

No. 19-1124

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

**UMG RECORDINGS, INC., CAPITAL RECORDS, LLC, WARNER BROS
RECORDS INC., ATLANTIC RECORDING CORPORATION, ELEKTRA
ENTERTAINMENT GROUP INC., FUELED BY RAMEN LLC,
NONESUCH RECORDS INC., SONY MUSIC ENTERTAINMENT, SONY
MUSIC ENTERTAINMENT US LATIN LLC, ARISTA RECORDS LLC,
LAFACE RECORDS LLC, ZOMBA RECORDING LLC**

Plaintiffs-Appellants,

v.

TOFIG KURBANOV,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, 1:18-cv-00957-CMH-TCB

***AMICUS CURIAE* BRIEF OF ASSOCIATION OF AMERICAN
PUBLISHERS IN SUPPORT OF PLAINTIFFS-APPELLANTS**

David E. Weslow
Megan L. Brown
Ari S. Meltzer
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
dweslow@wileyrein.com

*Counsel for Association of American
Publishers*

March 19, 2019

CORPORATE DISCLOSURE STATEMENT

The Association of American Publishers (“AAP”) is a non-profit association of book, journal, and education publishers. AAP has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

STATEMENT REGARDING CONSENT TO FILE

All parties have consented to the filing of this brief.

Pursuant to Fed. R. App. P. 29(a)(4), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its members made a monetary contribution to its preparation or submission.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
STATEMENT REGARDING CONSENT TO FILE	ii
TABLE OF AUTHORITIES	v
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. THE DISTRICT COURT’S ERRONEOUS FINDING THAT DEFENDANT DID NOT PURPOSEFULLY AVAIL HIMSELF OF THE BENEFITS AND PROTECTIONS OF THE U.S. LAWS INVITES INFRINGEMENT ON A MASSIVE SCALE.	6
A. The District Court’s Application of the Confusing and Outdated <i>Zippo</i> Test Improperly Diminished the Extent of the Defendant’s Contacts with American Users.	10
B. The District Court Compounded Its Error By Finding the Interactions Between the Defendant’s Websites and Users Not Significant and Non-Commercial.	21
II. THE DISTRICT COURT’S ERRONEOUS HOLDING THAT THE DEFENDANT DID NOT PURPOSEFULLY TARGET THE UNITED STATES COULD SUBSTANTIALLY DILUTE AN IMPORTANT MECHANISM FOR HOLDING FOREIGN ACTORS ACCOUNTABLE FOR ACTIONS TARGETING THE UNITED STATES.....	24
CONCLUSION.....	27

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>A&M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001), <i>as amended</i> (Apr. 3, 2001), <i>aff'd</i> <i>sub nom. A&M Records, Inc. v. Napster, Inc.</i> , 284 F.3d 1091 (9th Cir. 2002)	23
<i>Alitalia-Linee Aeree Italiane S.p.A. v. Casinoalitalia.Com</i> , 128 F. Supp. 2d 340 (E.D. Va. 2001)	19
<i>ALS Scan, Inc. v. Digital Service Consultants, Inc.</i> , 293 F.3d 707 (4th Cir. 2002)	8, 12, 13, 16, 19, 21
<i>American Chemical Society v. John Does 1-99</i> , No. 17-cv-726 (E.D. Va. Nov. 3, 2017)	4
<i>American Geophysical Union v. Texaco, Inc.</i> , 60 F.3d 913 (2d Cir. 1994)	24
<i>Best Van Lines, Inc. v. Walker</i> , 490 F.3d 239 (2d Cir. 2007)	16
<i>Bird v. Parsons</i> , 289 F.3d 865 (6th Cir. 2002)	17, 18, 19
<i>Bright Imperial Ltd. v. RT MediaSolutions, S.R.O.</i> , 1:11-cv-935, 2012 WL 1831536 (E.D. Va. May 18, 2012)	17
<i>Calder v. Jones</i> , 465 U.S. 783 (1984).....	21
<i>Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.</i> , 334 F.3d 390 (4th Cir. 2003)	13, 14, 21, 22
<i>CFA Institute v. Institute of Chartered Financial Analysts of India</i> , 551 F.3d 285 (4th Cir. 2009)	7
<i>Christian Science Board of Directors of the First Church of Christ, Scientist v. Nolan</i> , 259 F.3d 209 (4th Cir. 2001)	5, 8, 12

TABLE OF AUTHORITIES

(continued)

	Page
<i>Consulting Engineers Corp. v. Geometric Ltd.</i> , 561 F.3d 273 (4th Cir. 2009)	7
<i>Consumer Source Holding, Inc. v. Does 1-24</i> , No. 1:13-CV-1512 AJT/JFA, 2014 WL 2967942 (E.D. Va. July 1, 2014)	3
<i>Cortex Surveillance Automation, Inc. v. Security Integrators & Consultants, Inc.</i> , No. 1:05CV562, 2006 WL 994951 (M.D.N.C. Apr. 12, 2006)	20
<i>Elsevier Inc. v. www.Sci-Hub.org</i> , No. 15-cv-4282, 2015 WL 6657363 (S.D.N.Y. Oct. 30, 2015)	4
<i>ePlus Technology, Inc. v. Aboud</i> , 313 F.3d 166 (4th Cir. 2002)	7
<i>Hotaling v. Church of Jesus Christ of Latter–Day Saints</i> , 118 F.3d 199 (4th Cir. 1997)	10
<i>Illinois v. Hemi Group LLC</i> , 622 F.3d 754 (7th Cir. 2010)	16
<i>Mavrix Photo, Inc. v. Brand Technologies Inc.</i> , 647 F.3d 1218 (9th Cir. 2011)	23
<i>Microsoft Corp. v. Does 1-18</i> , No. 1:13CV139 LMB/TCB, 2014 WL 1338677 (E.D. Va. Apr. 2, 2014)	20
<i>Microsoft Corp. v. Does 1-2</i> , No. 1:16-cv-00993, 2017 WL 3605317 (E.D. Va. Aug. 22, 2017).....	2
<i>Microsoft v. Does 1-2</i> , No. 1:16CV993, 2017 WL 5163363 (E.D. Va. Aug. 1, 2017).....	20
<i>Montblanc-Simplo GmbH v. Ilnitsky</i> , No. 1:17-CV-415(LMB/TCB), 2018 WL 844401 (E.D. Va. Feb. 13, 2018)	2

