

No. 18-15051

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

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AMA MULTIMEDIA, LLC,  
A NEVADA LIMITED LIABILITY COMPANY

*Plaintiff-Appellant,*

v.

MARCIN WANAT,  
A FOREIGN CITIZEN,

*Defendant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA  
No. 2:15-CV-01674-ROS  
THE HONORABLE ROSLYN O. SILVER

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**BRIEF OF THE MOTION PICTURE ASSOCIATION, INC. AS *AMICUS  
CURIAE* IN SUPPORT OF PETITION FOR REHEARING *EN BANC***

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Date: September 10, 2020

**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, the Motion Picture Association, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock. The only law firm appearing for the Motion Picture Association, Inc. is Mitchell Silberberg & Knupp LLP.

Respectfully submitted,

Dated: September 10, 2020

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## **STATEMENT OF INTEREST**

The Motion Picture Association, Inc. (“MPA”) is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry.<sup>1</sup> Since then, MPA has served as the voice and advocate of the film and television industry around the world, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and bringing entertainment and inspiration to audiences worldwide. MPA’s members are Walt Disney Studios Motion Pictures, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and disseminators of filmed entertainment, which consumers enjoy via subscription and ad-supported services, by viewing discs or downloaded copies from online retailers, and by visiting theaters.

MPA’s members can continue to deliver high-quality content only if effective legal protection exists to guard against the devastating harm that digital piracy causes. MPA members rely on copyright law’s exclusive rights, *see* 17 U.S.C. § 106; on legal protections against circumvention of technological

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<sup>1</sup> No counsel for a party authored this brief in whole or in part and no person other than MPA and its counsel made a monetary contribution to its preparation or submission. (Before September 2019, MPA was known as the Motion Picture Association of America, Inc. (“MPAA”).)



measures used to prevent unauthorized access to, and infringement of, copyrighted works, *see* 17 U.S.C. § 1201; and on other legal protections, including trademark and unfair competition laws, *see, e.g.*, 15 U.S.C. § 1125.

Invoking well-established principles governing the exercise of personal jurisdiction in the U.S., MPA members and affiliated organizations consistently rely on the ability to bring cases to enforce their rights against illicit profiteers based *outside* the U.S. as the means of limiting the infringement of copyrighted works *in* the U.S. *See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (copyright infringement lawsuit commenced in Central District of California against Australian and Dutch defendants that distributed free software products to facilitate “sharing” infringing files through peer-to-peer networks); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013) (infringement action against illegal Canadian torrent-site operator commenced in Southern District of New York and transferred to Central District of California); *Disney Enters., Inc. v. Hotfile Corp.*, 798 F. Supp. 2d 1303 (S.D. Fla. 2011) (infringement case in Southern District of Florida against a Panamanian defendant); *Advanced Access Content Sys. Licensing Adm’r, LLC v. Shen*, No. 14-cv-1112 (VSB), 2018 WL 4757939 (S.D.N.Y. Sept. 30, 2018) (section 1201 claim

against Chinese defendant).<sup>2</sup> Accordingly, MPA has an interest in preserving copyright owners' ability to pursue actions in U.S. courts against copyright infringers that purposefully direct their infringing activities to the U.S., regardless of where those infringers reside.

MPA writes to address why this proceeding involves a question of exceptional importance; and why rehearing *en banc* is necessary to secure uniformity of this Court's decisions. *See* Fed. R. App. P. 35(a) ("FRAP"). Copyright infringement remains rampant on the internet, and foreign infringers are often the culprits. There were an estimated 46.9 billion online instances of piracy of movies, and 183.4 billion instances of piracy of television programming, in 2017 alone. David Blackburn et al., *Impacts of Digital Video Piracy on the U.S. Economy* 5 (Global Innovation Policy Center 2019) ("Blackburn"), available at <https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf>. Digital copyright infringement steals revenue that copyright holders could use to produce and distribute new works of authorship and also deprives copyright owners and their licensees of the ability to determine where, when, and how to make their works available through legitimate offerings. Widespread

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<sup>2</sup> Conversely, MPA members are frequently defendants in lawsuits, including lawsuits that allege copyright infringement. The members assert, where appropriate, lack of personal jurisdiction. MPA members' experience as both plaintiffs and defendants brings a balanced perspective to this brief.

infringement undermines copyright's core incentive to disseminate creative works for the benefit of the consuming public. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“[T]he ultimate aim is, by [copyright law’s] incentive, to stimulate artistic creativity for the general public good.”). Because the panel’s 2-1 decision upends this Court’s earlier opinions, misapplies *Walden v. Fiore*, 571 U.S. 277 (2014), and could cause significant damage to copyright holders and their licensees in the U.S., and ultimately to U.S. consumers, MPA urges the Court to grant rehearing *en banc*.

