

No. 19-1124

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

UMG RECORDINGS, INC., ET AL.

Plaintiffs-Appellants,

v.

TOFIG KURBANOV, ET AL.

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
CASE NO. 1:18-CV-00957

**BRIEF OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND
REVERSAL**

MITCHELL SILBERBERG & KNUPP LLP

ROBERT H. ROTSTEIN
2049 Century Park East, 18th Floor
Los Angeles, California 90067
Telephone: (310) 312-2000
Email: rxr@msk.com

J. MATTHEW WILLIAMS
1818 N Street, N.W., 7th Floor
Washington, D.C. 20036
Telephone: (202) 355-7900
Email: mxw@msk.com

Attorneys for Amicus Curiae

Date: March 19, 2019

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-1124 Caption: UMG Recordings, Inc., et al. v. Tofig Kurbanov, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Motion Picture Association of America, Inc.
(name of party/amicus)

who is Amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☒ YES ☐ NO
If yes, identify entity and nature of interest:

See Appellants' Disclosures

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/Robert H. Rotstein

Date: 3-19-2019

Counsel for: MPAA, Inc.

CERTIFICATE OF SERVICE

I certify that on March 19, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/Robert H. Rotstein
(signature)

3-19-2019
(date)

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. The Online-Advertising Ecosystem: Third-Party Advertising Brokers Play A Central Role In Sustaining Digital Piracy.	5
A. Digital Infringers Rely On Internet Advertising To Survive And Prosper.....	7
B. Third-Party Advertising Networks Help Monetize Digital Infringement.....	10
C. The Ability Of Copyright Owners To Enforce Their Rights In U.S. Courts Against Foreign Infringers Has Proved Critical In Stopping Massive Digital Piracy.	13
II. The District Court Erred By Concluding That Kurbanov’s Relationships With His Websites’ Visitors Were Non- Commercial.	18
CONCLUSION	20
CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)	21
CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Advanced Access Content Sys. Licensing Adm'r, LLC v. Shen</i> , No. 14-cv-1112 (VSB), 2018 WL 4757939 (S.D.N.Y. Sept. 30, 2018)	2, 15
<i>ALS Scan, Inc. v. Dig. Serv. Consultants</i> , 293 F.3d 707 (4th Cir. 2002)	5
<i>Arista Records, Inc. v. Sakfield Holding Co. SL</i> , 314 F. Supp. 2d 27 (D.D.C. 2004)	19
<i>Bose v. Interclick, Inc.</i> , No. 10 Civ. 9183 (DAB), 2011 WL 4343517 (S.D.N.Y. Aug. 17, 2011)	10
<i>Capitol Records, LLC v. VideoEgg, Inc.</i> , 611 F. Supp. 2d 349 (S.D.N.Y. 2009)	19
<i>Columbia Pictures Indus., Inc. v. Fung</i> , 710 F.3d 1020 (9th Cir. 2013)	2, 14
<i>Cybernet Entm't LLC v. IG Media Inc.</i> , No. CV 12-01101-PHX-SRB, 2012 WL 12874297 (D. Ari. Nov. 30, 2012)	19
<i>Disney Enters., Inc. v. Hotfile Corp.</i> , 798 F. Supp. 2d 1303 (S.D. Fla. 2011)	2, 14
<i>In re DoubleClick Inc. Privacy Litig.</i> , 154 F. Supp. 2d 497 (S.D.N.Y. 2001)	10, 12
<i>Mavrix Photo, Inc. v. Brand Techs., Inc.</i> , 647 F.3d 1218 (9th Cir. 2011)	19
<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 243 F. Supp. 2d 1073 (C.D. Cal. 2002)	19
<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005)	2, 9, 14

TABLE OF AUTHORITIES

(Continued)

Page(s)

<i>Twentieth Century Fox Film Corp. v. Ssupload.com</i> , No. CV 07-6258 GW (MANx) (C.D. Cal. Jan. 20, 2009).....	15
<i>United States v. Batato</i> , 833 F.3d 413 (4th Cir. 2016)	10
<i>Zippo Mfg. Co. v. Zippo Dot Com, Inc.</i> , 952 F. Supp. 1119 (W.D. Pa. 1997).....	5

