Fourth Circuit Dramatically Expands Scope of Personal Jurisdiction for Website Operators

Courts have had to determine, among the many challenges brought by the rise of the Internet, when a website operator is subject to personal jurisdiction, a potentially vexing problem because websites generally lack a specific location and can be accessed from almost anywhere on the globe. Mindful that website operators should not be hauled into a forum simply because their websites can be accessed there, most federal courts have attempted to address the problem by adopting the sliding scale test developed in 1997 by the seminal case, *Zippo Mfg. Co.* v. *Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), which focuses on the level of interaction between the website and its users.

Since 2014, however, the Supreme Court of the United States has dramatically altered the law of personal jurisdiction and narrowed the circumstances in which a foreign or out-of-state defendant can be subject to jurisdiction. The Supreme Court explained in *Walden* v. *Fiore*, that specific jurisdiction (i.e., jurisdiction over a particular dispute) requires a "relationship among the defendant, the forum, and the litigation" that arises out of contacts that the "defendant *himself* creates with the forum." 571 U.S. 277, 284 (2014). The lower federal courts since have been forced to confront how to apply these developments to the Internet.

On June 26, 2020, the United States Court of Appeals for the Fourth Circuit issued a significant decision regarding the exercise of personal jurisdiction over a web-based defendant. In *UMG Recordings, Inc.* v. *Kurbanov*, 963 F.3d 344 (4th Cir. 2020),[1] the Fourth Circuit reversed a lower court decision dismissing a copyright defendant for lack of personal jurisdiction and held that a Russian-based owner and operator of two websites allegedly used for music piracy was subject to personal jurisdiction in Virginia. In reaching this conclusion, the Fourth Circuit shifted away from the interactivity test developed in *Zippo* and focused instead on applying the standard in *Walden*. In applying *Walden*, the facts the Fourth Circuit considered sufficient for personal jurisdiction are the types of advertising practices commonly used by websites. If other courts find the Fourth Circuit's decision persuasive, website owners could potentially be subject to personal jurisdiction wherever their websites have a considerable number of users.

I. Background: Personal Jurisdiction and the Internet

In the 1997 *Zippo* decision, the United States District Court for the Western District of Pennsylvania developed a sliding scale test that focused on the level of interactions between the website and its users. At one end of the scale, the court explained, "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." *Zippo*, 952 F. Supp. at 1124. At the opposite end of the spectrum are so-called "passive" websites, where a "defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions." *Id.* The court held that 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." *Id.* Finally, the court considered websites in the "middle ground," or "interactive Web sites where a user can exchange information with the host computer." *Id.* For these websites, 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.*

Zippo has become "a seminal authority regarding personal jurisdiction based upon the operation of an Internet web site." *Ackourey* v. *Sonellas Custom Tailors*, 573 Fed. App'x 208, 211 (3d Cir. 2014) (citing *Toys "R"*

[1] Unless otherwise noted, all quotations in this memo are taken from this decision.

Us, Inc. v. *Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003)). The Courts of Appeals for the Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and D.C. Circuits have adopted the *Zippo* test.[2] The remaining circuits have taken different approaches. The Second and Seventh Circuits have not formally adopted or rejected *Zippo* but have considered its framework relevant to determining whether there is personal jurisdiction over a website operator.[3]

Starting in 2014, the Supreme Court issued a trilogy of decisions that dramatically changed the law of personal jurisdiction and, in doing so, limited the forums in which an out-of-state or foreign company can be sued. In *Daimler AG* v. *Bauman*, the Court limited general jurisdiction (i.e., whether there is personal jurisdiction over a defendant regardless of whether the underlying dispute connects with the forum) over a company to only those forums where it is "at home." 571 U.S. 117, 139 (2014). Then, in *Walden*, the Court clarified that specific jurisdiction (i.e., whether there is jurisdiction over a particular dispute) requires a "relationship among the defendant, the forum, and the litigation" that arises out of contacts that the "defendant *himself* creates with the forum," rather than contacts created by the plaintiff or third parties. *Walden*, 571 U.S. at 284 (emphasis in original). Finally, in *Bristol-Myers Squibb Co.* v. *Superior Court*, the Court extended its ruling in *Walden* to federal multi-plaintiff cases, requiring that each plaintiff establish that the court has personal jurisdiction over each of its claims. 137 S. Ct. 1773, 1783 (2017).

