

2021

Plus or Minus America: Spanski, Geoblocking Technology, and Personal Jurisdiction Analysis for Nonresident Defendants

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Daniel Canedo, *Plus or Minus America: Spanski, Geoblocking Technology, and Personal Jurisdiction Analysis for Nonresident Defendants*, 31 Fordham Intell. Prop. Media & Ent. L.J. 339 (2021).
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Cover Page Footnote

Daniel Canedo, attorney in Washington, D.C. The author would like to thank Robert Brauneis, Professor of Law and Co-Director of the Intellectual Property Law Program at the George Washington University Law School, and Eun Hee Han, Associate Professor of Law, Legal Practice at Georgetown Law, for providing the guidance and feed-back which made this Article possible.

Plus or Minus America: *Spanski*, Geoblocking Technology, and Personal Jurisdiction Analysis for Nonresident Defendants

By Daniel Canedo*

The use of a geoblock—technology that restricts access to websites based on user location—is a controversial topic, and one that plays a role in defining the scope under which nonresident defendants may be subjected to the personal jurisdiction of U.S. courts in copyright infringement cases. For example, a recent D.C. Court of Appeals case, Spanski Enterprises, Inc. v. Telewizja Polska, S.A., involved a Polish television network whose geoblock setting, known as “minus America,” failed to restrict website access in violation of a Canadian company’s exclusive rights under the U.S. Copyright Act. Cases like Carsey-Werner Co., LLC v. British Broadcasting Corp. and Triple Up Ltd. v. Youku Tudou Inc. also dealt with nonresident defendants whose public performances reached the U.S. in violation of another’s exclusive rights under the Act. However, in reviewing these and other cases that dove deep into personal jurisdiction analysis, one sees that there is room for simplification.

This Article discusses the various components of jurisdictional analysis with regard to nonresidents whose content reaches the U.S. and results in a potential violation of the Copyright Act. Looking at approaches from the Ninth Circuit, Second Circuit, and others, courts—wary of mandating geoblocking technology for

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websites—have held that general jurisdiction plays a much smaller role in personal jurisdiction analysis, leaving specific jurisdiction as the avenue in which a court may subject the defendant to personal jurisdiction. A review of the relevant case law shows that there are gaps, and that filling those gaps can make the inquiry more straightforward. Consequently, this Article proposes a revision to the analysis through an amendment to the Copyright Act specifying that reasonable efforts to implement a geoblock will negate the exercise of personal jurisdiction over a nonresident defendant. The proposal would be subject to any jurisdictional immunity exceptions under applicable law, or to any contractual agreements to the contrary.

Without imposing mandatory geoblocks, the proposed amendment will not only simplify the analysis, but it will also provide clarity to nonresident defendants regarding their potential liability when their activities reach the U.S, while allowing courts to continue exercising personal jurisdiction within the bounds of due process. That simplicity and clarity may also provide an incentive for internet actors to take responsibility in recognizing the territorial limits of copyright law.

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INTRODUCTION

In 2018, millions of soccer fans around the world gathered to watch the World Cup, hosted by Russia, streaming the broadcast in record-setting numbers.¹ Data from Conviva, an analytics company, showed that during the quarterfinals of World Cup 2018, viewers streamed over 23 million hours of viewing time.² The data also showed that, worldwide, “an average of 64.6 minutes of viewing time streamed per unique viewer not watching on traditional television,” a large jump compared with the average of 20 minutes per viewer during the first quarter of 2018.³ Such success, however, did not come without a price. In the digital age, networks and content providers constantly deal with obstacles when offering streaming content—and coverage of the World Cup was no exception. Using an infrastructure which one executive from beIN Sports—a global

¹ Adam Reed, *World Cup 2018 Breaks Viewing Records Across Streaming Platforms as Soccer Fans Tune In*, CNBC (July 14, 2018), <https://www.cnbc.com/2018/07/14/world-cup-2018-breaks-viewing-records-across-streaming-platforms-as-so.html> [<https://perma.cc/HGD3-CBZZ>].

² *Id.*

³ *Id.*

sports television company—characterized as “unprecedented” in its level of sophistication,⁴ one company’s alleged copyright infringement⁵ was so egregious that it caught the attention of the Fédération Internationale de Football Association (FIFA), television networks, and other sports governing bodies who were concerned that their content was being illegally streamed.⁶

beIN Sports, which is based in Qatar, secured the rights to broadcast the 2018 World Cup matches in the Middle East and North Africa region.⁷ Amid diplomatic tensions between Qatar and Saudi Arabia,⁸ beIN Sports attempted to reach a deal with Saudi Arabia to broadcast the World Cup.⁹ Despite no deal being reached, the Saudis were able to watch the matches through an illegal feed from another Saudi network called beoutQ, complete with advertising, set-top boxes, and subscription plans.¹⁰ Subsequently, beIN Sports alleged that beoutQ illegally seized and broadcasted the World Cup throughout the country, initially operating with a geoblock,¹¹ which only allowed the content to be shown in Saudi Arabia, but eventually

⁴ Anthony Cuthbertson, *World Cup 2018 Live Streaming Channel Lets Fans Watch Online Streams Illegally on ‘Industrial Scale’*, THE INDEPENDENT (July 9, 2018), <https://www.inkl.com/glance/news/world-cup-2018-live-streaming-channel-lets-fans-watch-online-streams-illegally-on-industrial-scale?section=coronavirus> [https://perma.cc/3KV2-4QHS].

⁵ According to the U.S. Copyright Office, copyright infringement occurs “when a copyrighted work is reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner.” *Definitions*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq/faq-definitions.html> [https://perma.cc/3C2F-AC3J].

⁶ Cuthbertson, *supra* note 4.

⁷ *Fifa to Take Legal Action Against BeoutQ over World Cup Broadcasts*, ARABIAN BUSINESS (July 12, 2018), <https://www.arabianbusiness.com/media/400550-fifa-to-take-legal-action-against-beoutq-over-world-cup-broadcasts> [https://perma.cc/DS5C-N7DP].

⁸ Bahrain, Saudi Arabia, Egypt, and the United Arab Emirates all cut diplomatic ties with Qatar in June 2017. *See* Cuthbertson, *supra* note 4.