TABLE OF AUTHORITIES

(continued)

	Page
<i>Newbold Corp. v. Data Systems Co.</i> , No. CIV.A. 706CV00033, 2006 WL 467979 (W.D. Va. Feb. 28, 2006)	20
<i>Pervasive Software Inc. v. Lexware GmbH & Co. KG</i> , 688 F.3d 214 (5th Cir. 2012)	16
<i>Plixer International, Inc. v. Scrutinizer GmbH</i> , 905 F.3d 1 (1st Cir. 2018).....	27
<i>Schreiner v. Patriarch Partners, LLC</i> , No. 2:14-CV-220-RMG, 2014 WL 11034777 (D.S.C. Nov. 7, 2014)	20
<i>Spanski Enterprises Inc. v. Telewizja Polska S.A.</i> , 883 F.3d 904 (D.C. Cir. 2018).....	27
<i>Stratagene v. Parsons Behle & Latimer</i> , 315 F. Supp. 2d 765 (D. Md. 2004).....	20
<i>Tire Engineering & Distribution, LLC v. Shandong Linglong Rubber Co.</i> , 682 F.3d 292 (4th Cir. 2012)	7
<i>Triple Up Ltd. v. Youku Tudou Inc.</i> , 235 F. Supp. 3d 15 (D.D.C. 2017), <i>aff'd</i> , No. 17-7033, 2018 WL 4440459 (D.C. Cir. July 17, 2018)	27
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980).....	25
<i>Worldwide Church of God v. Philadelphia Church of God</i> , 227 F.3d 1110 (9th Cir. 2000)	23
<i>Zippo Manufacturing Co. v. Zippo Dot Com, Inc.</i> , 952 F.Supp. 1119 (W.D. Pa. 1997).....	8, 10, 11, 15, 17
Rules	
Fed. R. Civ. P. 4(k)(2).....	5, 24, 25, 27

TABLE OF AUTHORITIES

(continued)

Page

Other Authorities

<i>America Online, Inc.</i> , Annual Report (Form 10-K)(Sept. 29, 1997), https://www.sec.gov/Archives/edgar/data/883780/0000883780-97-000014.txt	15
Catherine Ross Dunham, <i>Zippo-Ing the Wrong Way: How the Internet Has Misdirected the Federal Courts in Their Personal Jurisdiction Analysis</i> , 43 U.S.F. L. Rev. 559, 577–78 (2009).....	14
Hannah Fry, <i>International Movie Piracy Ring Targeted Hollywood Film Companies, Prosecutors Say</i> , Los Angeles Times (Dec. 13, 2018)	9
Jay P. Kesan & Rajiv C. Shah, <i>Deconstructing Code</i> , 6 Yale J. L. & Tech. 277 (2004).....	23
Mark Sableman, Michael Nepple, <i>Will the Zippo Sliding Scale for Internet Jurisdiction Slide into Oblivion?</i> , 20 J. Internet L. 3 (2016).....	14
Richard Alleyne, <i>YouTube: Overnight Success Has Sparked a Backlash</i> , The Telegraph (July 21, 2008), https://www.telegraph.co.uk/news/uknews/2480280/YouTube-Overnight-success-has-sparked-a-backlash.html	16
<i>Social Media Sites</i> , CBS News, https://www.cbsnews.com/pictures/then-and-now-a-history-of-social-networking-sites/ (last visited Mar. 12, 2019)	15
Zoe Niesel, <i>#personaljurisdiction: A New Age of Internet Contacts</i> , 94 Ind. L.J. 103, 119 (2019)	16

INTEREST OF AMICUS CURIAE

The Association of American Publishers, Inc. (“AAP”) is the largest national trade organization of U.S. book and journal publishers, representing organizations ranging from major commercial book and journal publishers to small, non-profit, university, and scholarly presses. AAP seeks to promote the adequate and effective protection of copyright to enable publishers and their technology partners to create and disseminate literary works in new and convenient formats for consumers around the world.

The U.S. journal publishing industry invests in the development of authors and the publication of trade books, academic textbooks, and scientific articles, as well as in the development of services through which published works may be shared with and distributed to relevant audiences. This investment is significant and would be rendered meaningless if publishers are unable to protect and enforce their intellectual property rights.

Unfortunately, by closing the doors to U.S. courthouses through its overly narrow interpretation of personal jurisdiction, the District Court’s decision threatens to deal a major blow to the ability of members of the book and publishing industry to enforce intellectual property rights against some of the most brazen and prolific infringers of content created and distributed in the United States. The availability of unauthorized copies of copyright protected works for download

from foreign-owned sites directly impacts the return on the sizeable investments made by publishing houses in the development, production, and publication of books and journals. Ultimately, these infringing sites and services undermine the continued ability of publishers to invest in and publish high quality books and journals relied upon by consumers and the scientific, academic, and medical communities. In turn, the reduced capacity of publishers to recoup their investments may result in less investment in new authors and new publications.