The Fourth Circuit's recent decision in *UMG Recordings, Inc.* v. *Kurbanov*, is a significant appellate court ruling on Internet-based jurisdiction that demonstrates a shift in approach since the Supreme Court's trilogy of personal jurisdiction cases. In January 2019, the United States District Court for the Eastern District of Virginia granted a motion to dismiss copyright law claims brought by twelve record companies against Tofig Kurbanov, a Russian resident. The companies alleged that Kurbanov operated two websites used to pirate music in violation of U.S. copyright law. Kurbanov's websites offered "stream-ripping" services, which allowed users to extract and download the audio portion of videos hosted on other sites. Although the websites had several permissible uses, many users accessed the websites to illegally "rip" copies of music videos hosted on YouTube. *UMG Recordings, Inc.* v. *Kurbanov*, 362 F. Supp. 3d 333, 335 (E.D. Va. 2019). The websites were free to access and had millions of users in the United States (including hundreds of thousands of users in Virginia). To profit from the websites, Kurbanov sold advertising space through third-party advertising brokers, who in turn "geo-targeted" unique advertisements to users in specific states based on information collected by the websites. The record companies argued that the use of "geo-targeting" advertisements was sufficient to establish specific jurisdiction over Kurbanov because these ads allowed him to direct particular advertisements to users in Virginia. In finding that Kurbanov was not subject to jurisdiction in Virginia, the District Court rejected the record companies' argument because the content of the advertisements and the decision as to where to place them were made by third-party brokers, not Kurbanov. *Id.* at 339. The record companies appealed.

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[2] *See Toys "R" Us, Inc.* v. *Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003); *ALS Scan, Inc.* v. *Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002); *Revell* v. *Lidov*, 317 F.3d 467, 470 (5th Cir. 2002); *Neogen Corp.* v. *Neo Gen Screening, Inc.*, 282 F.3d 883, 890 (6th Cir. 2002); *Lakin* v. *Prudential Securities, Inc.*, 348 F.3d 704, 711 (8th Cir. 2003) (adopting the test for specific jurisdiction inquiries); *Cybersell, Inc.* v. *Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997); *Soma Medical Intern.* v. *Standard Chartered Bank*, 196 F.3d 1292, 1297 (10th Cir. 1999); *Gorman* v. *Ameritrade Holding Corp.*, 293 F.3d 506, 513 (D.C. Cir. 2002).

[3] *See Best Van Lines, Inc.*, v. *Walker*, 490 F.3d 239, 252 (2d Cir. 2007); *Tamburo* v. *Dworkin*, 601 F.3d 693, 703 n.7 (7th Cir. 2010). The First Circuit "has never embraced [the *Zippo*] sliding scale analysis," *Kuan Chen* v. *United States Sports Academy, Inc.*, 956 F.3d 45, 55 n.3 (1st Cir. 2020), and the Eleventh Circuit has declined to adopt it. *Louis Vuitton Malleteir, S.A.* v. *Mosseri*, 736 F.3d 1339, 1355 n. 10 (11th Cir. 2013).

II. The Fourth Circuit's Decision in *UMG Recordings*

The Fourth Circuit reversed the District Court's decision and held that Kurbanov purposefully availed himself of the forum and that the record companies' claims arose out of his activities directed at Virginia. The Fourth Circuit remanded the case to the lower court for a determination of whether exercising personal jurisdiction over Kurbanov would be constitutionally reasonable.