⁹ *Id.*

¹⁰ *Id.*

¹¹ A geoblock is technology that can be used to limit who can access a website based on geographic location. *See* Michelle Edelman, *The Thrill of Anticipation: Why the Circumvention of Geoblocks Should Be Illegal*, 15 VA. SPORTS & ENT. L.J. 110, 112 (2015) (defining geoblocking as “the limiting of access to digital content based on the user’s geographical location. This is essentially an extension of digital rights management (DRM) that enables a copyright holder to control access to his work and control the release of content” (internal citation omitted)).

expanding its broadcast throughout the Middle East.¹² In October 2018, beIN Sports' parent company, beIN Media Group, filed a \$1 billion arbitration case against Saudi Arabia based on what it deemed, "the most widespread piracy of sports broadcasting the world has ever seen."¹³ The Saudi government has denied any involvement with beoutQ's activities.¹⁴

Although this particular situation involved piracy from a company based in the Middle East, this scenario is all too familiar in the U.S., especially in today's global economy. Content providers face the threat of infringement from websites and networks across the globe that stream their content in violation of their exclusive rights. In addition to piracy, copyright infringement claims can arise when television networks, streaming services, and other content providers enter into licensing agreements that provide differing options for available content based on the location of the ultimate consumer. When the matter is completely domestic—for example, if a U.S. entity streams a U.S. network's programming in violation of their various exclusive rights, including the right of public performance, as defined under the U.S. Copyright Act¹⁵—the solution is relatively simple. However, in cases involving a global event such as the World Cup or a streaming service with global reach on the internet, where networks are particularly concerned with how content is delivered in other countries, the answer may not be so straightforward. Given that the U.S. Copyright Act¹⁶ does not apply extraterritorially,¹⁷ how do we evaluate potential violations of a domestic copyright owner's exclusive right of public performance when the infringing activity involves conduct which occurred abroad?

¹² See *supra* note 8 and accompanying text.

¹³ Sam Carp, *BeIN Seeks US\$1bn From Saudi Arabia over BeoutQ 'Piracy Plague,'* SPORTSPRO (Oct. 1, 2018), <http://www.sportspromedia.com/news/bein-sports-saudi-arabia-beoutq-piracy> [<https://perma.cc/TA7J-CPF2>].

¹⁴ *Id.*

¹⁵ 17 U.S.C. § 106(4).

¹⁶ For purposes of this Article, the U.S. Copyright Act will also be referred to as "the Copyright Act" or "the Act."

¹⁷ Extraterritorial application of the Copyright Act will be discussed later in this Article. See discussion *infra* Section I.E; see also 5 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.02 (2020).

Moreover, as technology evolves, is further analysis needed to appropriately apply the rules while also addressing public policy concerns?

This Article will examine case law from various U.S. federal courts, which use divergent approaches when analyzing the effects of geoblocking technology use on the right of public performance for conduct that is initiated abroad and concluded in the U.S. In 2018, the U.S. Court of Appeals for the D.C. Circuit decided *Spanski Enterprises Inc. v. Telewizja Polska*.¹⁸ In *Spanski*, the court ruled in favor of plaintiff Spanski Enterprises, Inc., a Canadian company, when it held that defendant Telewizja Polska, a Polish national television broadcaster, infringed on Spanski's right of public performance when it removed technology that geographically restricted access to Spanski's website.¹⁹ Notably, one month before this decision, the Central District of California dealt with a similar situation in *Carsey-Werner Co. v. British Broadcasting Co.* In *Carsey-Werner*, the Central District of California granted the defendants' motion to dismiss for lack of personal jurisdiction.²⁰ In its opinion, the *Carsey-Werner* court cited a D.C. Circuit case when it discussed effective geoblocking technology and the effect the technology had on the court's analysis of whether the court had personal jurisdiction to hear the case. In that cited case, *Triple Up Ltd. v. Youku Tudou Inc.*, the plaintiff, based in the Seychelles, alleged that the defendant, a Chinese internet television company, infringed on its rights to certain films that were visible in the U.S. The *Triple Up* court noted its concerns about a ruling that would effectively require internet actors to use a geoblock to avoid being subject to personal jurisdiction in a U.S. court for conduct that was not purposely directed at the U.S.²¹

The Article will also discuss the aforementioned cases, among others, and how they have shaped legal analysis of infringement of an author's exclusive rights under the Copyright Act, particularly the right of public performance. This will focus on how geoblocking

¹⁸ *Spanski Enters. Inc., v. Telewizja Polska, S.A.*, 883 F.3d 904 (D.C. Cir. 2018).

¹⁹ *Id.* at 918.

²⁰ *Carsey-Werner Co. v. BBC*, No. CV 17-8041 PA (ASX), 2018 WL 1083550, at *9 (C.D. Cal. Feb. 23, 2018).

²¹ *Triple Up Ltd. v. Youku Tudou Inc.*, 235 F. Supp. 3d 15 (D.D.C. 2017), *aff'd*, No. 17-7033, 2018 WL 4440459, at *1 (D.C. Cir. July 17, 2018).

technology affects a court's ability to exercise personal jurisdiction over nonresident defendants. The cases, though in different U.S. jurisdictions, addressed similar conduct: a foreign actor whose acts or omissions allowed content to be viewed within the U.S. in violation of a content owner's exclusive rights under the Copyright Act. In *Spanski*, the defendant allegedly directed the content to the U.S. by lifting a geoblock, to be imposed per contract, and thus committed a violation of the U.S. Copyright Act.²² By contrast, in *Carsey-Werner* and *Triple Up*, the courts found that the defendants' conduct was not actionable on procedural grounds because the lack of an effective geoblock was insufficient to provide grounds for subjecting the defendants to personal jurisdiction.²³ Additionally, the courts tackled different policy considerations: the *Spanski* court was concerned with the ability of the U.S. government and content owners to enforce federal copyright law and prevent loopholes on conduct abroad which results in domestic harm,²⁴ while the *Triple Up* court took issue with creating case law that would require geoblocks and, consequently, subject defendants to sweeping jurisdiction while limiting access to the internet,²⁵ a concern noted by the *Carsey-Werner* court when it cited *Triple Up*.²⁶

Finally, this Article proposes a solution to simplify personal jurisdiction analysis when the conduct involves nonresident defendants who allow protected content to reach the U.S. in violation of a content owner's exclusive rights. The Copyright Act should be amended such that reasonable efforts to implement a geoblock will negate the exercise of personal jurisdiction, except in circumstances, as in *Spanski*, where the law provides for an exception to jurisdictional immunity, or where contracting parties have agreed otherwise. The Article will discuss why such a proposal strikes the best balance between protecting the rights of U.S. content owners and promoting access to information on the internet. Next, the Article will review counter arguments—particularly regarding whether geoblocks should even be used—and discuss why this proposal

²² *Spanski*, 883 F.3d at 907–08.