### **SUMMARY OF ARGUMENT**

The evidence and allegations indicate that Defendant-Appellee Marcin Wanat operates ePorn.com, a commercial website that attracts users (including users in the U.S.) by providing access to copyrighted works and monetizing that access through advertising. The U.S. is Wanat’s largest and most commercially significant market, which he sought to exploit through activity directed at the U.S.

The relevant precedents compel the exercise of jurisdiction under Federal Rule of Civil Procedure 4(k)(2). The panel majority misconstrued the facts to show only a relationship between the Plaintiff or Wanat’s users and the forum, rather than Wanat’s targeting of the forum himself. Based on this finding, the majority concluded that *Walden v. Fiore* prohibited the exercise of jurisdiction in the case. *AMA Multimedia, LLC v. Wanat*, No. 18-15051, 2020 WL 4745032, at

\*7 (9th Cir. Aug. 17, 2020) (“Slip op.”). As discussed in the dissent and Appellee’s petition, this was error.

The U.S. is Wanat’s largest market, whose economic value allegedly derives in significant measure from its appeal to forum residents. Wanat is alleged to have continuously and deliberately exploited this market through conduct directed at the U.S. market. His website is in English. He selected a domain name server (“DNS”) provider that touts its ability to deliver traffic to U.S. users quickly. He allegedly entered into contractual agreements with U.S. users of his website. His terms of service referenced U.S. law. He used advertising geo-targeted at the U.S. to reap financial benefits from his largest market, where advertising rates are among the highest in the world. Even after learning of Plaintiff’s claims, he continued to direct his website and its ads at the U.S., only blocking access to users in Arizona and Nevada (*i.e.*, the states where the lawsuit was filed and where Plaintiff was created as a limited liability company). Under Supreme Court and Ninth Circuit precedent, he is therefore subject to personal jurisdiction. *En banc* review is necessary to secure uniformity under FRAP 35(a)(1).

This case is also one of exceptional importance under FRAP 35(a)(2). Copyright owners’ ability to enforce their rights in U.S. courts against foreign defendants who commit infringement in the U.S. is critical in stopping digital piracy. Foreign jurisdictions often fail to provide effective mechanisms to enforce

intellectual property rights, leaving American courts as the only forum in which copyright owners can vindicate their rights. If the panel decision were to stand, the end result could provide a roadmap that guides foreign infringers on how to exploit the U.S. market and U.S. intellectual property while evading jurisdiction in the U.S., thus depriving aggrieved U.S. copyright owners of an efficacious—and often the only—forum in which to enforce their rights.

MPA therefore urges that the Court grant Appellant’s petition.

### **ARGUMENT**

#### **I. Because U.S. Courts Are Frequently the Only Forum in Which to Vindicate Infringement in the U.S. that Is Initiated from Abroad, This Case Involves a Question of Exceptional Importance.**

Digital piracy remains a devastating problem for copyright owners, including MPA’s members. The majority decision, if allowed to stand, could allow copyright infringers who cannot be brought to justice elsewhere to continue to harm U.S. copyright owners, while hiding behind evasive tactics, destroyed or withheld evidence, and willful blindness.

Often, the U.S. is the only available forum in which a U.S. copyright holder can effectively pursue an infringement claim against a foreign website that profits from infringement of U.S. intellectual property through activities both directed at and occurring in the U.S. *See* Office of United States Trade Representative, *2020 Special 301 Report and the Identification of Notorious Markets Facilitating Global*

*Piracy Report* (2020), available at

[https://ustr.gov/sites/default/files/2020\\_Special\\_301\\_Report.pdf](https://ustr.gov/sites/default/files/2020_Special_301_Report.pdf) (“2020 Notorious Markets Report”) (listing countries that do not enforce intellectual property rights in line with international norms). These infringers sometimes target their unlawful activity not toward one particular state, but toward the U.S. as a whole. Federal Rule of Civil Procedure 4(k)(2) allows lawsuits against such infringers in U.S. courts.

