLE.

This Court has applied a five-factor test in order to determine whether “the exercise of personal jurisdiction [is] constitutionally reasonable.” *Consulting Engineers Corp.*, 561 F.3d at 279. The exercise of jurisdiction over appellee is eminently reasonable here, *see* Appellants' Br. 46-50, and appellee's arguments in response are unpersuasive.

First, appellee claims that because there are significant wait times in order for him to obtain a United States visa, “[d]efending a lawsuit in the United States . . . would present a great burden.” Appellees' Br. 52. But even assuming that were true, appellee never explains *why* his inability to be physically present in the United States at this stage of the proceedings would hamper his opportunity to defend this lawsuit. Indeed, appellee has engaged able U.S. counsel who have succeeded in

getting his case dismissed before the district court. Appellee's failure to provide even a single example of how he is burdened by directing his lawsuit (and U.S. operations) from Rostov-on-Don is telling. Moreover, appellee apparently did not consider his alleged inability to visit the U.S. as a reason not to require his users to subject themselves to suit *by him* in U.S. courts.

Second, in arguing that the U.S. has no interest in this litigation because its interests in the rights of its copyright holders "end at the water's edge," appellee demonstrates his misunderstanding of the Copyright Act's presumption against extraterritoriality. *See* Appellees' Br. 53. Merely because appellee is located overseas does not mean that a lawsuit to prevent the infringement of U.S. copyrights in the U.S. is an extraterritorial application of the Copyright Act. Were this so, foreign pirates would have carte blanche to violate U.S. copyright law simply by locating themselves overseas. For this very reason, the test for whether the Copyright Act is being applied in an extraterritorial fashion looks *not* to where the defendant has located himself, but rather where the copyright violations have occurred and where they have their effects. *See, e.g., Nintendo of Am., Inc. v. Aeropower Co., Ltd.*, 34 F.3d 246, 249-250 (4th Cir. 1994). Under that sensible standard, the application of the Copyright Act here is entirely domestic.

Third, with measured understatement, appellee acknowledges that appellants "would undoubtedly face some burdens in having to litigate their claims against

Kurbanov in Russia.” Appellees’ Br. 53. As the U.S. Trade Representative has noted, however, what appellee calls “some burdens” could amount to a total inability to obtain relief. *See* Office of United States Trade Representative, *2018 Report on the Implementation and Enforcement of Russia’s WTO Commitments*, at 47 (Feb. 2019) (“[T]he government of Russia has not acted against those sites that, while located in Russia, target users outside of Russia.”), <https://ustr.gov/sites/default/files/Russia-2018-WTO-Report.pdf>. More fundamentally, appellee never confronts the absurdity of a legal rule that requires U.S. companies to go to Russia to seek redress for the violation of U.S. copyrights in the U.S.

Fourth, citing *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 115 (1987), appellee claims that the absence of federalism concerns here is offset by “*heightened* concerns of national sovereignty” that arise when asserting jurisdiction over foreign defendants. Appellees’ Br. 54. But *Asahi* is easily distinguishable. In that case, the Supreme Court held that California had little interest in asserting jurisdiction over a Japanese maker of tire valves that were manufactured in Japan, sold to a tire maker in Taiwan, and shipped from Japan to Taiwan. The Court held that “a defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of

placing the product into the stream into an act purposefully directed toward the forum State.” *Id.* at 112.

The situation here is entirely different. Appellee’s products are not “swept” by accident into the United States. To the contrary, appellee knows full well he has tens of millions of U.S. users, and he earns substantial revenues precisely because he facilitates the geo-targeting of ads to those users during their almost one hundred million U.S.-based stream-ripping sessions. Appellants, U.S. record companies, allege that those sessions result in massive infringement of their U.S.-registered copyrights in violation of U.S. law, and they seek to have their claims heard in U.S. courts. The U.S.’s interest in this matter could hardly be clearer. Moreover, Congress’s entire purpose in adopting Rule 4(k)(2) was to close a “loophole” that permitted foreign defendants who had “sufficient contacts with the United States as a whole,” but not with any one State, to “escape jurisdiction in all fifty states.” *Touchcom, Inc. v. Bereskin & Parr*, 574 F.3d 1403, 1414 (Fed. Cir. 2009). Rule 4(k)(2) thus represents Congress’s judgment that, notwithstanding any national sovereignty concerns that may exist, plaintiffs with “federal claims will have a U.S. forum if sufficient national contacts exist.” *Id.* The animating concern behind Rule 4(k)(2) further demonstrates why jurisdiction is reasonable in exactly these circumstances.

III. SHOULD THE COURT HAVE ANY DOUBT THAT JURISDICTION EXISTS, JURISDICTIONAL DISCOVERY IS APPROPRIATE.

Finally, in a single sentence, appellee argues that appellants have waived their right to jurisdictional discovery in the district court. Appellees' Br. 55. But that is wrong. Appellants clearly stated that should the district court find "a *prima facie* case for personal jurisdiction . . . has not been made, Plaintiffs respectfully request that the Court defer ruling on Defendant's motion and permit the parties to engage in limited jurisdictional discovery." J.A. 135 n.11. Appellants thus put their request for discovery squarely before the court. Although appellants *do* believe the basis for jurisdiction is "plain" based on the allegations in the Complaint, to the extent the Court finds appellee's attempts to dispute those allegations persuasive, jurisdictional discovery (rather than accepting appellee's unverified and self-serving representations) is required. *See* Appellants' Br. 50-54.

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: May 2, 2019

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellants 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 6,479 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.

May 2, 2019

/s/ Ian Heath Gershengorn

CERTIFICATE OF SERVICE

I certify that on May 2, 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.

May 2, 2019

/s/ Ian Heath Gershengorn