²³ *Carsey-Werner*, 2018 WL 1083550, at *6; *Triple Up*, 2018 WL 1083550, at *25.

²⁴ *Spanski*, 883 F.3d at 915–16.

²⁵ *Carsey-Werner*, 2018 WL 1083550, at *6.

²⁶ *Id.*; *Triple Up*, 2018 WL 1083550, at *25.

would not discourage internet actors from creating works of authorship, making works available in the public domain, or sharing content that is otherwise legally available outside of the U.S. Then, there will be discussion on why this proposal would be in line with U.S. treaty obligations such as the Berne Convention and TRIPS. Finally, possible outcomes will be presented based on this analysis in a hypothetical fact pattern with variations of the aforementioned World Cup scenario.

I. BACKGROUND

A. *A Brief Overview of the U.S. Copyright Act and the Exclusive Right of Public Performance*

The U.S. Copyright Act provides six exclusive rights to owners of a copyright.²⁷ One of those rights is, “in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly.”²⁸ The Copyright Act defines a performance of a work as, “to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”²⁹ A “public” performance means either of the following:

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in

²⁷ The U.S. Copyright Act defines a copyrighted work as an “original work of authorship fixed in any tangible medium of expression, now known or later developed, from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102.

²⁸ 17 U.S.C. § 106.

²⁹ *Id.* § 101.

the same place or in separate places and at the same time or at different times.³⁰

B. Extraterritorial Application of Federal Laws

Generally, the Copyright Act does not apply extraterritorially.³¹ The principle of extraterritorial limitation, “provides that ‘[r]ules of the United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States.’”³² However, courts have recognized three exceptions to the presumption against extraterritoriality for a statute: (1) when Congress clearly states that a law will apply to conduct outside of the U.S.; (2) when not extending a statute’s scope has adverse effects in the U.S.; or (3) when the conduct in question actually occurs in the U.S.³³ One example of a federal statute that applies extraterritorially is the Sherman Act, where cases like the Second Circuit’s *United States v. Aluminum Co. of America* provided a test, known as the “effects doctrine,” with factors that must be satisfied to overcome the presumption: adverse effects in the U.S. and intent.³⁴ Another example is the Lanham Act, where the Supreme Court in *Steele v. Bulova Watch Co.* found that the language which provided the definition of “commerce”—as “all

³⁰ *Id.*

³¹ *See Env’t Def. Fund, Inc. v. Massey*, 986 F.2d 528, 529 (D.C. Cir. 1993) (the primary purpose of this presumption against extraterritoriality is “to protect against the unintended clashes between our laws and those of other nations which could result in international discord.”); *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); NIMMER, *supra* note 17 at § 17.02 (“For the most part, acts of infringement that occur outside of the United States are not actionable under the United States Copyright Act ... for the reason that copyright laws do not have any extraterritorial operation.”).

³² *See Massey*, 986 F.2d at 530; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (AM. L. INST. 1965); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. g (AM. L. INST. 1987).

³³ *See Massey*, 986 F.2d at 531–32.

³⁴ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443–44 (2d Cir. 1945). For a discussion of cases which overcome the presumption against extraterritoriality regarding the Sherman Act and the Lanham Act, see Susan S. Murphy, *Copyright Protection, the New Economy and the Presumption Against the Extraterritorial Application of United States Copyright Law: What Should Congress Do*, 33 CONN. L. REV. 1401, 1408–17 (2001).

commerce which may lawfully be regulated by Congress”³⁵—granted U.S. courts broad jurisdiction over such matters.³⁶

Courts have recognized the “longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”³⁷ The Supreme Court recognized this in *Equal Employment Opportunity Commission v. Arabian American Oil Company* (commonly known as the *Aramco* case), a case involving a U.S. citizen working in Saudi Arabia who sought relief under Title VII of the Civil Rights Act of 1964 for claims of discrimination.³⁸ In the *Aramco* case, the Supreme Court held that courts will not presume that a statute is extraterritorial unless such application is clearly expressed by Congress.³⁹ Consequently, since the Copyright Act does not expressly provide for its application, and the exclusive rights of a copyright owner per Section 106 are granted only under Title 17 of the U.S. Code, the presumption against extraterritorial application set forth in *Aramco* applies to U.S. copyright law.⁴⁰ However, “when an allegedly infringing act occurring without the United States is publicly performed within the United States, the Copyright Act is implicated and a district court possesses jurisdiction.”⁴¹ The discussion of the *Spanski* case will further illustrate extraterritorially and public performances, among other things, but it is important to first address (1) personal jurisdiction and (2) the concept of geoblocking.

³⁵ 15 U.S.C. § 1127.

³⁶ See *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285 (1952); *Murphy*, *supra* note 34, at 1412.

³⁷ See *IMAPizza, LLC v. At Pizza Ltd.*, 334 F. Supp. 3d 95, 117 (D.D.C. 2018) (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)) (internal citation omitted).

³⁸ See *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 244 (1991).

³⁹ *Id.* at 248. For further discussion, see William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. 383, 452 (2000) (citing *Aramco*, 499 U.S. at 248); Curtis Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 512–13 (1997).

⁴⁰ See Patry, *supra* note 39, at 452. For further discussion of the presumption against territorial application, though noting that there is no language in either section 106 or 501(a) of the Copyright Act that limits its scope “to the U.S. borders,” see Bradley, *supra* note 39, at 523–26.

⁴¹ *Twentieth Century Fox Film Corp. v. iCraveTV*, No. Civ.A. 00-120, 2000 WL 255989, at *3 (W.D. Pa. Feb. 8, 2000) (internal citation omitted).