It is critical that U.S. courts exercise their legitimate authority to hold foreign infringers accountable. Historically, the U.S. courts have played a crucial role in enforcing the rights of copyright holders faced with rampant global digital piracy directed at the U.S. market. In the landmark *Grokster* opinion, the United States Supreme Court held that Dutch and Australian defendants who distributed software allowing the transmission of massive amounts of copyrighted works over peer-to-peer networks were liable for inducing infringement. *Grokster*, 545 U.S. at 941.

In *Fung*, 710 F.3d at 1036-37, the defendant, a Canadian resident, operated websites that induced users to share infringing films over a peer-to-peer network. This Court affirmed the district court’s order holding that Fung had engaged in contributory copyright infringement and enjoining Fung from further infringement. *Id.* at 1049.

In *Hotfile Corp.*, 798 F. Supp. 2d at 1307, the Panamanian defendant operated a website that automatically allowed users to upload and download copyrighted films. The district court exercised jurisdiction and held that the plaintiffs had stated a claim for copyright infringement under the U.S. Copyright Act. *Id.* at 1305.

And in *Shen*, 2018 WL 4757939, the defendants, residents of China, trafficked in products that circumvented the plaintiff's encryption technology on Blu-ray discs. *Shen*, 2018 WL 4757939, at \*1. The district court enjoined defendants' violation of section 1201 of the DMCA. *Id.* at \*2.

Rights holders' ability to sue foreign infringers in the U.S. remains critical to limiting digital piracy. If infringers can steal from U.S. copyright owners and profit from infringement via users and advertisers located in the U.S., yet evade jurisdiction in the U.S., piracy will cause even greater widespread harm and threaten to decrease the output of the entertainment industry, which suffers significant losses when forced to compete with lawless exploitation of copyrighted works. *See Blackburn, supra.*

Consumers can access legitimate content distributed by MPA's members and their licensees through ad-supported services, subscription services, rentals, or paid downloads. Pirate websites deprive copyright owners and their licensees of the ability to determine where, when, and how to make their works available,

including via these means. Some consumers will not pay for lawful services or will not view ads on legitimate websites if they can obtain unauthorized copies from pirate websites. The ability to provide legitimate access to content is the foundation of MPA members' businesses. The success of these businesses depends upon carefully designed strategies to build demand for filmed entertainment. So, the effects of piracy are deeply felt, and the effects of the outcome of this proceeding might be, as well.

**II. Because the Majority Misapplied Supreme Court Law and Circuit Precedent, *En Banc* Review is Appropriate under FRAP 35(a)(1).**

**A. The Majority Misapplied *Walden v. Fiore*.**

The dissenting opinion correctly observed that this Court's precedents "establish that [courts] have the authority to exercise personal jurisdiction over a defendant who has, among other things, expressly aimed his tortious conduct at the U.S. That authority allows us 'to hold [a defendant] answerable . . . for the contents of a website whose economic value turns, in significant measure, on its appeal to [forum residents].' *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1230 (9th Cir. 2011)." Slip op. at \*13. The panel majority deviated from these precedents by misapplying *Walden v. Fiore*.

In a footnote, the majority wrote that *Walden* altered the prior landscape regarding how courts should evaluate personal jurisdiction in cases involving intentional torts committed against plaintiffs located within a forum. Slip op. at



\*6, n.5. According to *Walden*, “[a] forum State’s exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum.” *Walden*, 571 U.S. at 286. “The plaintiff cannot be the only link between the defendant and the forum.” *Id.* at 285. The majority then concluded that *Walden* mandated dismissal of the instant case. Slip op. at \*11.

However, unlike in *Walden*, Appellant does not assert jurisdiction based solely on its presence in the forum. Rather, the U.S. is Wanat’s largest market for his interactive website, and he knows it. His website’s terms of service specifically reference U.S. law. Twenty percent of his website’s users are located in the U.S. Indeed, he selected a DNS provider that could deliver traffic quickly to that market, and he published his website in English, which no doubt increases the site’s appeal to the U.S. market. He used advertising networks that target ads to U.S. consumers and maximize his financial benefit from the U.S. market. And he continued to do so even after learning of Plaintiff’s claims, blocking access only to users in Arizona and Nevada (*i.e.*, the states where the suit was brought and Plaintiff is incorporated). Wanat *himself* did these things to exploit the U.S. market. The facts establishing jurisdiction over Wanat are based on Wanat’s intentional acts, not Plaintiff’s location.