The AAP is deeply concerned about the decision below. This appeal presents an important opportunity to revisit a misguided and outdated approach to federal jurisdiction in cases involving the Internet, which this Court has not meaningfully addressed or clarified in almost two decades. Given the importance of courts in this Circuit to litigation involving Internet crimes and activity, the AAP urges this Court to reverse the decision below and clarify the law to ensure that victims of copyright infringement have meaningful and effective recourse to U.S. federal courts. *See, e.g., Montblanc-Simplo GmbH v. Ilnitsky*, No. 1:17-cv-415(LMB/TCB), 2018 WL 844401 (E.D. Va. Feb. 13, 2018) (enjoining defendant from infringing Montblanc copyrights and trademarks through Internet sales and awarding more than \$32 million in damages); *Microsoft Corp. v. Does 1-2*, No. 1:16-cv-00993 (GBL/TCB), 2017 WL 3605317, at *1-2 (E.D. Va. Aug. 22, 2017) (granting broad injunction against unauthorized access to computers and

distribution of malicious computer software); *Consumer Source Holding, Inc. v. Does 1-24*, No. 1:13-cv-1512 AJT/JFA, 2014 WL 2967942 (E.D. Va. July 1, 2014) (issuing injunction against Doe defendants in domain name theft case).

SUMMARY OF ARGUMENT

The District Court’s decision threatens to derail an important intellectual property enforcement mechanism for publishers and other copyright owners whose works are created in the United States, improperly copied and/or reproduced by foreign actors, and subsequently redistributed in the United States using instrumentalities located in the United States, in violation of U.S. copyright law. The Internet has made massive copyright infringement possible on a global scale. As the United States Trade Representative recently recognized, “Commercial-scale copyright piracy . . . cause[s] significant financial losses for U.S. right holders and legitimate businesses, undermine[s] critical U.S. comparative advantages in innovation and creativity to the detriment of American workers, and can pose significant risks to consumer health and safety.” *See* Office of the United States Trade Representative, *2017 Out-of-Cycle Review of Notorious Markets* at 2 (2018), <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

AAP member-publishers rely on the protections of copyright laws to safeguard their investments in developing content. Unfortunately, there has been a

proliferation in recent years of online sites and services designed to facilitate unauthorized access to copyrighted content, much of which makes its way back to the United States through websites hosted abroad, so-called torrents, and “dark web” platforms.

Rights holders depend upon their ability to enforce copyright laws in U.S. federal courts. In many foreign jurisdictions, the online enforcement framework is inadequate, failing to provide appropriate incentives for online sites and services to cooperate with rights holders to effectively address rampant online piracy. Fortunately, AAP member-publishers have been able to obtain relief in U.S. courts against foreign infringers who have both acquired the infringing content in the United States and targeted the United States to distribute the infringing content. *See, e.g., Elsevier Inc. v. www.Sci-Hub.org*, No. 15-cv-4282, 2015 WL 6657363 (S.D.N.Y. Oct. 30, 2015) (enjoining foreign websites Sci-Hub and LibGen from, *inter alia*, “unlawful access to, use, reproduction, and/or distribution of Elsevier’s copyrighted works” and ultimately awarding Elsevier \$15 million in damages for willful copyright infringement); *Am. Chem. Soc’y v. John Does 1-99*, No. 17-cv-726 [Dkts. 36 & 37] (E.D. Va. Nov. 3, 2017) (enjoining Sci-Hub from, *inter alia*, “[c]opying, distributing, altering, displaying, hosting, selling and/or promoting any works registered to Plaintiff ACS with the United States Copyright Office” and awarding ACS \$4.8 million in damages).

The District Court's opinion included numerous material errors that threaten to eviscerate the protections that U.S. intellectual property laws provide to U.S.-based rights holders against infringement both on and offline. *First*, the lower court misapplied the 22-year-old test for determining jurisdiction based on contacts over the Internet. While this Court almost two decades ago approved the classification of websites based on their level of interactivity as an initial screening test, the classification approach has outlived its usefulness. The District Court improperly devoted the bulk of its analysis to this outdated classification exercise at the expense of a fact-specific analysis into whether the Defendant purposefully availed himself of the right to conduct business in Virginia. The District Court's overly formulaic analysis provides a roadmap for foreign infringers to evade the reach of U.S. courts.

Second, the District Court failed in its jurisdictional analysis to properly account for the Defendant's extensive contacts with the United States as a whole. Rule 4(k)(2) provides a process for enforcing federal laws against a person with significant contacts with the United States, even if no individual state could properly exercise jurisdiction. To the extent jurisdiction in Virginia is not proper, federal long-arm jurisdiction is meant for a case like this. The lower court improperly disregarded the Defendant's contacts with the United States as unilateral without considering the numerous ways in which the Defendant

specifically targeted the United States generally, if not Virginia, in particular (e.g., obtaining the infringing content from a U.S.-based service, maintaining an English-language website, and collecting user location data for targeted advertising). If allowed to stand, the District Court's decision will make it difficult, if not impossible, for AAP and its member publishers to enforce U.S. intellectual property laws against many infringers who both intend to benefit and do benefit from their infringing activities in the United States.

ARGUMENT

I. **THE DISTRICT COURT'S ERRONEOUS FINDING THAT DEFENDANT DID NOT PURPOSEFULLY AVAIL HIMSELF OF THE BENEFITS AND PROTECTIONS OF THE U.S. LAWS INVITES INFRINGEMENT ON A MASSIVE SCALE.**

The Internet has transformed the nature of piracy. While it is still possible to find physical copies of bootlegged books, movies, software, and more, infringers increasingly begin and end their schemes online, where they can obtain digital copies of copyrighted works and redistribute them broadly—all while using keystrokes rather than pen strokes and leaving digital footprints rather than physical ones. But while the methods through which these pirates act may have changed, the underlying nature of their infringement has not. Foreign actors are reaching into the United States to acquire copyrighted materials, hosting those misappropriated materials abroad, and then knowingly transmitting those infringing materials back to the United States.