C. Basics of Personal Jurisdiction

As with any case, a plaintiff alleging copyright infringement against a nonresident defendant must meet certain jurisdictional requirements, since, “[t]he Due Process Clause protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful ‘contacts, ties, or relations.’”⁴² By providing this protection, the Due Process Clause “‘gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.’”⁴³

To meet those requirements, a nonresident defendant “‘must have ‘certain minimum contacts’” with the forum so that “‘maintenance of the suit does not offend traditional notions of fair play and substantial justice.’”⁴⁴ Before courts may exercise personal jurisdiction, “‘an applicable state rule or statute must potentially confer personal jurisdiction over the out-of-state defendant.’”⁴⁵ In a case where there is no applicable federal statute, courts apply “‘the law of the state in which the court sits,’” meaning that courts look at a state’s long-arm statute to see whether they may exercise personal jurisdiction.⁴⁶

The two forms of personal jurisdiction which may be exercised over a nonresident defendant are general and specific jurisdiction. General jurisdiction is found where defendants are “‘at home’”;⁴⁷ the forum is “‘the individual’s domicile; for a corporation, it is an equivalent place, on in which the corporation is fairly regarded as at

⁴² See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985) (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

⁴³ *Id.* at 472 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

⁴⁴ See *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011) (citing *Int’l Shoe*, 326 U.S. at 316).

⁴⁵ See *Carsey-Werner Co. v. BBC*, No. CV 17-8041 PA (ASX), 2018 WL 1083550, at *2 (C.D. Cal. Feb. 23, 2018); FED. R. CIV. P. 4(k).

⁴⁶ See *Bibiyan v. Marjan Television Network, Ltd.*, No. CV 18-1866, 2019 WL 422664, at * 2 (C.D. Cal. Feb. 2, 2019) (citing *Mavrix*, 647 F.3d at 1223).

⁴⁷ See *IMAPizza, LLC v. At Pizza Ltd.*, 334 F. Supp. 3d 95, 109 (D.D.C. 2018) (citing *Daimler AG v. Bauman*, 571 U.S. 117 (2014)).

home,”⁴⁸ such as a principal place of business or where the company is incorporated. However, for specific jurisdiction, the cause of action must “aris[e] out of or relat[e] to the defendant’s contacts with the forum.”⁴⁹ The three-part test for specific jurisdiction is as follows:

First, the defendant must have “purposefully directed [its] activities” at the forum.⁵⁰ Second, the litigation must “arise out of or relate to” at least one of those activities.⁵¹ And third, if the prior two requirements are met, a court may consider whether the exercise of jurisdiction otherwise “comport[s] with ‘fair play and substantial justice.’”⁵²

The requirements necessary for general and specific jurisdiction will be discussed in further detail in this Article through analysis of cases from various districts that dealt with nonresident defendants.

D. What is Geoblocking?

Though many internet actors around the world may not be familiar with, or may not feel the need to be familiar with, geoblocking, it is an important development for the internet which some suggest could be utilized as a “tool for regulation” by courts.⁵³ Geolocation—“the process of finding, determining and providing the

⁴⁸ See *Bristol-Myers Squibb Co. v. S.F. Cnty.*, 137 S. Ct. 1773, 1780 (2017) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

⁴⁹ *Id.* (citing *Daimler*, 571 U.S. 117).

⁵⁰ See *O’Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 317 (3d Cir. 2007) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quotation marks omitted)).

⁵¹ *Id.* (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)); *Grimes v. Vitalink Commc’ns Corp.*, 17 F.3d 1553, 1559 (3d Cir. 1994).

⁵² *O’Connor*, 496 F.3d at 317 (citing *Burger King*, 471 U.S. at 476 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945))). For purposes of this Article, the “fair play and substantial justice” prong will not be discussed in detail. See *id.* at 325 (discussing *Asahi Metals Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102 (1987) (“Indeed, *Asahi* is the only Supreme Court case ever to present so compelling a situation, and it involved a suit in California between parties from Japan and Taiwan.”)). Notably, “a purposeful availment analysis is most often used in suits sounding in contract,” while purposeful direction, “is most often used in suits sounding in tort.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (internal citation omitted).

⁵³ Marketa Trimble, *Geoblocking, Technical Standards and the Law*, in *GEOBLOCKING AND GLOBAL VIDEO CULTURE* 54, 56 (Ramon Lobato & James Meese eds., 2016).

exact location of a computer, networking device or equipment”⁵⁴— provides the information which website administrators can use to implement geoblocking technology.

Geoblocking is a way to restrict users from accessing websites from a certain geographic location based on the user’s unique internet protocol (“IP”) address.⁵⁵ All devices that connect to the internet, such as computers, tablets, fax machines, and mobile phones, are assigned an IP address.⁵⁶ Based on the device’s IP address, one can find the user’s approximate geographic location.⁵⁷ When someone registers a domain to create a website, that domain name is given a corresponding IP address.⁵⁸ These IP addresses are administered by the Internet Corporation for Assigned Names and Numbers (“ICANN”), a non-profit organization based in Los Angeles, California that globally coordinates the use of IP addresses.⁵⁹ Part of ICANN’s administration includes issuing Registrar Accreditation Agreements (“RAA”), contracts required for individuals to register a domain name under a generic top-level domain.⁶⁰ RAAs also require registrars to keep databases of registrant contact information and provide public access to it.⁶¹

In one method of geolocation, ICANN uses a system called Whois that can access information about domain name registrants

⁵⁴ *Geolocation*, TECHNOPEdia, <https://www.techopedia.com/definition/1935/geolocation> [<https://perma.cc/CGQ4-AQNA>].

⁵⁵ An internet protocol (IP) address is “the address of a connected device in an IP network (TCP/IP network), which is the worldwide standard both in-house and on the Internet.” *IP Address*, PCMAG, <https://www.pcmag.com/encyclopedia/term/45349/ip-address> [<https://perma.cc/K5BR-PCTZ>]; see also Sandra Pattison, *Geoblocking Guide: What Is It and How Do You Get Around It in 2020?*, CLOUDWARDS, <https://www.cloudwards.net/geoblocking-guide/> [<https://perma.cc/V5WF-V5RH>] (last updated Dec. 2, 2019).