Although the panel did not formally reject the Fourth Circuit's longstanding use of the *Zippo* test, it downplayed its significance in the analysis, concluding that "[w]hether the Websites are highly interactive or semi-interactive . . . is not determinative for purposes of personal jurisdiction." The Fourth Circuit also cautioned that "the internet we know today is very different from the internet of 1997, when *Zippo* was decided," and warned that if the Fourth Circuit "attached too much significance on the mere fact of interactivity, we risk losing sight of the key issue in a specific jurisdiction case—whether the defendant has purposefully directed [his] activities at residents of the forum." Instead, the Fourth Circuit considered a wide array of other factors and held that there were "more than sufficient facts raised to conclude" that Kurbanov "purposefully availed himself of the privilege of conducting business in Virginia."

The Fourth Circuit cited several factors supporting the exercise of jurisdiction over Kurbanov, including that (i) more than half a million unique visitors from Virginia visited the website, making Virginia "one of the most popular states"; (ii) the websites' domain names were registered with a U.S.-based registrar and administered by Virginia companies; (iii) the websites' servers were for a time hosted by Amazon Web Services, which had servers in Virginia; and (iv) Kurbanov had registered a Digital Millennium Copyright Act agent with the U.S. Copyright Office.

Critically, the Fourth Circuit rejected the lower court's analysis regarding "geo-targeted" advertisements, finding that, although third parties (and not Kurbanov) determine where advertisements should be placed, jurisdiction still lies over Kurbanov because he "facilitates targeted advertising by collecting and selling visitors' data" and "earns revenues precisely because the advertising is targeted to visitors in Virginia."

In reaching this conclusion, the Fourth Circuit rejected concerns that such practices are commonly used by websites and could potentially subject website operators to jurisdiction anywhere their website is frequently accessed.[4] The Fourth Circuit held that there were unique features of Kurbanov's websites that distinguished them from every other website that was merely accessible in Virginia:

> [T]his is not a situation where a defendant merely made a website that happens to be accessible in Virginia. Rather, Kurbanov actively facilitated the alleged music piracy through a complex web involving Virginia visitors, advertising brokers, advertisers, and location-based advertising. From Virginia visitors, he collected personal data as they visited the Websites. To the advertising brokers, he sold the collected data and advertising spaces on the Websites. For end advertisers, he enabled location-based advertising in order to pique visitors' interest and solicit repeated visits. And through this intricate network, Kurbanov directly profited from a substantial audience

[4] Brief of Electronic Frontier Foundation as *Amicus Curiae* Supporting Defendant-Appellee at 11, *UMG Recordings, Inc.* v. *Kurbanov*, 963 F.3d 344 (4th Cir. 2020) (No. 19-1124) ("Websites that do not directly sell goods or services to its users often generate revenue through online advertisements hosted on their website. These online advertisements have geo-targeting capabilities, meaning that third-party advertising networks serve users specific advertisements based on guesses about their location. . . . If using this common form of advertising were enough to constitute purposeful availment, then simply employing an advertising broker of this type would create jurisdiction wherever *any* website user resides—a massive expansion of personal jurisdiction that would affect millions of websites.")

of Virginia visitors and cannot now disentangle himself from a web woven by him and forms the basis of Appellants' claims.

III. Conclusion

The Fourth Circuit's decision in *UMG Recordings* indicates that courts may be moving away from the *Zippo* interactivity test and focusing instead on whether the website owner took steps to aim his website at the forum and whether those activities form the basis for the lawsuit.

Although the Fourth Circuit took pains to paint Kurbanov's websites as a uniquely "complex web involving . . . location-based advertising," the pervasiveness of ad-supported websites hardly makes the facts of *UMG Recordings* unique. If other courts find *UMG Recordings* persuasive, it could mean that website operators will be subject to personal jurisdiction more broadly in any forum where their website is frequently accessed.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg at 212.701.3120 or jkurtzberg@cahill.com; Adam Mintz at 212.701.3981 or amintz@cahill.com; or Benjamin Lash at 212.701.3312 or blash@cahill.com; or email publications@cahill.com.