STATUTES

Fed. R. App. P. 29(a)(4)(E).....	1
15 U.S.C. § 1125	2
17 U.S.C.	
§ 106.....	2
§ 1201.....	2, 15

OTHER AUTHORITIES

Austin Siegemund-Broka, <i>MPAA Wins \$10.5 Million and Injunction in Movie Tube Lawsuit</i> , Hollywood Reporter, Nov. 24, 2015	15
Cision PR Newswire, <i>Study Shows Ad Industry Anti-Piracy Efforts Have Cut Pirate Ad Revenue in Half</i> , Oct. 5, 2017	16
David Kravets, <i>Feds Shutter Megaupload, Arrest Executives</i> , Wired, Jan. 19, 2012	10
Digital Citizens Alliance, <i>Good Money Still Going Bad: Digital Thieves and the Hijacking of the Online Ad Business</i> (May 2015).....	7
Federal Trade Commission, <i>Cross Device Tracking</i> (Jan. 2017).....	12
Federal Trade Commission, <i>Self-Regulatory Principles for Online Behavioral Advertising</i> (Feb. 2009)	10, 12, 13
George B. Delta & Jeffrey H. Matsuttra, <i>Law of The Internet</i> § 6.05 “Online Advertising” (4th ed. 2019)	12, 13

TABLE OF AUTHORITIES

(Continued)

Page(s)

Ginny Martin, <i>Practices Aimed To Starve Piracy Sites of Ad Revenues</i> , Marketing Land, July 15, 2013	16
Janko Roettgers, <i>Streaming Services Generated More Than 50% of All U.S. Music Industry Revenue in 2016</i> , Variety, Mar. 30, 2017	19
John Glenday, <i>TAG Anti-Piracy Drive Looks to Block Ad Revenue from Illicit Content</i> , The Drum, Feb. 12, 2019	16
Maddy Fry, <i>Hollywood Takes Megaupload to Court</i> , Time, Apr. 8, 2014	15
Meredith Halama and Michael Sherling, <i>Tracking the Past and Present Future of Interest-Based Advertising</i> , Antitrust (Summer 2017)	11, 13
National Advertising Initiative, <i>Understanding Online Advertising</i>	11
Neil Fried, <i>Voluntary Advertising Initiative May Hold a Key to a Responsible Internet</i> , June 14, 2018	16
Office of Intellectual Property Enforcement Coordinator, <i>U.S. Joint Strategic Plan on Intellectual Property Enforcement: Fiscal Years 2017-2019</i> , Jan. 25, 2017	7, 9
Office of United States Trade Representative, <i>2016 Out-of-Cycle Review of Notorious Markets</i> (Dec. 2016)	6
Office of United States Trade Representative, <i>2017 Out of Cycle Review of Notorious Markets</i>	7
Office of United States Trade Representative, <i>2018 Report on the Implementation and Enforcement of Russia's WTO Commitments</i> (Feb. 2019)	14
Organization for Economic Cooperative Development, <i>Online Advertising: Trends, Benefits and Risks for Consumers</i> (Jan. 2019)	8, 12, 13
Press Release, MPAA, <i>MPAA Statement on IPEC Best Practices for Advertising Networks to Combat Online Piracy and Counterfeiting</i> , July 13, 2015	16

TABLE OF AUTHORITIES**(Continued)**

Press Release, Digital TV Research, <i>Online TV & Movie Piracy Losses to Soar to \$52 Billion</i> , Oct. 30, 2017	<u>Page(s)</u> 17
Press Release, U.S. Department of Justice, <i>Founder of NinjaVideo Pleads Guilty to Criminal Copyright Conspiracy</i> , Sept. 23, 2011	10
PricewaterhouseCoopers LLP, <i>IAB Internet Advertising Revenue Report</i> (Nov. 2018)	13
RIAA, <i>2018 RIAA Shipment & Revenue Statistics</i>	19
Stephen E. Siwek, <i>The True Cost of Copyright Industry Piracy to the U.S. Economy</i> (Oct. 2007)	17
Ted Johnson, <i>Judge Grants Default Judgment to Shut Down PubFilm</i> , Variety, Jan. 18, 2018	15
U.S. Department of Commerce Internet Policy Task Force, <i>Copyright Policy, Creativity, and Innovation in the Digital Economy</i> (July 2013)	9
Webopedia, <i>What are Cookies and What Do Cookies Do?</i> , Sept. 4, 2008	12

STATEMENT OF INTEREST

The Motion Picture Association of America, Inc. (“MPAA”) is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry.¹ Since that time, MPAA 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.