⁵⁶ PCMAG, *supra* note 55.

⁵⁷ TECHNOPEdia, *supra* note 54.

⁵⁸ Tracie E. Wandell, *Geolocation and Jurisdiction: From Purposeful Availment to Avoidance and Targeting on the Internet*, 16 J. TECH. L. & POL’Y 275, 291 (2011).

⁵⁹ *Welcome to ICANN*, ICANN, <https://www.icann.org/resources/pages/welcome-2012-02-25-en> [<https://perma.cc/NND8-KPU7>]; see also Wandell, *supra* note 58, at 291–92.

⁶⁰ Wandell, *supra* note 58, at 292. A generic top-level domain is “the class of top-level domains that includes general-purpose domains such as .com, .net, .edu, and .org.” *ICANN Acronyms and Terms: Generic Top-Level Domain*, ICANN, <https://www.icann.org/icann-acronyms-and-terms/en/G0169> [<https://perma.cc/6CRB-8DA7>].

⁶¹ Wandell, *supra* note 58, at 292.

and IP address users maintained in public databases.⁶² Website administrators can use information from these databases to determine end user IP addresses, and, therefore, the user's geographic location, to implement technology which blocks access to their website.⁶³ There are also companies which provide geolocation information accessible by Whois, with identifying information including a user's city, state, and zip code.⁶⁴ Another method of geolocation is network routing, which maps a computer's response time with ping measurements.⁶⁵

With geolocation information, companies and individuals can implement technology to block access to their website from users outside of the defined territory. For example, the *Spanski* case noted that TV Polska⁶⁶ ("TVP") used a system that could, "digitally embed territorial access restrictions into uploaded content."⁶⁷ Using those restrictions, TVP's geoblocking system could compare the IP address with a database that provided information on IP addresses and their corresponding countries.⁶⁸

Geoblocking, however, is fallible; technology exists to circumvent geoblocks. One way that users can circumvent a geoblock is by using a proxy server. A proxy server is a computer server or a computer application which connects a local network with another, usually larger network.⁶⁹ When someone uses a proxy server to request access to content which may be geoblocked because it is from a website located in another country, the proxy server functions like an intermediary by requesting access for the user.⁷⁰ This way, the foreign website does not realize that the request is coming from an outside user; rather, it fails to recognize that the IP address

⁶² *Id.*

⁶³ *See id.*

⁶⁴ *Id.* at 293.

⁶⁵ *Id.*

⁶⁶ TV Polska is Poland's national public television broadcaster. *Spanski Enters., Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904, 907 (D.C. Cir. 2018).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *About Proxy Servers*, IND. UNIV., <https://kb.iu.edu/d/ahoo> [<https://perma.cc/KJG9-RCRG>] (last updated Nov. 15, 2018).

⁷⁰ *Id.*

associated with the request is coming directly and solely from the proxy server.⁷¹

Another way that users circumvent geoblocking technology is with a virtual private network (“VPN”). A VPN uses technology that allows for computers to send data between each other across a public network (i.e. the Internet) in a manner as though the computers were connected through a private network.⁷² By using encrypted connections, VPNs give the effect of a private connection between the computer and the network, allowing a user to connect to the network from a remote location.⁷³ VPN users, through this private network connection across a public network, can thus be located in the United States or Canada, but still access content in Europe or the Middle East.

One can argue that there are challenges that website owners and administrators will face in implementing geoblocking technology which could also inhibit courts from imposing a jurisdictional doctrine based on geolocation. These challenges include the cost of implementing the technology, the accuracy with which it functions, and privacy concerns about the ability to access a user’s personal registration information.⁷⁴ Another issue is the ability to set effective minimum standards for geoblocks, as was agreed upon in *Spanski* for “latest widely disseminated and financially practicable geoblocking technologies.”⁷⁵ Despite these concerns, some argue that these obstacles can be overcome and that, ultimately, geoblocking can effectively set jurisdictional limits by creating borders online.⁷⁶

⁷¹ See Pattison, *supra* note 55.

⁷² *What is a VPN? – Virtual Private Network*, CISCO, <https://www.cisco.com/c/en/us/products/security/vpn-endpoint-security-clients/what-is-vpn.html> [<https://perma.cc/T6KZ-D8M9>].

⁷³ *Id.*

⁷⁴ For a discussion of counterarguments to concerns about cost, accuracy, and privacy, see Wandell, *supra* note 58, at 297–304.

⁷⁵ Trimble, *supra* note 53, at 58.

⁷⁶ Trimble, *supra* note 53, at 61; see also Wandell, *supra* note 58, at 304–05.

E. *Extraterritorial Application of the Copyright Act for Public Performances Abroad*

1. *Spanski Enterprises, Inc. v. Telewizja Polska, S.A.: Geoblocking Technology and Public Performance*

Spanski Enterprises, Inc. v. Telewizja Polska, S.A. was the first case at the federal appellate level to analyze whether infringing performances that reach U.S. viewers, but originate abroad, may give rise to a cause of action under the U.S. Copyright Act.⁷⁷ In *Spanski*, the plaintiff, a Canadian company, held an exclusive license with the defendant (referred to as “TVP”), the national broadcaster for Polish television, to broadcast certain content in North and South America. Following a litigation settlement in 2009, Spanski held the exclusive rights to broadcast TVP’s content in North and South America. TVP—which provided content to the public via a video-on-demand function on its website—agreed to use a geoblock to restrict access—which included a “default territorial access setting” known as “minus America.”⁷⁸ In 2011, Spanski’s U.S.-based attorneys and website developer viewed Spanski’s copyrighted content from a computer in the U.S.⁷⁹ and discovered that TVP’s geoblock for its website was not restricting access to the content, in violation of Spanski’s right of public performance.⁸⁰

Spanski claimed that the District Court for the District of Columbia had original jurisdiction to hear the matter pursuant to the Copyright Act, as well as to the Foreign Sovereign Immunities Act, since TVP was “an agency and instrumentality of the Polish

⁷⁷ See generally *Spanski Enters., Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904 (D.C. Cir. 2018). For purposes of this Article, the other argument presented to the court in *Spanski*—whether Telewizja Polska’s operation of a video-on-demand service that allowed for the transmission of Spanski’s copyrighted content constituted infringement under the Copyright Act, of which the District Court for the District of Columbia held that it did based on the precedent set in *Am. Broad. Cos. V. Aereo, Inc.*, 573 U.S. 431 (2014)—will not be discussed in detail. For a discussion of the issue, see *Spanski*, 883 F.3d at 909–14.

