

## **Ninth Circuit Takes a Narrow View on Personal Jurisdiction over Website Operators, Setting Up Potential Circuit Split**

As we reported in August,<sup>1</sup> courts are increasingly being asked to decide when website operators are 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. In June 2020, the United States Court of Appeals for the Fourth Circuit, in *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344 (4th Cir. 2020), answered that question by adopting an expansive view of personal jurisdiction. The court held that certain common web-based advertising activities subjected a Russia-based website operator to personal jurisdiction in Virginia. Specifically, the defendant was alleged to have posted free content on his website, and rather than profit directly from end-users, sold advertising space on the site to third-party advertisers. He was then sued in Virginia, a forum where the website was frequently accessed. If the Fourth Circuit’s approach were adopted more widely, any website operator would potentially be subject to personal jurisdiction for claims in any forum where their website is frequently accessed.

On August 17, 2020, however, in *AMA Multimedia, LLC v. Wanat*, the United States Court of Appeals for the Ninth Circuit adopted a different approach. Addressing a similar fact pattern to *UMG Recordings*, the court held it could not exercise jurisdiction over a foreign website operator. 970 F.3d 1201 (9th Cir. 2020).<sup>2</sup> Although *AMA Multimedia* determined that *UMG Recordings* was distinguishable, the Ninth Circuit’s decision creates a potential split among the circuits. Until the issue is resolved, website operators remain at risk of being forced to defend lawsuits in any jurisdictions where they have a substantial number of users.

### **I. Background: Personal Jurisdiction and The Effects Test**

To exercise jurisdiction over out-of-state defendants, courts typically must have specific jurisdiction, or “case-linked” jurisdiction, which requires a “relationship among the defendant, the forum, and the litigation” that arises out of contacts that the “defendant *himself* creates with the forum.” *Walden v. Fiore*, 571 U.S. 277, 284 (2014).

Before the Supreme Court of the United States articulated the foregoing jurisdictional framework in *Walden*, courts analyzing jurisdiction over website operators typically used an “interactivity” test that considers the degree of interaction between a website and its users. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). The *Zippo* court held that, where a website does business over the internet or contracts with residents of a foreign jurisdiction, the exercise of jurisdiction over the website is proper. *Id.* at 1124. By contrast, the *Zippo* court held that “passive” websites, or those that merely post information that is accessible to out-of-forum viewers, are not subject to jurisdiction in the forums in which users access them. *Id.* For websites in the “middle ground,” or those where users can exchange information with the host computer, the court examined “the level of interactivity and commercial nature of the exchange of information” that occurs on the site to determine whether exercising jurisdiction would be proper. *Id.*

Since *Walden*, however, courts have started to deviate from the interactivity test and instead applied the general standards of personal jurisdiction to the internet context. For example, the Fourth Circuit in *UMG Recordings* found that the dispute at issue arose out of the defendant’s contacts with Virginia. In that case, the plaintiff record companies sued the Russia-based operator of a website allegedly used to pirate music. The Fourth

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<sup>1</sup> *Fourth Circuit Dramatically Expands Scope of Personal Jurisdiction for Website Operators*, Cahill Gordon & Reindel (Aug. 19, 2020), <https://www.cahill.com/publications/firm-memoranda/2020-08-19-fourth-circuit-dramatically-expands-scope-of-personal-jurisdiction-for-website-operators>.

<sup>2</sup> Unless otherwise indicated, all quotations in this memo are taken from this decision.

Circuit found that exercising specific jurisdiction over the website operator in Virginia was proper because the site derived its revenue through the use of third-party advertising brokers, who “geo-targeted” unique advertisements to visitors, including those from Virginia. The court also cited the site’s (i) large Virginia user base; (ii) registration of domain names with a U.S.-based registrar with a Virginia-based administrator; (iii) decision to host its servers with a company with technical infrastructure in Virginia; and (iv) registration of a Digital Millennium Copyright Act agent with the U.S. Copyright Office. *UMG Recordings*, 963 F.3d at 353-54.