MPAA’s member companies are Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures, Warner Bros. Entertainment Inc., and Netflix Inc. These companies and their affiliates are the leading producers and disseminators of filmed entertainment in the United States, which consumers enjoy in theatres, on Blu-ray discs and DVDs, via cable, satellite and over-the-top subscription services, and by downloading copies from online retailers.

MPAA’s members can continue to deliver high-quality content only if effective legal protection exists to guard against the devastating harm that

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E), MPAA states that no counsel for a party authored this brief in whole or in part, and no person or entity other than MPAA, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief. All parties consented to the filing of this brief.

inevitably results from digital piracy. MPAA members thus rely on their exclusive copyright rights of reproduction, adaptation, public performance, and distribution, *see* 17 U.S.C. § 106; on legal protections against circumvention of technological measures used to prevent unauthorized access to, and infringement of, copyrighted works, *see* 17 U.S.C. § 1201; as well as on other legal protections, including trademark and unfair competition laws, *see, e.g.*, 15 U.S.C. § 1125.

MPAA members and organizations with which they are affiliated have brought numerous cases to enforce their rights and to stop illicit profiteers, including those operating outside the United States, from engaging in unauthorized dissemination of works. *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

brought against Chinese defendant).² Accordingly, MPAA has an interest in preserving copyright owners' ability to pursue actions in U.S. courts against non-U.S. digital pirates like Appellee Tofig Kurbanov. Because the district court's order granting the motion to dismiss was erroneous and could cause significant damage to copyright holders and their licensees, and ultimately to consumers, MPAA submits this brief urging reversal.

SUMMARY OF ARGUMENT

Kurbanov is a brazen digital pirate. His highly interactive, commercial, stream-ripping websites are, in essence, piracy valets that deliver stolen works to the websites' users. Like most other digital pirates, Kurbanov generates significant sums of money from his infringing sites through selling space for third-party advertisements. As archetypal components of the worldwide digital-piracy ecosystem, Kurbanov's websites unquestionably target Virginia and the United States and have effects in Virginia and the United States.

Nevertheless, the district court erroneously held that it lacked personal jurisdiction over Kurbanov. Among other serious errors, the court below ruled that Kurbanov's infringing websites were not commercial for jurisdictional purposes

² Conversely, MPAA members are frequently defendants in lawsuits, including lawsuits that allege copyright infringement. They defend these cases on a variety of grounds, including, where appropriate, lack of personal jurisdiction. MPAA members' experience as both plaintiffs and defendants brings a balanced perspective to this *amicus curiae* brief.

because he neither charged consumers fees to access his websites nor directly sold advertising, but, rather, generated revenues through a third-party advertising network.³

The district court's holding failed to appreciate how the internet-advertising and digital-piracy ecosystems work. In fact, Kurbanov's websites are quintessentially commercial. Kurbanov attracts users, in part, because the only cost of accessing the infringing websites is exposure to advertisements—no money changes hands between the users and Kurbanov. His illegal conduct generates revenue from advertising networks that pay him to glean consumer data by collecting and using information regarding, *inter alia*, his websites' users' internet browsing histories. Even a cursory analysis of advertising networks' role in internet advertising and digital piracy demonstrates that, contrary to the district court's holding, the relationship between Kurbanov's websites and their users is highly commercial.