The District Court improperly applied a more stringent standard for acts conducted over the Internet than it would have applied if those same acts were conducted using other means. Federal courts analyzing personal jurisdiction over a nonresident consider whether the assertion of jurisdiction satisfies the forum state's long-arm statute and is consistent with due process. *See Tire Eng'g & Distrib., LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 301 (4th Cir. 2012) (citing *CFA Inst. v. Inst. of Chartered Fin. Analysts of India*, 551 F.3d 285, 292 (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." *Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 277 (4th Cir. 2009) (quoting Va. Code Ann. § 8.01-328.1(A)(1)) (alterations in original). The Fourth Circuit has explained that Virginia's long-arm statute "extends the jurisdiction of its courts as far as federal due process permits." *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 176 (4th Cir. 2002). Accordingly, the "statutory inquiry necessarily merges with the constitutional inquiry, and the two inquiries essentially become one." *Id.* (citing *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 710 (4th Cir. 2002)).

The factors for consideration of whether specific jurisdiction exists are: "(1) the extent to which the defendant 'purposefully avail[ed]' itself of the privilege of conducting activities in the State; (2) whether the plaintiffs' claims arise out of

those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally ‘reasonable.’” *ALS Scan*, 293 F.3d at 712 (citing *Christian Sci. Bd. of Dirs. of the First Church of Christ, Scientist v. Nolan*, 259 F.3d 209, 216 (4th Cir. 2001)). The District Court held that the Defendant’s contacts with Virginia through the websites at issue were insufficient to be purposeful availment and, therefore, the court did not reach the remaining factors. J.A. 394-95. In reaching this conclusion, the District Court misapplied a modified version of the bright-line test articulated in the watershed case of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997), considering whether the Defendant’s websites were (1) interactive, (2) semi-interactive, or (3) passive. J.A. 390. This approach was incorrect.

The District Court’s flawed approach demonstrates the problems inherent in attempting to apply a framework developed in 1997 to modern day Internet websites and services. First, the District Court erroneously classified the Defendant’s websites as semi-interactive. J.A. 391-92. The District Court failed to recognize that Defendant’s websites respond to specific requests from Internet users, obtain digital files (without authorization) from third-party websites in response to the users’ requests, modify the digital files in response to the users’ requests, and then provide the modified files in a format that users can download to their phones, personal computers, or other devices. Second, the District Court

erred by replacing the fact-specific sliding-scale test for a “semi-interactive” website with an arbitrary, mechanical checklist that failed to account for the ways in which the Defendant manifested an intent to avail himself of the privilege of conducting business in Virginia and in the United States. This approach fundamentally misapprehends the *Zippo* case and its relevance to jurisdictional issues in the modern Internet era.

In correcting these legal missteps, the Court should declare that the categorical approach laid out 22 years ago in *Zippo* no longer serves its limited purpose of identifying certain *per se* cases and has become a distraction from the critical purposeful availment inquiry required for evaluating jurisdiction in the online context. As the District Court’s decision demonstrates, rigid application of the *Zippo* factors departs from their intended purpose and unnecessarily places the focus on the classification of websites rather than on how defendants use the Internet to target their activity toward the forum state, threatening to leave intellectual property owners with no recourse for infringement that begins and ends in the United States.¹

¹Rigid application of the *Zippo* categorization of websites could leave copyright owners with no recourse against foreign websites that maliciously target the U.S. for distribution of infringing content because such sites could be considered “non-interactive.” See Hannah Fry, *International Movie Piracy Ring Targeted Hollywood Film Companies, Prosecutors Say*, Los Angeles Times (Dec. 13, 2018), <https://www.latimes.com/local/lanow/la-me-ln-piracy-indictment-20181213-story.html> (addressing indictment of piracy ring involving “more than 25,000

To avoid this perverse result, the Court should adopt the approach followed by several trial courts in this circuit and require consideration of the totality of the Defendant's contacts with the forum state, including the level of interactivity of the Defendant's sites and services and the commercial nature of these activities, to determine whether such activity reflects the Defendant's intent to avail himself of the privilege of conducting activities in the forum state.

A. **The District Court's Application of the Confusing and Outdated *Zippo* Test Improperly Diminished the Extent of the Defendant's Contacts with American Users.**

The District Court's focus on the outdated *Zippo* categories of website interactivity obscured what should have been a fact-based analysis of how this Defendant's websites targeted both services and users based in the United States and, specifically, Virginia. *Zippo* involved a number of claims, including trademark infringement and dilution, by the Pennsylvania-based lighter manufacturer, Zippo, against a California corporation, Dot Com, which operated a website providing information about the company, advertisements, and an application for an Internet news service. *Zippo*, 952 F. Supp at 1121. The news service included two paid levels for which payment could be made over the

motion pictures . . . uploaded to [a] server in France"); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 201 (4th Cir. 1997) (“[A] library distributes a published work, within the meaning of the Copyright Act, when it places an unauthorized copy of the work in its collection, includes the copy in its catalog or index system, and makes the copy available to the public.”) (emphasis added).