⁷⁸ *Id.* at 907–08. The “minus America” setting from TVP’s program editors allowed TVP to block content from devices with North or South American IP addresses. However, the geoblock did not work if a program director provided another setting for the content. *Id.*

⁷⁹ Spanski registered copyrights for fifty-one episodes of a program with the U.S. Copyright Office, holding exclusive rights which were the subject of this case. *Id.* at 908.

⁸⁰ *Id.* at 907–08.

Government engaging in commercial activity within the United States.”⁸¹ TVP argued that because the transmission of the content—episodes of a television show for which Spanski held the rights in the U.S.—originated in Poland, TVP could not be subject to extraterritorial application of the U.S. Copyright Act.⁸² The court noted that this was the first time that a federal appellate court would analyze whether infringing performances which begin in a foreign country and reach U.S. viewers could be actionable under the Copyright Act.⁸³

In its discussion of extraterritorial application of federal statutes, the court noted that when a statute does not explicitly state that it can be applied extraterritorially, the next step was to look at whether the case involved “permissible domestic application” under a “focus” test.⁸⁴ Using this test, the court determined that the Copyright Act’s focus was on “protecting the exclusivity of the [exclusive] rights it guarantees.”⁸⁵ The court explained that because the Copyright Act’s focus was on “policing infringement,” the actual infringing performance—when the attorney and web developer watched the episodes in the U.S.—was the relevant conduct subject to regulation.⁸⁶ Therefore, the court found that while the infringing episodes were uploaded in Poland, those episodes were viewed in the U.S., and thus the relevant conduct allowed for permissible domestic application of the Copyright Act.⁸⁷

⁸¹ Complaint at 4, *Spanski Enters., Inc., v. Telewizja Polska, S.A.*, 883 F.3d 904 (D.C. Cir. 2018) (No. 12-cv-00957); *see also* 28 U.S.C. § 1605(a)(2):

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

⁸² *Spanski*, 883 F.3d at 913.

⁸³ *Id.*

⁸⁴ *Id.* (citing *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016)). For further discussion of the “focus” test, *see Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 265–68 (2010).

⁸⁵ *Spanski*, 883 F.3d at 914.

⁸⁶ *Id.*

⁸⁷ *Id.*

TVP argued that, based on *American Broadcasting Cos. v. Aereo, Inc.*,⁸⁸ there were two performances: (1) a non-infringing performance by TVP, the broadcaster, that occurred in Poland, and (2) an infringing performance by the viewer based in the U.S.⁸⁹ The court rejected this argument and held that TVP misinterpreted *Aereo* because a broadcaster like TVP and a U.S. viewer can both infringe a content owner's rights based on the same performance.⁹⁰ The court took particular issue with TVP's characterization of *Aereo* with regard to what constituted a "public performance":

Under TV Polska's reading, a broadcaster would commit an infringing performance merely by transmitting a copyrighted work into the void, regardless of whether those transmissions ever result in the work's 'images' being 'show[n]' to even a single viewer . . . the Act defines 'perform' (in relevant part) to require such a showing⁹¹

Furthermore, as a matter of public policy, the court in *Spanski* was also concerned that because of the global nature of the internet, a copyright in a work that is transmittable online would be meaningless and subject to extensive, global infringement if courts allowed foreign broadcasters to send infringing performances to the U.S. without culpability.⁹² The court was not persuaded by TVP's argument that by allowing the Copyright Act to apply domestically in this case, the court left, "any casual internet user anywhere in the world open to liability for uploading copyrighted content to a foreign website whenever anyone in the United States happens to stumble upon it."⁹³ TVP feared that it, as well as other such providers, would be liable even in situations where geoblocks were implemented, but outside users were still able to access their website.⁹⁴ The court rejected this point, noting that "although we have no occasion to prejudge such situations, we note that foreign defendants

⁸⁸ See generally *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431 (2014).

⁸⁹ *Spanski*, 883 F.3d at 914.

⁹⁰ *Id.* at 914–15.

⁹¹ *Id.* (citing 17 U.S.C. § 101).

⁹² *Id.*

⁹³ *Id.* at 915–16.

⁹⁴ *Id.* at 916.

in such cases may well have alternative defenses against liability . . .” suggesting that TVP and others might be able to rely on lack of personal jurisdiction or proximate cause as viable defenses in those cases.⁹⁵ Finally, the court noted that district courts have come to the same conclusion in similar cases.⁹⁶ The court ultimately stated that “holding foreign actors liable for conduct that results in the domestic infringement of those rights effectuates the Act’s guarantees and fully coheres with principles of extraterritoriality as articulated by the Supreme Court.”⁹⁷

Though the D.C. Court of Appeals noted that a claim for copyright infringement for conduct abroad that reached the U.S. was a question of first impression,⁹⁸ the court had no problem finding TVP liable based on existing law. The court applied the test used in *RJR Nabisco v. European Community* and *Morrison v. National Australia Bank Ltd.* to determine extraterritorial application of the Copyright Act.⁹⁹ It also relied on support from both congressional intent and an amicus brief from the U.S., which highlighted the importance of preventing piracy from abroad and preventing a loophole to the exclusive rights of a copyright holder.¹⁰⁰ All of this gave the *Spanski* court a clear path to hold that infringing conduct violates an author’s exclusive rights under the Copyright Act when it reaches the U.S., regardless of whether the conduct was volitional or where it began.

Ultimately, due to the commercial activity exception of the Foreign Sovereign Immunities Act, jurisdictional hurdles were not an issue for the *Spanski* court. However, as the discussion of the *Carsey-Werner* and *Triple Up* cases will show, personal jurisdiction and geoblocking often play an important role in analyzing infringement claims in cases that deal with the right of public performance.

⁹⁵ *Id.*

⁹⁶ *Id.* (citing *Crunchyroll, Inc. v. Pledge*, No. C 11-2334 SBA, 2014 WL 1347492, at *17 (N.D. Cal. Mar. 31, 2014); *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 225 (S.D.N.Y. 2002)).