MPAA has extensive experience combatting the proliferation of offshore, commercial websites that, like Kurbanov's pirate sites, employ advertising to profit from infringement that targets the United States. Unfortunately, copyright infringement continues to be big business on the internet, and foreign pirates are

³ For the purpose of this brief, MPAA will use the terms “advertising network” and “advertising broker” interchangeably.

often the culprits. Not only does digital piracy steal revenue that legitimate copyright holders could use to produce and distribute new works of authorship; such piracy also deprives copyright owners and their licensees of the ability to determine where, when, and how to make their works available. If affirmed and widely adopted, the district court's erroneous holding could serve as a roadmap for foreign pirates, teaching them how to exploit the U.S. market and American intellectual property while evading jurisdiction in the United States, thus depriving aggrieved American copyright owners of a legitimate—and often the only—forum in which to enforce their rights.

ARGUMENT

I. The Online-Advertising Ecosystem: Third-Party Advertising Brokers Play A Central Role In Sustaining Digital Piracy.

For the reasons discussed in detail in Appellants' brief, the district court misapplied the factors that determine personal jurisdiction over the operator of a foreign website. Under *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), adopted in *ALS Scan, Inc. v. Dig. Serv. Consultants*, 293 F.3d 707, 713-14 (4th Cir. 2002), if a website is semi-interactive, rather than highly interactive, courts analyze the extent to which the website is commercial to determine whether personal jurisdiction exists. The district court declined to exercise personal jurisdiction over Kurbanov because (i) his stream-ripping

websites,⁴ which serve as piracy facilitators that enable users to request the decryption of music videos available on YouTube and the creation of mp3 audio files from those decrypted videos, were supposedly only semi-interactive,⁵ and (ii) his websites' relationships with visitors were supposedly non-commercial. The district court found an absence of commerciality simply because Kurbanov did not charge a direct fee to consumers and did not sell advertising space directly himself, but rather used third-party advertising brokers. In the district court's view, "[t]he revenue from the advertisements cannot be the basis for finding a commercial relationship with the users because they are separate interactions and the due process analysis must only look at the acts from which the cause of action arises, here, the alleged aid in music piracy." Joint Appendix, at 393. Because the district court misunderstood both the nature of internet advertising and the extent to which

⁴ Offering ad-supported, stream-ripping services is an especially pernicious form of piracy. See Office of United States Trade Representative, *2016 Out-of-Cycle Review of Notorious Markets*, at 5 (Dec. 2016) <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf> ("Stream ripping is an emerging trend in digital copyright infringement that is increasingly causing substantial economic harm to music creators and undermining legitimate services.").

⁵ *Amicus* strongly disagrees with the district court's conclusion that Kurbanov's websites are only semi-interactive. On the contrary, the websites are highly interactive. *Amicus* endorses the arguments on this issue presented by Appellants and by *amicus curiae* The Copyright Alliance.

digital pirates leverage such advertising to further their illicit schemes, the court's conclusion on the commerciality factor was an error.

A. Digital Infringers Rely On Internet Advertising To Survive And Prosper.

“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*, at 1 (May 2015), <https://www.mpaa.org/research-docs/good-money-still-going-bad-digital-thieves-and-the-hijacking-of-the-online-ad-business/>; Office of Intellectual Property Enforcement Coordinator, *U.S. Joint Strategic Plan on Intellectual Property Enforcement: Fiscal Years 2017-2019*, at 63, Jan. 25, 2017 (hereinafter “IPEC Joint Strategic Plan”) <https://create.org/news/ipec-joint-strategic-plan-ip-enforcement-fy-2017-2019/> (“Ad-supported piracy is extensive. 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.”). Many pirate website operators are based outside the U.S. and, like Kurbanov’s pirate sites, 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*, at 5, <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Mark>

ets%20List%201.11.18.pdf (“Again this year, the [Notorious Markets] List highlights online piracy sites that are funded by advertising revenue.”).⁶

Advertising networks help pirate websites sell advertisement displays. The U.S. 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

⁶ Digital technology has enabled more efficient and successful advertising for lawful sites that provide *licensed* content. See Organization for Economic Cooperative Development, *Online Advertising: Trends, Benefits and Risks for Consumers*, *OECD Digital Economy Papers*, No. 272, OECD Publishing, Paris, at 23 (Jan. 2019) (hereinafter “OECD Rep.”) <https://doi.org/10.1787/1f42c85d-en>. This fact actually underscores the commercial nature of advertising via advertising brokers.