Internet or by telephone. *Id.* Once Dot Com processed a user's application, it would provide the user with a password that enabled him or her to download newsgroup messages that were stored on Dot Com's server in California. *Id.*

Recognizing in 1997 that "the development of the law concerning the permissible scope of personal jurisdiction based on Internet use [was] in its infant stages," *id.* at 1123, the *Zippo* court synthesized a number of cases into a "sliding scale" test:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the 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. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Id. at 1124 (internal citations omitted).

Thus, as originally conceived, the interactivity analysis in *Zippo* merely served as a starting point to identify the cases on the extremes where no further analysis was required. The court in *Zippo* ultimately looked beyond how Dot Com's website operated to assess "whether Dot Com's conducting of electronic commerce with Pennsylvania residents constitutes the purposeful availing of

doing business in Pennsylvania.” *Id.* at 1125-26. In concluding that it did, the court focused on the totality of Dot Com’s activity in Pennsylvania, which included advertising and entering into transactions with 3,000 users and seven Internet access providers in Pennsylvania. *Id.* at 1126.

When this Court first recognized the *Zippo* test in *Christian Science Board*, it focused not on the three categories of interactivity, but on the subsequent analysis of the “‘level of interactivity and commercial nature of the exchange of information’ of the defendant’s website.” *Christian Sci. Bd.*, 259 F.3d at 218 (4th Cir. 2001). However, the Court in *Christian Science Board* concluded that it did not need to “address[]the propriety of exercising jurisdiction over a defendant whose only contact with the forum state consists of a website accessible by residents of the forum” because the defendant there had specific contacts with the forum outside of the website. *Id.*

A year later, this Court had the opportunity to revisit the applicability of jurisdiction based on Internet contacts in *ALS Scan*, 293 F.3d at 714. *ALS Scan* involved a claim of copyright infringement against a Georgia-based Internet service provider (“ISP”) that provided Internet access and transmission services to the alleged infringer. *Id.* at 709. The Court “adopt[ed] and adapt[ed]” the *Zippo* model not for the application of a rigid three-part categorical test, but for the proposition that:

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.

ALS Scan, 293 F.3d at 714.

Although the Court described the ISP's role as "at most, passive," its analysis did not stop there. *Id.* Rather, the Court conducted a detailed analysis of whether the ISP, through its services in Georgia, purposefully availed itself of the privilege of conducting business or other transactions in Maryland, concluding that it did not because the ISP "did not direct its electronic activity specifically at any target in Maryland; it did not manifest an intent to engage in a business or some other interaction in Maryland; and none of its conduct in enabling a website created a cause of action in Maryland." *Id.* at 715.

The Court most recently revisited *Zippo* in *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390 (4th Cir. 2003). There, a Maryland health insurance company, Carefirst, sued an Illinois pro-life advocacy organization, CPC, for trademark infringement. *Id.* at 394. CPC had no physical presence in Maryland: its only contact was an Internet website accessible anywhere in the world that was provided by a web hosting company registered in Delaware and headquartered in Maryland. *Id.* Although the Court generally described the three categories of interactivity from *Zippo* (renaming them interactive, semi-interactive,

and passive) and classified CPC's website as "semi-interactive,"² it went on to conduct a totality of the circumstances analysis, considering the level of interactivity and commercial nature of the websites along with CPC's intent. *See id.* at 399-401. Ultimately, the Court determined that CPC did not act with the "manifest intent" of targeting Marylanders because: (1) the record only included evidence of a single online exchange between CPC and Maryland residents; and (2) the website had a "strongly local character." *See id.*

The three-part *Zippo* screening test has failed to keep up with the rapid technological changes of the past 22 years and now serves as a barrier to enforcing U.S. intellectual property laws against those who choose to intentionally flout them. Observers have noted that the *Zippo* test came to prominence because, "[i]n the late 90s, Internet jurisdiction issues seemed to baffle many courts." Mark Sableman, Michael Nepple, *Will the Zippo Sliding Scale for Internet Jurisdiction Slide into Oblivion?*, 20 J. Internet L. 3 (2016); *see also* Catherine Ross Dunham, *Zippo-Ing the Wrong Way: How the Internet Has Misdirected the Federal Courts in Their Personal Jurisdiction Analysis*, 43 U.S.F. L. Rev. 559, 577-78 (2009) ("Courts relied on the newness of Internet activity in formulating the original scale."). When the U.S. District Court for the Western District of

² The Court did not explain why the website's features "that make it possible for a user to exchange information with the host computer" made the website semi-interactive instead of highly interactive. *Carefirst of Md.*, 334 F.3d at 400.

Pennsylvania decided *Zippo* in 1997, the Internet was still in its infancy, as evidenced by the court's need to define the terms "site," "Web," and "World Wide Web" in a footnote. *Zippo*, 952 F. Supp. at 1121 n.2. For perspective, that year, America Online claimed to have "the largest subscriber base of any Internet online service, with approximately 8.6 million members." See America Online, Inc., Annual Report (Form 10-K) (Sept. 29, 1997), <https://www.sec.gov/Archives/edgar/data/883780/0000883780-97-000014.txt>.

AOL offered a number of self-described "interactive" services, including "electronic mail, Buddy Lists, Instant Messages, interactive news and magazines, entertainment, weather, sports, games, stock quotes, mutual fund transactions, online shopping, Internet access with search capabilities, software files, computing support, online classes and auditorium events, online meeting rooms and conversations (chat), and parental and mail controls." *Id.*

The decisions of this Court "adopt[ing]" and "adapt[ing]" *Zippo* are, themselves, at least 17 years old, and came at a time when Netflix had around 750,000 subscribers for its DVD by postal mail service, see Netflix, Inc. Quarterly Report (Form 10-Q) (Nov. 11, 2002), and MySpace (2003), Facebook (2004) and YouTube (2005) had not yet launched. See *Then and Now: A History of Social Media Sites*, CBS News, <https://www.cbsnews.com/pictures/then-and-now-a-history-of-social-networking-sites/> (last visited Mar. 12, 2019); Richard Alleyne,

YouTube: Overnight Success Has Sparked a Backlash, The Telegraph (July 21, 2008), <https://www.telegraph.co.uk/news/uknews/2480280/YouTube-Overnight-success-has-sparked-a-backlash.html> (explaining how YouTube’s creators launched the service because, at the time, it was impossible to exchange videos online).

