

ALERT

Ninth Circuit Recognizes 'Catch All' Jurisdiction Over Foreign-Based Internet IP Infringers

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In a decision that continues a trend of courts recognizing expansive jurisdiction over persons and entities engaging in intellectual property infringement through the internet, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded for new trial a judgment of the U.S. District Court for the Central District of California, dismissing the plaintiff's claims for lack of personal jurisdiction.

Lang Van, Inc. v. VNG Corporation involved the question of whether invoking jurisdiction over a foreign entity with no physical presence in the United States comports with due process. VNG, a Vietnam-based corporation, operates a website that makes copyrighted music available for download worldwide, including in the United States. Lang Van, a California-based producer and distributor of Vietnamese music, filed a lawsuit for copyright infringement against VNG in the Central District of California.

In 2014, the District Court granted VNG's motion to dismiss for lack of personal jurisdiction. However, in a 2016 decision, the Ninth Circuit vacated and remanded the dismissal with instructions to allow Lang Van to undertake jurisdictional discovery. Following jurisdictional discovery, the District Court again dismissed the case, finding no specific personal jurisdiction over VNG in California. The District Court did not address Lang Van's argument that personal jurisdiction was appropriate under the "catch all" provision in Rule 4(k)(2) of the Federal Rules of Civil Procedure, and Lang Van appealed the dismissal.

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Practice Areas

Copyright
Cybersquatting & Internet IP
Intellectual Property

Rule 4(k)(2) applies to situations where no individual court has general jurisdiction over a foreign defendant, but the defendant's contacts with the United States as a whole are ample to warrant jurisdiction. To establish personal jurisdiction under Rule 4(k)(2), three prongs must be satisfied: (1) The claim must arise under federal law, (2) The foreign entity must not be subject to general jurisdiction anywhere in the United States, and (3) The defendant must purposefully avail itself of the privileges of conducting business in the United States. The third prong encompasses several notions related to due process, including that the claim arises out of activities related to the United States, the assertion of jurisdiction comports with the notions of fair play and substantial justice, and the defendant created the necessary contacts with the forum state. In cases alleging copyright infringement, purposeful direction is shown when the defendant commits an intentional act that is aimed at the forum and causes harm that the defendant knew would occur.

On review of the second dismissal, the Ninth Circuit found that the first and second prongs of Rule 4(k)(2) were met because copyright infringement arises under federal law and VNG is not subject to general jurisdiction anywhere in the United States. Therefore, the decision turned on the due process analysis.

In conducting this analysis, the Ninth Circuit determined that it should look at the total sum of VNG's business contacts even if those contacts, individually, would be insufficient to subject VNG to jurisdiction.

Applying this approach, the court found that VNG purposefully targeted American companies and their intellectual property. Moreover, VNG took a number of actions that the court found were consistent with targeting the United States as a whole, including releasing a music app that allowed consumers to download copyrighted material, in English, to the U.S. market, where it was downloaded more than 320,000 times. The Ninth Circuit noted that VNG had elected not to "geoblock" (restrict access to) consumers outside of Vietnam except for music from certain companies. The court also found relevant that VNG distributed the app on platforms such as the Google Play Store and the Apple App Store. Finally, the court detailed VNG's extensive business dealings with companies in the United States, including Sony Music and Universal Music and even a prior course of negotiations with Lang Van.

The Lang Van decision follows a recent trend in favor of finding jurisdiction over persons or entities that use the internet to provide services to persons in the United States. In *UMG et al. v. Kurbanov*, the Fourth Circuit found that federal courts in Virginia had specific jurisdiction over the operator of two Russian "stream-ripping" websites that attracted more than 500,000 users from Virginia in a one-year period. Although the holistic analysis performed by the Fourth Circuit was similar, the court in *Kurbanov* did not need to reach Rule 4(k)(2) because it found that the defendant's contacts with Virginia were sufficient.

These decisions suggest that victims of online copyright infringement, and other internet-based torts such as trademark infringement and cybersquatting, may have an opportunity to pursue remedies in federal courts even where the tortfeasor's primary business interests are not directed at the United States.

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