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, whose office is in the White House, described the problem of ad-supported piracy as follows:

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. *See also* U.S. Department of Commerce Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy*, at 68-70 (July 2013),

<https://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf> (“Many websites that sell or provide access to pirated content profit from advertisers paying for banner ads. . . . Denying infringing websites access to lucrative advertising has the potential to starve them of funds and substantially curtail infringement.”).⁷

B. Third-Party Advertising Networks Help Monetize Digital Infringement.

Sometimes, website operators sell space on their sites directly to advertisers. However, because outsourcing of this advertising-sales function is often more efficient, digital pirates like Kurbanov frequently hire advertising “networks” or “brokers” to serve as middlemen. *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); *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 503-04 (S.D.N.Y. 2001) (same); Federal Trade Commission, *Self-Regulatory Principles for Online Behavioral Advertising*, at 2-3 (Feb. 2009) (hereinafter “2009

⁷ The Department of Justice has prosecuted operators of copyright infringing websites that utilized and profited from online advertising. *See, e.g.*, Press Release, U.S. Department of Justice, *Founder of NinjaVideo Pleads Guilty to Criminal Copyright Conspiracy*, Sept. 23, 2011, <https://www.justice.gov/opa/pr/founder-ninjavideo-pleads-guilty-criminal-copyright-conspiracy>. Some such defendants have been based outside the United States. *See* David Kravets, *Feds Shutter Megaupload, Arrest Executives*, *Wired*, Jan. 19, 2012, <https://www.wired.com/2012/01/megaupload-indicted-shuttered/>; *United States v. Batato*, 833 F.3d 413 (4th Cir. 2016) (appeal involving asset seizures from operators of the “Mega Conspiracy”).

FTC Rep.”), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadreport.pdf>. These middlemen deliver increased revenue to the website operators by connecting the websites with advertisers seeking to advertise online. See National Advertising Initiative, *Understanding Online Advertising*, <https://www.networkadvertising.org/faq> (“Websites and applications work with third-party advertising companies because these companies can more efficiently sell advertising space. This enables websites and applications to earn more revenue and to continue providing free content and services.”); Meredith Halama and Michael Sherling, *Tracking the Past and Present Future of Interest-Based Advertising*, *Antitrust* (Summer 2017) (hereinafter “Halama & Sherling”).

The ability of illegal websites to employ a third-party advertising broker plays a major role in facilitating copyright infringement and other illegality. Indeed, advertising networks allow infringers to earn significant revenues that would otherwise be unobtainable. Many users visit illicit, ad-supported websites in order to access a wide swath of unauthorized digital content.

Using ad networks to sell space to advertisers on unlawful websites is, unfortunately, practical and efficient. This advertising model allows infringing website operators to focus on delivering illegal content rather than on cultivating

relationships with a vast, incalculable number of potential advertisers. Online advertising is largely based on the ability of websites and ad networks to collect data regarding consumer browsing habits and to place ads for companies based on whether a given website is likely to attract consumers who will be interested in the products and services being promoted. *See generally* George B. Delta & Jeffrey H. Matsutra, *Law of The Internet* § 6.05 “Online Advertising” (4th ed. 2019) (hereinafter “Delta & Matsutra”). When consumers visit websites, the website operators and advertising middlemen often place “cookies” on the consumers’ web browsers and computers. *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d at 503-04; 2009 FTC Rep. at 2, n.3. These cookies, and other technologies, enable the websites and middlemen to recognize consumers when they return to the same website after the initial visit; cookies also frequently enable the websites and middlemen to record which other websites consumers visit. Webopedia, *What are Cookies and What Do Cookies Do?*, Sept. 4, 2008, https://www.webopedia.com/DidYouKnow/Internet/all_about_cookies.asp. Over time, a consumer’s browsing history and interactions with advertisements provide insight into which ads will be of most interest to that consumer. In that way, advertisers can connect with the consumers most likely to value their products and services. *See* OECD Rep. at 23; Federal Trade Commission, *Cross Device Tracking*, at 5-6 (Jan. 2017),

https://www.ftc.gov/system/files/documents/reports/cross-device-tracking-federal-trade-commission-staff-report-january-2017/ftc_cross-device_tracking_report_1-23-17.pdf.