While the *Zippo* categories of interactivity, on their face, streamline the jurisdiction analysis, they have been the subject of much criticism for “prov[ing] less ‘bright-line’ than might be anticipated.” See, e.g., Zoe Niesel, *#personaljurisdiction: A New Age of Internet Contacts*, 94 Ind. L.J. 103, 119 (2019). Other circuits have rejected *Zippo*, at least in part, due to the analytical limits of the categorical approach. See, e.g., *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 252 (2d Cir. 2007) (recognizing limited value of interactivity in analyzing purposeful jurisdiction); *Pervasive Software Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 227 n.7 (5th Cir. 2012) (declining to follow “mechanical” approach of *Zippo*); *Ill. v. Hemi Grp. LLC*, 622 F.3d 754, 758-59 (7th Cir. 2010) (rejecting the need for a categorical test). This Court, meanwhile, has recognized that defining a website’s interactivity should be just the beginning of the analysis. See *ALS Scan*, 293 F.3d at 713.

In classifying Defendant’s websites as “semi-interactive,” the District Court failed to see the forest through the trees, conducting a formulaic analysis to define

the websites' level of interactivity based on a patchwork of cases rather than a fact-specific analysis of the Defendant's manifested intent. J.A. 391-92. The District Court placed a disproportionate emphasis on the volume and duration of the interactions between a user and the Defendant's websites and the "want of an ongoing, developed relationship between users and the Websites." *Id.* But the lack of repetition is only part of the analysis where the volume of contacts is substantial. *See Bird v. Parsons*, 289 F.3d 865, 874–75 (6th Cir. 2002) (finding jurisdiction where website accepted business with 4,666 residents of forum state although it was "unclear whether registrants who use Dotster's website do so on a repeated basis") (citing *Zippo*, 952 F. Supp. at 1126-27).³ Here, the Defendant's websites had nearly 32 million users in the United States and more than half a million users in Virginia between October 2017 and September 2018. J.A. 78-79, 87-88. Put another way, Defendant's websites had almost four times more users in the United States in a one-year period than the world's largest ISP had subscribers when the categorical test in *Zippo* was adopted. Only by focusing on an inflexible

³ The case upon which the District Court relied, *Bright Imperial Ltd. v. RT MediaSolutions, S.R.O.*, did not reach a contrary conclusion. 1:11-cv-935, 2012 WL 1831536 (E.D. Va. May 18, 2012). The court in *Bright Imperial* discussed two scenarios: (1) where the number of contracts with the forum is limited, but the contacts are "ongoing and extensive," jurisdiction is proper, and (2) where the number of contacts with the forum is limited and the defendant's relationship with the forum is not ongoing, jurisdiction likely does not comport with due process. *Id.* at *5. *Bright Imperial* did not address the situation here, where the website's contacts with the forum are extensive in number, but may be limited in duration.

set of outmoded standards could a court conclude that such contacts are not “significant.”

The District Court’s emphasis on the amount of time a user spent on the Defendant’s sites also failed to properly account for how standards and terminology adopted in an era of static websites and dial up connections apply to the operational nature of the Internet today. While duration of a site visit has never been a good proxy for interactivity (indeed, even a wholly passive site can engage a user for an extended period of time), advances in the processing power of modern computers and the ability to deliver large files using high-speed broadband connections make it impossible to measure a site’s interactivity based on the length of users’ visits.⁴ Here, Defendant’s websites require a user to enter a publicly available web address for a YouTube video, choose the desired format, and click “convert.” J.A. 18-23, 76. Defendant’s services then reach out to YouTube’s servers to obtain the specific file requested by the user, illegally copy the file, and convert the audio to the specific format requested by the user. J.A. 21-22, 76. Finally, Defendant’s services present the user with a link to download the custom-made audio file to the user’s device. *Id.* It is difficult to fathom how a website that creates infringing content on demand for users to download to their own devices is

⁴ A purely time-based analysis would reward infringing websites for their technological savvy by making it more difficult to assert jurisdiction in contrast to a site that requires greater processing time and, potentially, a repeat visit.

less interactive than a site that merely allows users to play online games but which, according to the District Court, was interactive because “users could play...for significant periods of time.” See J.A. 392 (citing *Alitalia-Linee Aeree Italiane S.p.A. v. Casinoalitalia.Com*, 128 F. Supp. 2d 340 (E.D. Va. 2001)).⁵

Similarly, the District Court’s focus on whether users “need to create an account, sign in, or register in order to use the Websites,” *id.*, establishes an unnecessary roadblock to asserting jurisdiction over sites that distribute infringing and pirated content. Sites engaging in these practices generally avoid collecting information such as user names and passwords due to the inherent illegality of the activities conducted on those sites. The purpose of categorization of an Internet site or service is to determine whether a foreign defendant used the Internet to direct activity into the state. See *ALS Scan*, 293 F.3d at 714. Because many websites that process requests expeditiously and/or do not require usernames or passwords are still substantially more interactive than the kind of websites contemplated 22 years ago in *Zippo*, the categorical test distracts from, rather than supports this inquiry.