The majority’s disregard of these facts rests on a misreading of *Walden*. The majority said that insofar as *Mavrix* “found the website’s traffic relevant to targeting, *Walden* made clear that the third-party advertiser’s behavior cannot be attributed to the defendant as a contact.” Slip op. at \*7, n.6 (citing *Walden*, 571 U.S. at 284). But *Walden* held no such thing. The Court there simply reaffirmed the rule that the “*unilateral* activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.” *Walden*, 571 U.S. at 284 (emphasis added, citation omitted). But Wanat is a *defendant* – not “another party or a third person.” And his intended audience’s use of his website to infringe copyright in the U.S. is in no sense unilateral conduct.

The majority’s decision conflicts with the Fourth Circuit’s decision in *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344, 354 (4th Cir. 2020), which, applying *Walden*, found personal jurisdiction where, *inter alia*, “Kurbanov knew the Websites were serving Virginian visitors and yet took no actions to limit or block access, all while profiting from the data harvested from the same visitors.” The panel tried to distinguish *Kurbanov* on the grounds that Kurbanov registered an agent with the U.S. Copyright Office,<sup>3</sup> employed U.S.-based ad brokers rather than

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<sup>3</sup> Plaintiff’s petition disputes the majority’s statement that Wanat had not registered an agent with the U.S. Copyright Office. Pet’r’s Br. at 16, 17.

foreign brokers, and used U.S.-based hosting servers. Slip op. at \*8 n.8. But *Kurbanov* makes clear that what counts for personal jurisdiction “are the *quality* and *nature* of the defendant’s connections, not merely the number of contacts between the defendant and the forum[.]” *Kurbanov*, 963 F.3d at 352. The majority failed to show how the purported distinctions between *Kurbanov* and *Wanat* have any qualitative import.

**B. The Majority failed to apply *Zippo*.**

The majority’s decision also breaks from Ninth Circuit precedent, which adopted *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), in the internet context. *E.g.*, *Mavrix*, 647 F.3d at 1227 (“We have followed *Zippo*.”). Under *Zippo*, where a website is highly interactive, a court may exercise personal jurisdiction; where a website is only semi-interactive, a court will analyze the extent to which a website is commercial.<sup>4</sup> The more commercial the website, the more appropriate for the court to exercise personal jurisdiction. Such an analysis was central in *Kurbanov*, 963 F.3d at 353, and has been significant in this Court’s precedents. *E.g.*, *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 417-20 (9th Cir. 1997).

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<sup>4</sup> The dissent appropriately, albeit briefly, addressed the website’s interactivity, *see* Slip op. at \*15 n.2 (noting that ePOrner.com is more than purely passive and concluding “[i]n any event, regardless of whether the site is passive, interactive, or semi-interactive, jurisdiction is proper here”).

The majority should have applied the same sliding-scale test. Wanat's website is fully interactive (permitting users to upload content) and also highly commercial.

As to commerciality, Wanat's website utilizes a model widely used by foreign sites to monetize infringing content—and that model is directly relevant to the fact that Wanat targets the U.S. and is subject to personal jurisdiction here. Many users visit illicit, ad-supported, interactive websites in order to access a wide array of unauthorized digital content. “Ad revenue is the oxygen that allows content theft to breathe.” Digital Citizens Alliance, *Good Money Still Going Bad: Digital Thieves and the Hijacking of the Online Ad Business* 1 (2015), available at <https://www.motionpictures.org/wp-content/uploads/2018/03/66692a61-cd18-4c14-bede-f09ce3d84b53.pdf>. “According to one report, online advertising supports up to 86 percent of IP infringing websites that allow web users to download or stream infringing content for free to the end-user.” Office of Intellectual Property Enforcement Coordinator, *Supporting Innovation, Creativity & Enterprise: Charting a Path Ahead: U.S. Joint Strategic Plan on Intellectual Property Enforcement: FY 2017-2019* 63 (2016) (“IPEC Joint Strategic Plan”), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/IPEC/2016jointstrategicplan.pdf>. Many pirate website operators are based outside the U.S. and, like Wanat, intentionally target U.S. consumers, who represent a

profitable advertising demographic. *See* Office of United States Trade Representative, *2017 Out of Cycle Review of Notorious Markets 5* (2018), available at <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf> (“Again this year, the [Notorious Markets] List highlights online piracy sites that are funded by advertising revenue.”).