Advertising networks are a cornerstone of digital piracy, as 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. In fact, ad networks and other middlemen have access to far more data about consumers than any individual website. *See* Delta and Matsuura, *supra*, § 6.05; Halama & Sherling, *supra*. Thus, the networks can make more money for a website operator than the operator could make by directly selling ad space or by charging consumers a fee. *See* 2009 FTC Rep., *supra*, at 1, 6; OECD Rep., *supra*, at 23; *see also generally* PricewaterhouseCoopers LLP, *IAB Internet Advertising Revenue Report* (Nov. 2018), <https://www.iab.com/wp-content/uploads/2018/11/REPORT-IAB-Internet-Advertising-Revenue-Report-HY-2018.pdf> (detailing digital advertising revenues). In short, third-party advertising networks, like the ones Kurbanov used, efficiently commercialize infringement and other illegal acts.

C. The Ability Of Copyright Owners To Enforce Their Rights In U.S. Courts Against Foreign Infringers Has Proved Critical In Stopping Massive Digital Piracy.

Often, the United States is the only available forum in which a U.S. copyright holder can pursue an infringement claim against a foreign site that

profits from its infringement, and its users' infringement, of U.S. intellectual property. See Office of United States Trade Representative, *2018 Report on the Implementation and Enforcement of Russia's WTO Commitments*, at 47 (Feb. 2019), <https://ustr.gov/sites/default/files/Russia-2018-WTO-Report.pdf> (“[T]he government of Russia has not acted against those sites that, while located in Russia, target users outside of Russia.”). Indeed, historically, the United States courts have played a crucial role in enforcing the rights of copyright holders faced with rampant digital piracy by foreign infringers. For example, in the landmark *Grokster* opinion, the United States Supreme Court held that Dutch and Australian defendants who sold software that allowed the transmission of massive amounts of copyrighted works over peer-to-peer networks were liable for inducing infringement. 545 U.S. at 926.

Similarly, in *Fung*, 720 F.3d at 1036-37, the defendant, a resident of Canada, operated websites that induced users to share infringing motion pictures over a peer-to-peer network. The Ninth Circuit affirmed the district court's order holding that Fung had engaged in contributory copyright infringement and enjoining Fung from further infringement.⁸ In *Hotfile Corp.*, 798 F. Supp. 2d at 1303, the Panamanian defendant operated a website that automatically, at the direction of

⁸ In both *Grokster* and *Fung*, the defendant website operators, like Kurbanov, generated most, if not all, of their revenue from advertisements.

users, allowed uploading and downloading of studios' copyrighted films. The Southern District of Florida ruled that the plaintiffs had stated a claim for copyright infringement. And, in *Shen*, 2018 WL 4757939, the defendants, residents of China, trafficked in products designed to circumvent Plaintiff's encryption technology. The Southern District of New York enjoined defendants' violation of section 1201 of the DMCA.⁹ Kurbanov is another in a long line of pirates that make virtual homes in the U.S. in ways that go beyond directly selling services.

The MPAA has attempted to curtail the ability of infringers to rely on advertising in general, and on advertising brokers specifically, both through appeals to the government and by advocating effective, voluntary initiatives whereby advertising networks endeavor to reduce their relationships with

⁹ See also Austin Siegemund-Broka, *MPAA Wins \$10.5 Million and Injunction in Movie Tube Lawsuit*, Hollywood Reporter, Nov. 24, 2015, <https://www.hollywoodreporter.com/thr-esq/mpaa-wins-105-million-injunction-843803> (default judgment in Central District of California against Canadian defendant who operated website containing links to infringing audiovisual works); Ted Johnson, *Judge Grants Default Judgment to Shut Down PubFilm*, Variety, Jan. 18, 2018, <https://variety.com/2018/politics/news/pub-film-mpaa-piracy-1202668821/> (default judgment in Southern District of New York against operators of "large-scale piracy sites" located in Vietnam); Maddy Fry, *Hollywood Takes Megaupload to Court*, Time, Apr. 8, 2014, <http://time.com/53381/hollywood-takes-megaupload-to-court/> (lawsuit in the Eastern District of Virginia against an operator of a website that permitted massive digital download of copyrighted works); Consent Judgment, *Twentieth Century Fox Film Corp. v. Ssupload.com*, No. CV 07-6258 GW (MANx) (C.D. Cal. Jan. 20, 2009) (ECF No. 40) (judgment in Central District of California against a Canadian defendant whose website contained links to infringing audiovisual works).