⁹⁷ *Spanski*, 883 F.3d at 916.

⁹⁸ *Id.* at 913.

⁹⁹ *Id.* at 913–14.

¹⁰⁰ *Id.* at 915–16.

2. Additional Insight into Personal Jurisdiction: *Carsey-Werner Co. V. British Broadcasting Corp.*

In *Carsey-Werner Co. v. British Broadcasting Corp.*, the Central District of California analyzed procedural grounds for whether it could hear a copyright infringement case where the conduct began outside of the U.S.¹⁰¹ In this case, plaintiff Carsey-Werner was a U.S. based television company that produced *The Cosby Show*.¹⁰² The plaintiff claimed that BBC, a U.K. based television corporation, infringed on its exclusive rights when BBC broadcast a documentary on the alleged sexual assault charges against Bill Cosby using clips and musical cues from *The Cosby Show* without permission.¹⁰³ BBC moved to dismiss Carsey-Werner's claim for lack of personal jurisdiction.¹⁰⁴ Ultimately, the court held that it lacked personal jurisdiction and dismissed Carsey-Werner's amended complaint.¹⁰⁵

In its analysis of personal jurisdiction, the court looked at whether specific jurisdiction existed over BBC.¹⁰⁶ Based on the Ninth Circuit's three-part test for specific jurisdiction,¹⁰⁷ the court found that specific jurisdiction did not exist.¹⁰⁸ BBC argued that

¹⁰¹ See generally *Carsey-Werner Co. v. BBC*, No. CV 17-8041 PA (ASX), 2018 WL 1083550, at *1 (C.D. Cal. Feb. 23, 2018).

¹⁰² *Id.*

¹⁰³ *Id.* at *1–2. BBC's co-defendant was Sugar Films, a U.K. production company that produced the documentary. *Id.*

¹⁰⁴ *Id.* at *1–2, *9.

¹⁰⁵ *Id.* at *9. The court denied as moot the BBC's and Sugar Films' motion to dismiss for improper venue and the case was dismissed without prejudice. *Id.*

¹⁰⁶ *Carsey-Werner*, 2018 WL 1083550, at *3–7. Though there was discussion of its requirements, Carsey-Werner did not argue general jurisdiction, so the court only ruled on whether specific jurisdiction existed. See *id.* at *4.

¹⁰⁷ In order to find specific jurisdiction, the Ninth Circuit's test requires that:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum thereby invoking the benefits and protections of its laws;
- (2) The claim must be one which arises out of or relates to the defendant's forum-related activities; and
- (3) The exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Id. at *3 (quoting *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004)).

¹⁰⁸ *Id.* at *7.

although it could not prevent outside access via VPNs or proxy servers, BBC did not purposely direct any conduct toward California because it had geoblocking technology to prohibit viewing outside of the U.K. on its iPlayer website.¹⁰⁹ BBC argued that Carsey-Werner could not provide proof of any intentional acts by BBC to cause harm in California.¹¹⁰ Furthermore, BBC argued that the operation of a “passive service” that others could use to watch the program was not enough to meet the threshold for personal jurisdiction.¹¹¹

Ruling for BBC and its codefendant, the court found that although BBC’s use of copyrighted material qualified as an intentional act for purposes of the first “purposeful direction” element of specific jurisdiction, it did not meet the second element of “express aiming.”¹¹² The court held that BBC’s knowledge of Carsey-Werner’s connections to the forum, by itself, was not enough to satisfy the express aiming element, and therefore the court examined BBC’s actual contacts with the forum.¹¹³

Although BBC knew that Carsey-Werner was located in California, and that it held a copyright in the clips and cues, the court agreed that BBC maintained a passive website which did not direct any of its commercials or advertise in publications directed at the state.¹¹⁴ The court noted that BBC had technology in place to restrict viewership; such technology’s ineffectiveness was insufficient to

¹⁰⁹ *Id.* at *5.

¹¹⁰ *Id.* at *6.

¹¹¹ *Id.*

¹¹² *Id.* at *6. Discussing the express aiming element, the court explained, “in the past, the Ninth Circuit held that the ‘express aiming’ requirement was satisfied by a defendant’s ‘individualized targeting,’ or wrongful conduct targeted at a plaintiff whom the defendant knew to be a resident of the forum state.” *See id.* (quoting *Axiom Foods, Inc. v. Acerchem Int’l, Inc.*, 874 F.3d 1064, 1069 (9th Cir. 2017)).

¹¹³ *Id.*

¹¹⁴ *Id.* The court noted, “[W]hile a theory of individualized targeting may remain relevant to the minimum contacts inquiry, it will not, on its own, support the exercise of specific jurisdiction, absent compliance with what *Walden* requires,” and, therefore, courts, “must look to the defendant’s ‘own contacts’ with the forum, not to the defendant’s knowledge of a plaintiff’s connections to a forum.” *See id.* (quoting *Axiom Foods*, 874 F.3d at 1070).

find purposeful direction.¹¹⁵ Since the second element could not be met, the court held that it lacked specific jurisdiction over BBC.¹¹⁶

Furthermore, the court noted that even if BBC could foresee that viewers in California would use their website to watch the video, that was not enough to find that the court had personal jurisdiction to hear the matter.¹¹⁷ The court noted that even if BBC's conduct was enough to amount to "willful copyright infringement," that still wasn't enough to get past the personal jurisdiction issues.¹¹⁸ The court also did not entertain any assumptions about whether any viewers in California—besides Carsey-Werner's general counsel—watched the video. In fact, the court highlighted BBC's "active measures" of banning users outside the UK from using a VPN to access its website, which also factored into the court's decision.¹¹⁹ In highlighting these measures, the court demonstrated that bringing a claim in a forum against a nonresident defendant required conduct definitively aimed at that forum.¹²⁰ The court also showed that, in deciding whether it had personal jurisdiction to hear a copyright infringement case, it considered active steps by the defendant to prevent such conduct an important factor.¹²¹

3. *Triple Up Ltd. v. Youku Tudou Inc.* Says No to Mandatory Geoblocking

The D.C. District Court recently looked at the implications of a foreign internet actor's geoblock, or lack thereof, and the procedural

¹¹⁵ *Id.* (citing *Triple Up Ltd. v. Youku Toudu Inc.*, 235 F. Supp. 3d 15, 25 (D.D.C. 2017), *aff'd*, No. 17-7033, 2018 WL 4440459 (D.C. Cir. July 17, 2018)). The court also noted that (1) Carsey-Werner failed to actually prove, beyond a news article about the extent of viewership, that people in California watched the program, and that (2) co-defendant Sugar Films' on-location interviews and filming in California was not enough to subject them to personal jurisdiction in California. *See id.* at *7.