## II. The Ninth Circuit’s Decision in *AMA Multimedia*

The defendant in *AMA Multimedia*, Marcin Wanat, is a resident of Poland who operates ePorner.com (“ePorner”), an adult video website that is accessible globally, including in the United States. The website generates revenue through the use of third-party advertising companies, who “geolocate” unique advertisements to the website’s visitors that differ depending on where they reside. Although Wanat has never visited the United States, and ePorner maintains no offices or agents there, Wanat had some limited connections to the country. Wanat contracted with an American domain name server, Tiggee LLC, to allow American users to access ePorner more efficiently. Wanat also registered the ePorner domain names with an American company, GoDaddy.com, though he did so from Poland using a Polish version of GoDaddy’s website. And while Wanat claimed he did not “specifically target any of [his] services to residents of the [United] States,” United States-based visitors accounted for about one-fifth of the site’s users, making the United States the site’s largest market.

The plaintiff, AMA Multimedia, LLC (“AMA”), is a Nevada-based company that produces and distributes adult videos. AMA’s videos are copyrighted, and the company owns several websites where paying customers can view AMA’s productions. When AMA discovered that ePorner was displaying AMA videos without authorization, it sued Wanat for copyright infringement, trademark infringement, and unfair competition. The United States District Court for the District of Arizona granted Wanat’s motion to dismiss for lack of personal jurisdiction, holding that AMA failed to show that Wanat intentionally aimed any act at the United States.

On appeal, the United States Court of Appeals for the Ninth Circuit evaluated Wanat’s conduct under the “effects test.” Satisfying the “effect test” in the Ninth Circuit requires a showing that the defendant “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011).

In *AMA Multimedia*, the majority of the panel concluded that Wanat’s creation and maintenance of ePorner and his registration of domain names constituted intentional acts under the framework. The steps Wanat took to establish the website, the Ninth Circuit held, evinced “an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act.” However, the court further concluded that these intentional acts were not “expressly aimed” at the United States for purposes of jurisdiction. AMA had argued that Wanat’s conduct *was* aimed at the United States, citing ePorner’s (1) use of geo-targeted ads to earn revenue from the United States; (2) large U.S. viewer-base; (3) terms of service; and (4) use of the U.S.-based domain name server. But the court rejected these arguments, holding that the website “lacks a forum-specific focus.”

In support of this conclusion, the Ninth Circuit referenced its previous decision in *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218 (9th Cir. 2011). There, the court concluded that an out-of-state website operator, Brand Technologies, was subject to personal jurisdiction in California where it managed a website devoted to celebrity gossip. The court determined that Brand Technologies “expressly aimed” its conduct at the forum because the website contained “a specific focus on the California-centered celebrity and entertainment industries.” *Id.* at 1230. The *Mavrix* court’s conclusion, in significant part, was “[b]ased on the website’s subject matter.” *Id.* By contrast, in *AMA Multimedia*, the court held that “the market for adult content is global,” as evidenced by the

fact that 80% of ePorner’s viewers were outside the United States. Because ePorner did not maintain a specific focus on the United States, the court concluded, it did not “expressly aim” its web activities there.

The Ninth Circuit also rejected AMA’s argument that ePorner’s conduct was aimed at the United States because it “features a significant portion of U.S.-based content from producers like AMA and U.S.-based models.” On this point, the court distinguished between content uploaded by ePorner’s visitors and content posted by ePorner itself. The court determined that “the popularity or volume of U.S.-generated adult content does not show that Wanat expressly aimed the site at the U.S. market.” Instead, the court explained, “it merely suggests the United States produces a significant quantity of adult content or that ePorner’s users are more likely to upload content produced in the United States.”

ePorner’s effort to “geo-target” specific advertisements to United States visitors likewise was held insufficient to confer jurisdiction over Wanat. For one, the Ninth Circuit held that such geo-targeting was conducted by a third-party advertising company, not Wanat. Additionally, the court stated that finding jurisdiction based on location-based advertising would result in ePorner being subject to jurisdiction anywhere its site was accessible. The court explained that such targeting meant that “ePorner’s geo-located advertisements...are *always* directed at the forum” (emphasis in original). “If such geo-located advertisements constituted express aiming,” the court held, “ePorner could be said to expressly aim at *any* forum in which a user views the website” (emphasis in original). The court concluded that such a finding would run afoul of jurisdictional and due process principles.