infringers.¹⁰ Unfortunately, these non-judicial efforts have not yet fully solved the problem, as Kurbanov's profitable piracy business shows. *See* Cision PR Newswire, *Study Shows Ad Industry Anti-Piracy Efforts Have Cut Pirate Ad Revenue in Half*, Oct. 5, 2017, <https://www.prnewswire.com/news-releases/study-shows-ad-industry-anti-piracy-efforts-have-cut-pirate-ad-revenue-in-half-300531749.html>. For this reason, the ability of rights holders to sue foreign digital infringers in the United States remains critical to stopping the myriad forms of massive digital piracy. But if infringing businesses, like Kurbanov's stream-ripping sites, can steal with impunity from U.S. copyright owners and profit from infringement by users located in the United States, yet evade jurisdiction in the United States simply because they outsource their ad-sales function to third-party brokers, the ad-broker model of piracy will cause even greater widespread harm

¹⁰ *See, e.g.*, Neil Fried, *Voluntary Advertising Initiative May Hold a Key to a Responsible Internet*, June 14, 2018, <https://www.mpaa.org/press/voluntary-advertising-initiative-may-hold-a-key-to-a-responsible-internet/>. Such efforts have been underway for years. *See* Press Release, MPAA, *MPAA Statement on IPEC Best Practices for Advertising Networks to Combat Online Piracy and Counterfeiting*, July 13, 2015, <https://www.mpaa.org/press/mpaa-statement-on-ipecc-best-practices-for-advertising-networks-to-combat-online-piracy-and-counterfeiting/>; Ginny Martin, *Practices Aimed To Starve Piracy Sites Of Ad Revenues*, Marketing Land, July 15, 2013, <https://marketingland.com/major-ad-networks-sign-anti-piracy-best-practices-aimed-to-starve-piracy-sites-of-ad-revenues-51646>; John Glenday, *TAG Anti-Piracy Drive Looks to Block Ad Revenue from Illicit Content*, The Drum, Feb. 12, 2019, <https://www.thedrum.com/news/2019/02/12/tag-anti-piracy-drive-looks-block-ad-revenue-illicit-content>.

and threaten to decrease the output of the entertainment industry, which suffers significant harm when it is forced to compete with lawless exploitation of copyrighted works. *See generally* Stephen E. Siwek, *The True Cost of Copyright Industry Piracy to the U.S. Economy* (Oct. 2007), https://www.ipi.org/docLib/20120515_CopyrightPiracy.pdf.¹¹ Consumers can access legitimate content distributed by MPAA's members and their licensees, via subscriptions, rentals, or paid downloads.¹² It stands to reason that some

¹¹ Another study concluded that revenues lost to online piracy of movies and television shows will rise to almost \$52 billion by 2022. Press Release, Digital TV Research, *Online TV & Movie Piracy Losses to Soar to \$52 Billion*, Oct. 30, 2017, <https://www.digitaltvresearch.com/ugc/press/219.pdf>.

¹² One model provides consumers in-home and remote access to movies and television via cable, satellite, and over-the-top television bundle providers, such as Comcast, which owns MPAA member Universal City Studios; DirecTV, which is affiliated with MPAA member Warner Bros. Entertainment; and Sony's PlayStation Vue, which is operated by an affiliate of MPAA member Sony Pictures Entertainment. Another model involves access via online subscription streaming services, like the platforms operated by Netflix, an MPAA member, and also Hulu, which is jointly owned by parents/affiliates of MPAA members Twentieth Century Fox Film Corporation, Walt Disney Studios, Warner Bros. Entertainment and Universal City Studios. For other products, like Blu-ray discs and digital downloads from online retailers like Vudu, Apple, Amazon, and Google Play, consumers pay one-time prices to acquire temporary or permanent access to digital copies of content. Consumers can access these copies through the Movies Anywhere service, which facilitates remote access to consumers' libraries of content. Other services, like the websites of the ABC and NBC television networks, CNN, and Pluto TV, which are all affiliated with MPAA members, offer ad-supported access to streams of audiovisual works. Hulu, which initially offered an entirely ad-supported streaming service, currently offers a reduced-price, advertising-supported subscription plan. MPAA members also license content to YouTube, which similarly offers ad-supported streaming.

consumers will not pay for lawful services or will not view ads on legitimate websites, if they can obtain unauthorized copies from pirate websites.