The Supreme Court cogently described how pirates rely on advertising to profit from infringement:

The business models employed by Grokster and StreamCast confirm that their principal object was use of their software to download copyrighted works. Grokster and StreamCast receive no revenue from users, who obtain the software itself for nothing. Instead, both companies generate income by selling advertising space, and they stream the advertising to Grokster and Morpheus users while they are employing the programs. As the number of users of each program increases, advertising opportunities become worth more. While there is doubtless some demand for free Shakespeare, the evidence shows that substantive volume is a function of free access to copyrighted work. Users seeking Top 40 songs, for example, or the latest release by Modest Mouse, are certain to be far more numerous than those seeking a free Decameron, and Grokster and StreamCast translated that demand into dollars.

*Grokster*, 545 U.S. at 926.

Recently, the U.S. Intellectual Property Enforcement Coordinator (located in the White House), described the problem of ad-supported piracy:

Whereas the rogue website operator pays nothing for a downloaded or streamed movie or song, for example, the ads that appear beside the misappropriated content generate revenue for the website operator—

generally in the form of pure profit. The artist, label, and studio do not see a penny. The ad network that delivered ads to the website dedicated to offering infringing content also generates revenue, while again, the artist, label and studio receive no compensation for their work. Everyone profits, except the creator and/or authorized distributor of the original content.

IPEC Joint Strategic Plan, *supra*, at 63.

Sometimes, website operators sell space on their websites directly to advertisers. However, because outsourcing of this advertising-sales function is often more efficient, digital pirates frequently hire advertising “networks” or “brokers” to generate advertising revenue via targeted users. *See Bose v. Interclick, Inc.*, No. 10 Civ. 9183 (DAB), 2011 WL 4343517, at \*1-2 (S.D.N.Y. Aug. 17, 2011) (describing advertising networks); Federal Trade Commission, *Self-Regulatory Principles for Online Behavioral Advertising* 2-3 (2009) (hereinafter “2009 FTC Rep.”), available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadreport.pdf>.

Website operators like Wanat receive increased revenues through this approach because ad brokers efficiently connect the websites with companies seeking to advertise online. *See Understanding Online Advertising*, Network Advertising Initiative, <https://www.networkadvertising.org/faq> (last visited Sept. 10, 2020) (“Websites and applications work with third-party advertising companies because these companies can more efficiently sell advertising space”). Most

website operators cannot sell advertising space directly—*i.e.*, without the assistance of an ad network—and at the same time use browsing data to its full potential. Outsourcing these functions to an ad broker gives the website owner access to far more data about consumers than any individual website possesses. *See generally* George B. Delta & Jeffrey H. Matsuura, *Law of The Internet* § 6.05 (4th ed. 2019). This enables websites and applications to make more revenue and continue providing free content and services. *See Why Use Ad Networks?*, The Online Advertising Guide, <https://theonlineadvertisingguide.com/display-advertising-guide/placing-ads-on-your-site/why-use-ad-networks> (last visited Sept. 10, 2020) (describing how a website operator can, in many instances, make far more money using an ad broker than the operator could make by directly selling ad space or by charging consumers a fee).

Therefore, it should make no difference whether Wanat personally posted the ads onto his website or instead hired ad networks to do so on his behalf and for his benefit. Given the size of the U.S. market, the commercial value of that market to Wanat’s business, and his forum-related activities, that the site utilized advertising targeting U.S. residents indicates that Wanat knew—actually or at the very least constructively—about his U.S. user base, “and that [he] exploits that base for commercial gain by selling space on [his] website for advertisements.”

*Mavrix*, 647 F.3d at 1230.<sup>5</sup> The panel majority should not have imposed an additional hurdle requiring that, for website advertising to matter, the defendant must “personally control the advertisements shown on the site.” Slip op. at \*8.

Courts that have confronted the ad-based model of piracy routinely hold that advertising on such websites is relevant in determining whether to exercise personal jurisdiction. As the Fourth Circuit concluded in *Kurbanov*:

Kurbanov ultimately profits from visitors by selling directed advertising space and data collected to third-party brokers, thus purposefully availing himself of the privilege of conducting business within Virginia.