The Ninth Circuit rejected each of AMA’s remaining arguments for finding jurisdiction. The court held that United States-based visitors’ acceptance of ePorner’s terms of service could not establish jurisdiction, because the dispute did not arise out of those terms. ePorner’s use of Tiggee LLC, which advertises itself as “one of the fastest DNS providers in the United States,” also was not enough to confer jurisdiction. Although the court observed that using such a company could be a relevant jurisdictional fact, AMA had not “provided evidence to suggest that Wanat chose this vendor or was motivated by a desire to appeal to the U.S. market.” The court therefore upheld the lower court’s determination that Wanat was not subject to jurisdiction in the United States.

The Ninth Circuit distinguished the Fourth Circuit’s decision in *UMG Recordings v. Kurbanov*, arguing that, unlike Wanat, the defendant in that case had registered an agent with the U.S. copyright office, contracted with U.S.-based advertising brokers, and relied on U.S.-based servers. The court concluded that “none of those specific actions aimed at the United States” were present in this case.

Although the majority determined that exercising jurisdiction over Wanat was not proper, the two judges in the majority disagreed on whether its decision conclusively resolved the case. Judge Sandra Ikuta asserted that the majority’s opinion “means this case is over.” Because the district court lacks jurisdiction over Wanat, Judge Ikuta wrote, “it now has the authority to do only one thing: remove this case from its docket in accordance with its ordinary procedure.”

The other judge in the majority, Judge Ryan D. Nelson, argued that there were “potential issues left open in light of our decision to affirm” and that “perhaps the door remains slightly open for further proceedings on remand.” He argued that if AMA were to succeed on a request for additional jurisdictional discovery, “Wanat’s contacts with the United States may be shown to be more significant than the current record demonstrates.” His concurrence specifically identified ePorner’s advertising agreements and “evidence that Wanat engaged Tiggee for the purpose of targeting U.S. forum residents” as factors that could affect the jurisdictional analysis on remand.

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### III. Dissent

In dissent, Judge Ronald M. Gould argued that the majority misapplied the Ninth Circuit’s precedent in *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, to impose a “forum-specific focus” standard for determining whether out-of-state websites were subject to jurisdiction. In *Mavrix*, the Ninth Circuit held that a California-focused website operated from Ohio was subject to jurisdiction in California. But while the *AMA Multimedia* majority interpreted *Mavrix* to require a specific connection between the content of the website and the forum, Judge Gould interpreted that decision to hold that such a link was merely one piece of evidence to be evaluated in weighing whether jurisdiction is proper.

Applying that standard, Judge Gould argued that ePorner had exploited the United States market for purposes of jurisdiction. The dissent concluded that ePorner’s connections to the U.S. — including the site’s United States audience, which comprised the site’s largest user base “by a significant margin”; its location-based advertising business model, which tied its revenues to the number of United States-based visitors; its retention of a United States-based DNS company that specifically markets itself as advantageous for United States visitors; and its invocation of U.S. copyright and trademark law in its terms of service — were sufficient to allege that Wanat had “expressly aimed” conduct at the forum. Judge Gould thus concluded that the district court should have exercised jurisdiction over Wanat.

### IV. Conclusion

Issued just months after the Fourth Circuit’s contrary decision in *UMG Recordings*, the Ninth Circuit’s decision in *AMA Multimedia* creates a potential split in the circuits regarding the circumstances in which an overseas website operator can be sued in the United States: a narrower approach adopted by the Ninth Circuit that requires the website operator to direct specific conduct at the forum and a more expansive approach adopted by the Fourth Circuit which effectively subjects website operators that engage in the common practice of geo-targeted advertising to jurisdiction in any state where they have a significant number of end-users. While the Ninth Circuit attempted to distinguish *UMG Recordings* on its facts, it remains an open question which approach will be adopted by other courts.

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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](mailto:jkurtzberg@cahill.com); Adam Mintz at 212.701.3981 or [amintz@cahill.com](mailto:amintz@cahill.com); or Benjamin Lash at 212.701.3312 or [blash@cahill.com](mailto:blash@cahill.com); or email [publications@cahill.com](mailto:publications@cahill.com).