⁵ In *Alitalia-Linee Aeree Italiane S.p.A.*, the court found that the defendant was subject to personal jurisdiction despite only having five of its 750 users in Virginia because online gaming “is an inherently interactive activity.” 128 F. Supp. 2d at 350. On demand file conversion, however, would seem at least as inherently interactive as online gaming in that it requires the website to obtain and convert the specific file requested by the user and deliver it to the user for download.

To avoid unduly precluding a finding of personal jurisdiction based on a single factor, courts in this circuit frequently analyze the totality of a Defendant's contacts with the forum to determine whether purposeful availment exists. *See Microsoft v. Does 1-2*, No. 1:16-cv-993, 2017 WL 5163363, at *1 (E.D. Va. Aug. 1, 2017) (adopting report and recommendation finding jurisdiction based on use of "computers, internet websites, and instrumentalities in Virginia" and maintenance of .com and .org domain names); *Microsoft Corp. v. Does 1-18*, No. 1:13-cv-139 LMB/TCB, 2014 WL 1338677, at *2 (E.D. Va. Apr. 2, 2014) (finding jurisdiction based on use of instrumentalities in district and harm in district); *Newbold Corp. v. Data Sys. Co.*, No. CIV.A. 706-cv-00033, 2006 WL 467979, at *3 (W.D. Va. Feb. 28, 2006) (aggregating contacts to find personal jurisdiction); *Schreiner v. Patriarch Partners, LLC*, No. 2:14-cv-220-RMG, 2014 WL 11034777, at *4 (D.S.C. Nov. 7, 2014) (same); *Cortex Surveillance Automation, Inc. v. Sec. Integrators & Consultants, Inc.*, No. 1:05-cv-562, 2006 WL 994951, at *5 (M.D.N.C. Apr. 12, 2006) (same); *Stratagene v. Parsons Behle & Latimer*, 315 F. Supp. 2d 765, 769 (D. Md. 2004) (relying on "factual circumstances, taken together" to find personal jurisdiction). The Court should require a similarly comprehensive inquiry and reject the District Court's mechanical application of *Zippo*.

B. The District Court Compounded Its Error By Finding the Interactions Between the Defendant's Websites and Users Not Significant and Non-Commercial.

Even if the District Court's classification of the Defendant's website as semi-interactive had been proper, the lower court failed to properly apply the sliding scale test for semi-interactive websites. As this Court has recognized, "[w]hen a website is neither merely passive nor highly interactive, the exercise of jurisdiction is determined 'by examining the level of interactivity and commercial nature of the exchange of information that occurs.'" *Carefirst of Md.*, 334 F.3d at 390 (quoting *Zippo*, 952 F. Supp. at 1126). By discounting the substantial volume of contacts between Defendant's website and the forum state, and failing to recognize the commercial nature of modern-day Internet advertising networks, the District Court adopted a nearly impossible standard for jurisdiction that only an e-commerce site for physical goods, such as Amazon.com, or a subscription-based service, such as Netflix, could meet.

As an initial matter, while the District Court assigned a category of interactivity to Defendant's websites, it failed to conduct the requisite follow up analysis into the level of interactivity within the broad range of semi-interactive websites. The sliding scale approach is designed to "reconcil[e] contacts through electronic media with standard due process." *See ALS Scan*, 293 F.3d at 714 (citing *Calder v. Jones*, 465 U.S. 783 (1984)). By failing to consider where

Defendant's websites fall on the scale of semi-interactive websites, however, the District Court cannot have properly accounted for these due process concerns.

Equally problematic was the District Court's failure to consider the many ways in which a modern website may be properly classified as commercial even if it lacks a direct exchange of payment between the user and the site operator. While acknowledging that the Defendant "earn[s] money from the sale of advertising space on the Websites," the District Court nevertheless categorized the sites' interactions with users as non-commercial because "all of this money comes from third party advertisers who Defendant does not deal with directly." J.A. 393. While such a narrow concept of commercial interaction may have been appropriate at the time of *Zippo*, *Carefirst*, and *ALS Scan*, it ignores the reality of web-based interactions today. Many of the world's most popular sites and services such as Google, Facebook, Gmail, and YouTube do not engage in direct commercial transactions with users. Instead, these and many other clearly commercial sites operate in a data economy. They provide a variety of interactive services seemingly for "free" in exchange for: (1) the right to direct advertising to the user; and/or (2) access to data about the user that can make advertising more effective not only on individual websites but throughout the Internet as a whole.

The fact that advertisements on a website are provided by a third-party service rather than the website operator itself is irrelevant to the jurisdictional

inquiry. As other circuits have recognized, providing advertising space to third-party advertisers that target residents in the forum state is sufficient to establish jurisdiction. *See Mavrix Photo, Inc. v. Brand Tech. Inc.*, 647 F.3d 1218, 1230 (9th Cir. 2011) (addressing similar third-party advertisements and noting that “it is immaterial whether the third-party advertisers or [the defendant] targeted California residents”). A third-party advertising model is frequently more lucrative to the website operator because third-party advertisers have the ability to aggregate information from multiple websites. *See, e.g., Jay P. Kesan & Rajiv C. Shah, Deconstructing Code*, 6 Yale J. L. & Tech. 277 (2004) (describing use of advertising networks “to aggregate the information about a person’s web surfing from its client web sites”).

The District Court’s opinion also failed to consider the value of the content exchanged in determining whether a commercial transaction occurred. In the copyright context, a “[d]irect economic benefit is not required to demonstrate a commercial use.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001), *as amended* (Apr. 3, 2001), *aff’d sub nom. A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002). The copyright-protected music files at issue in this case, like the books and journals published by AAP’s members, have commercial value that is diminished by the infringement itself. *See Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1118 (9th Cir.