Pirate websites deprive copyright owners and their licensees of the ability to determine where, when, and how to make their works available. Possessing exclusive rights that underpin those business decisions is the foundation of MPAA members' businesses. The success or failure of these businesses depends upon carefully designed strategies to build demand for motion pictures. So, the effects of piracy are deeply felt.

II. The District Court Erred By Concluding That Kurbanov's Relationships With His Websites' Visitors Were Non-Commercial.

The foregoing discussion underscores the district court's erroneous holding on commerciality. A website operator's choice to use an advertising network rather than a direct-sales model does not indicate a lack of commercial intent or a lack of intent to exploit the U.S. market. Rather, that choice reveals quite the opposite intent. Kurbanov made a calculated business decision not to charge consumers directly to decrypt and download recordings, in order to attract U.S. traffic to his websites and to monetize that traffic through advertising to U.S. consumers. Through that decision, he inflicts significant, irreparable and incalculable harm to the ecosystem for licensed content that enables consumers to access sound recordings online. Services such as Apple Music, Amazon, Google

Play, and Spotify play by the rules in working with record labels and music publishers to make content widely available.¹³

Kurbanov, by engaging in this unlawful scheme, rendered himself subject to the jurisdiction of our federal courts. Courts have confronted the ad-based model of piracy in numerous prior cases, and have routinely held that such sites are commercial in nature. *See, e.g., Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1230 (9th Cir. 2011); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1087 (C.D. Cal. 2002); *Arista Records, Inc. v. Sakfield Holding Co. SL*, 314 F. Supp. 2d 27, 32 (D.D.C. 2004); *Capitol Records, LLC v. VideoEgg, Inc.*, 611 F. Supp. 2d 349, 360-61 (S.D.N.Y. 2009); *Cybernet Entm't LLC v. IG Media Inc.*, No. CV 12-01101-PHX-SRB, 2012 WL 12874297, at *7 (D. Ari. Nov. 30, 2012). If, as the court below held, the numerous infringers who employ the ad-broker model are not subject to personal jurisdiction in the United States—as they should be under well-established law—infringers who cannot be brought to justice elsewhere will continue to employ advertising brokers, giving the infringers carte blanche to steal from copyright owners in the United States.

¹³ Such digital services have become a major component of the music industry. *See* Janko Roettgers, *Streaming Services Generated More Than 50% of All U.S. Music Industry Revenue in 2016*, Variety, Mar. 30, 2017, <https://variety.com/2017/digital/news/streaming-services-us-music-revenue-2016-1202019504/>; RIAA, *2018 RIAA Shipment & Revenue Statistics*, <https://www.riaa.com/reports/2018-riaa-shipment-revenue-statistics-riaa/>.

CONCLUSION

Amicus respectfully submits that the Court should reverse the district court's dismissal of Appellants' lawsuit.

DATED: March 19, 2019

MITCHELL SILBERBERG & KNUPP LLP

Robert H. Rotstein

J. Matthew Williams

By: /s/ Robert H. Rotstein

Robert H. Rotstein

Attorneys for Amicus Curiae

**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF
APPELLATE PROCEDURE 32(A)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 4165 words, excluding the parts of the brief exempted by Fed. R. App. P. 32.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point, Times New Roman.

DATED: March 19, 2019

By: /s/ Robert H. Rotstein
Robert H. Rotstein

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of March 2019, a true and correct copy of the foregoing *Amicus Curiae* Brief was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h).

DATED: March 19, 2019

/s/ Robert H. Rotstein

Robert H. Rotstein