963 F.3d at 353; *see Hydentra HLP Int. Ltd. v. Sagan Ltd.*, 783 F. App’x. 663, 664 (9th Cir. 2019) (jurisdiction proper under Rule 4(k)(2) where foreign residents allegedly committed intentional copyright infringement involving adult videos expressly aimed at the U.S. that caused harm that they likely knew would be suffered by plaintiffs in the U.S.); *Universal Music MGB NA LLC v. Quantum*

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<sup>5</sup> The majority attempted to distinguish the advertising in *Mavrix* from the advertising here. The advertisements in *Mavrix* apparently did not differ, however. Like the defendant in *Mavrix*, ePorneer has some ads directed to forum users and some that are not. *See Mavrix*, 647 F.3d at 1230 (“One of the ways we know this is that **some of the** third-party advertisers on Brand’s website had advertisements directed to Californians.”) (emphasis added). A review of the *Mavrix* docket reveals that the defendant there, like Wanat, employed advertising networks that likely geo-targeted. *See Mavrix*, No. 09-56134, Appellees’ Answering Br., Dkt. 12 at 15 (“[A]ll of the advertisements on Brand Technologies’ websites are through a third-party advertising network agency – such as Google, Value Click and Glam, and those companies control the advertisements.”).



*Music Works, Inc.*, 769 F. App'x. 445, 446-47 (9th Cir. Apr. 29, 2019) (infringing authorization of “an advertising campaign which ran throughout the United States” and provision of interactive website conferred jurisdiction); *Arista Records, Inc. v. Sakfield Holding Co. S.L.*, 314 F. Supp. 2d 27, 32-33 (D.D.C. 2004) (offering free downloads prior to charging users conferred jurisdiction where advertising at issue); *Capitol Records, LLC v. VideoEgg, Inc.*, 611 F. Supp. 2d 349, 360-61 (S.D.N.Y. 2009) (seeking to, *inter alia*, participate in advertising campaigns targeting users sufficient for jurisdiction); *Cybernet Entm't LLC v. IG Media Inc.*, No. CV 12-01101-PHX-SRB, 2012 WL 12874297, at \*6 (D. Ariz. Nov. 30, 2012) (“For purposes of personal jurisdiction, the relevant inquiry is whether the third-party advertisements demonstrate that Defendant exploited the United States market for commercial gain.”).

In sum, there is nothing “random, fortuitous, or attenuated” about Wanat’s contacts with the U.S. *Walden*, 571 U.S. at 286. He executed a plan to profit from his largest and most commercially significant market. He published his website in English and referenced U.S. law in his terms of service. He selected a DNS provider known for fast delivery of traffic to the U.S. And he sought to profit from his largest and most significant market through advertising targeting that market. *See Mavrix*, 647 F.3d at 1230 (Express aiming is present where a defendant

“anticipated, desired, and achieved a substantial [U.S.] viewer base.”).<sup>6</sup> Under these collective facts, U.S. courts have personal jurisdiction over Wanat under Rule 4(k)(2).

### **CONCLUSION**

If widely adopted, the majority’s erroneous approach could give non-U.S. infringers a blueprint to engage in massive piracy, confident that no court exists that will stop the unlawful conduct. *Amicus* respectfully asks the Court to grant the petition.

Respectfully submitted,

Dated: September 10, 2020

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<sup>6</sup> As the dissent and petition note, while *Mavrix* stated that the website there contained celebrity content related to California, the Court did not *require* that a website feature forum-specific content as a prerequisite to jurisdiction. Rather, the *Mavrix* court focused on website content because it did not have information as to the number of California users. By contrast, the evidence here established that the U.S. is Wanat’s largest market.

**CERTIFICATE OF COMPLIANCE**  
**PURSUANT TO CIRCUIT RULE 32-1**

I hereby certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the enclosed brief is proportionately spaced, has a typeface of 14-point Times New Roman including footnotes, and contains approximately 4,180 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: September 10, 2020

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J. Matthew Williams  
Attorneys for *Amicus Curiae*  
The Motion Picture Association, Inc.

**CERTIFICATE OF SERVICE**

I certify that this **BRIEF OF THE MOTION PICTURE ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING *EN BANC*** was timely filed with the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system on September 10, 2020. I further certify that, to my knowledge, all participants in the case are registered CM/ECF users so service will be made on counsel of record for all parties to this case through the Court's CM/ECF system.

Dated: September 10, 2020

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