2000) (stating that church that copied religious text for its members “unquestionably profit[ed]” from the unauthorized “distribution and use of [the text] without having to account to the copyright holder”); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994) (finding that researchers at for-profit laboratory gained indirect economic advantage by photocopying copyrighted scholarly articles).

Whether goods are distributed without authorization or legitimately sold should not be the basis on which jurisdiction turns. Rather, where, as here, the exchange itself has commercial value, the transaction should be considered at least partially commercial in the sliding scale analysis.

II. **THE DISTRICT COURT’S ERRONEOUS HOLDING THAT THE DEFENDANT DID NOT PURPOSEFULLY TARGET THE UNITED STATES COULD SUBSTANTIALLY DILUTE AN IMPORTANT MECHANISM FOR HOLDING FOREIGN ACTORS ACCOUNTABLE FOR ACTIONS TARGETING THE UNITED STATES.**

The District Court’s cursory dismissal of the Defendant’s contacts with the United States as a whole threatens to undermine important protections for American interests under United States intellectual property laws. The District Court failed to properly consider Rule 4(k)(2), or the Federal long-arm statute. This measure provides a separate basis for exercising jurisdiction in cases involving federal claims where: (1) the defendant is not subject to jurisdiction in any state’s courts of general jurisdiction; and (2) exercising jurisdiction is

consistent with the United States Constitution and laws. *See* Fed. R. Civ. P. 4(k)(2). The District Court dismissed the Plaintiffs' 4(k)(2) argument in a single paragraph, concluding that "Defendant took no action through the Websites that would demonstrate purposeful targeting of Virginia or the United States" because any contact was "unilateral in nature." J.A. 393-94. In so holding, the District Court improperly focused on the primary target of Defendant's activities rather than examining the evidence that Defendant was targeting the United States.

The Court's focus on the unilateral nature of the websites at issue ignored specific indicia that the Defendant: (1) attempted to attract users from the United States; (2) anticipated that he would attract users from the United States; (3) knew that he attracted users from the United States; and (4) benefited from attracting users in the United States. This is not a traditional stream-of-commerce case, where Defendant took no action to establish contacts with the forum. *Cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980) (finding no jurisdiction outside of states in which defendants engaged in commerce). Here, Defendant's attempt to attract users from the United States is evident from the use of English language (notwithstanding Defendant's domicile in Russia) and the reference to the Digital Millennium Copyright Act ("DMCA") on Defendant's websites. J.A. 76 (English claim that website "makes converting streaming videos to MP3 online easier and faster than ever"), 164, 172 (references to DMCA).

There would be no reason for the Defendant to reference the DMCA on his websites and register a DMCA agent with the U.S. Copyright Office if he was not both targeting users in the United States and anticipating that he would succeed in obtaining users from the United States. And succeed he did, with Defendant's own data demonstrating that he attracted nearly 32 million users in the United States and more than half a million users from Virginia in a one-year period. J.A. 78-79, 87-88.

If, despite all these facts, Defendant truly did not intend to avail himself of the privileges of conducting business in the United States, he could have enabled geoblocking to prevent access by U.S.-based users given that Defendant was actively collecting geolocation data from site visitors. J.A. 70, 176, 178. Yet, rather than use the geolocation data that he collected to limit his contacts with the United States, the Defendant used his contacts with U.S.-based site visitors to expand his service offerings to such visitors, noting in his website privacy policies that he may use "your IP address, country of origin and other non-personal information about your computer or device . . . to provide targeted advertising based on your country of origin and other personal information." J.A. 176, 178.

As at least one other circuit has recognized, the Defendant's failure to implement geoblocking to prevent uses of the websites by users in the U.S., despite his collecting such geographic data for advertising purposes, further supports a

finding of jurisdiction under Rule 4(k)(2). *See Plixer Int'l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 9 (1st Cir. 2018) (“Scrutinizer’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.”).⁶ The Defendant cannot simply turn a blind eye to his substantial contacts with the United States. Where, as here, the Defendant had both a reasonable basis to believe that his website was targeting American users and a reasonable method to prevent such targeting, failure to adopt such preventive measures demonstrates an intent to avail himself of the privileges of conducting business in the United States. Any other conclusion would effectively render Rule 4(k)(2) meaningless in the Internet context and strip AAP members of an important tool for protecting their copyrights against foreign infringers.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court’s grant of Defendant’s motion to dismiss and remand the case for further proceedings.

⁶ Although the U.S. District Court for the District of Columbia recently refused to adopt a mandatory geoblocking requirement, that court was not presented with the same indicia that the defendant had taken other efforts to target the United States for the activities at issue in the case. *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). Moreover, the D.C. Circuit subsequently identified removal of geoblocking as one of a number of facts supporting a finding of intentional copyright infringement. *See Spanski Enters. Inc. v. Telewizja Polska S.A.*, 883 F.3d 904, 917 (D.C. Cir. 2018).

Respectfully submitted,

/s/ David E. Weslow

David E. Weslow

Megan L. Brown

Ari S. Meltzer

WILEY REIN LLP

1776 K Street, N.W.

Washington, D.C. 20006

(202) 719-7000

dweslow@wileyrein.com

*Counsel for Association of American
Publishers*

March 19, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 6,487 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman, 14 point.

/s/ David E. Weslow

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2019, the foregoing brief was filed electronically using the Court's CM/ECF system, which will send notification of such filing to party counsel, all of whom are registered ECF filers, and I further certify that a copy of the foregoing will be dispatched to a third-party commercial courier on March 19, 2019 for delivery to:

Patricia S. Connor, Clerk
U.S. Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

/s/ David E. Weslow