¹¹⁶ *Id.* The court held that since the express aiming element could not be met, there was no need to look at the final element regarding reasonableness. *Id.* The court also reviewed whether it had personal jurisdiction over the defendants under Federal Rule of Civil Procedure 4(k)(2) for service of summons or waiver of service, but also held that it lacked personal jurisdiction on that basis. *Id.* at *7–8.

¹¹⁷ *Id.* at *7.

¹¹⁸ *Id.* at *6.

¹¹⁹ *Id.* at *7.

¹²⁰ *See id.* at *6–7.

¹²¹ *See id.* at *8.

grounds for which courts may hear infringement cases where the conduct began abroad. In *Triple Up Ltd. v. Youku Tudou Inc.*, plaintiff Triple Up, a Seychelles company, filed suit alleging copyright infringement against the defendant Youku, a Chinese internet television company with websites that allow users to publish and view content.¹²² Triple Up’s counsel was able to access three Taiwanese movies—of which Triple Up held the exclusive right to broadcast in the U.S.—in the District of Columbia, despite the fact that Youku implemented geoblocking technology to prevent outside access.¹²³ Upon review of the sufficiency of Youku’s contacts with the U.S., the court held that it could not exercise personal jurisdiction over Youku with regard to Triple Up’s claims.¹²⁴

Analyzing whether Youku had sufficient contacts with the U.S. for purposes of specific jurisdiction, the court noted that the contacts must, “demonstrate that Youku has ‘purposely directed’ its activities at residents of the forum”¹²⁵ “or that Youku has ‘purposely availed itself of the privilege of conducting activities within the [U.S.], thus invoking the benefits and protections of its laws.’”¹²⁶ The court acknowledged that the ability to access Youku’s website alone was not enough to establish minimum contacts necessary to find that personal jurisdiction exists.¹²⁷ However, it noted that it could potentially find jurisdiction under an “effects test” to determine whether Youku’s conduct has an effect on the forum.¹²⁸

Regarding the geoblock, Triple Up argued that because Youku used geoblocking technology to block some of the content on its site, including videos uploaded by Youku employees, then it could have

¹²² *Triple Up Ltd. v. Youku Tudou Inc.*, 235 F. Supp. 3d 15, 20 (D.D.C. 2017), *aff’d*, No. 17-7033, 2018 WL 4440459 (D.C. Cir. July 17, 2018). Youku has its principal place of business in China, but it is a Cayman Islands company. *Id.* at *18. Youku has two website platforms for content view and publishing, and it also has a search engine for users to search for videos. *Id.*

¹²³ *Id.* at *19–20.

¹²⁴ *Id.* at *22.

¹²⁵ *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

¹²⁶ *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

¹²⁷ *Id.* at *23 (citing *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000)).

¹²⁸ *Id.* at *24.

used the geoblock to block all of the content on its site.¹²⁹ Triple Up argued that by failing to do so, Youku allowed the content to be transmitted to the U.S.¹³⁰ However, the court found that Triple Up's arguments failed to meet the effects test¹³¹ because exercising personal jurisdiction on that basis would, "invite a sea change in the law of internet personal jurisdiction."¹³² The court was troubled by Triple Up's assertions that a failure to impose a geoblock could lead to purposeful availment because such a rule would, "effectively mandate geoblocking for any website operator wishing to avoid suit in the United States."¹³³ The *Triple Up* court was particularly concerned about the greater implications on internet access if it ruled in favor of the plaintiff based on the defendant's failure to implement a geoblock:

To say the least, such a rule . . . could limit U.S. residents' access to what is appropriately called the World Wide Web. Perhaps, in the future, geoblocking will become sufficiently widespread that a failure to use it will be considered 'purposeful' and assigned jurisdictional significance. But Triple Up provides no factual basis for the Court to conclude that this is the case now. . . .¹³⁴

Looking to guidance set by the Ninth Circuit's analysis, the court notes that Triple Up could have argued under the effects test, that Youku was subject to personal jurisdiction for an intentional act

¹²⁹ *Id.* at *24–25.

¹³⁰ *Id.*

¹³¹ The D.C. Circuit noted that because the Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984):

...upheld the exercise of personal jurisdiction over nonresident defendants on the grounds that their "intentional...actions were expressly aimed at [the forum]," which was where "the brunt of the harm" was felt...[i]t now stands for the principle that the "effects" of a non-forum actor's intentional conduct can, in some circumstances, "create[] the necessary contacts with the forum."

See id. at *29.

¹³² *See id.* at *25.

¹³³ *Id.*

¹³⁴ *Id.*

expressly aimed at the forum, that caused harm in that forum.¹³⁵ Triple Up, however, did not make an effects test argument.¹³⁶ Nevertheless, the court stated that such argument would not have been persuasive for several reasons: (1) the videos were Taiwanese, (2) with Mandarin subtitles, (3) the copyright holder did not have a connection to the U.S., and (4) there was no evidence that anyone besides Triple Up’s U.S. counsel watched the video.¹³⁷

On appeal, the Court of Appeals for the District of Columbia affirmed the District Court’s judgement.¹³⁸ Addressing Triple Up’s claim for actual damages,¹³⁹ the Court of Appeals reiterated the focus of the inquiry, which was “whether Youku ‘has sufficient contacts with the United States as a whole to justify the exercise of personal jurisdiction under the Due Process Clause’”¹⁴⁰ Reviewing whether Youku purposefully directed conduct at the U.S. or “otherwise created a ‘substantial connection with the [U.S.],’”¹⁴¹ the court found that it lacked personal jurisdiction because (1) Youku lacked a physical presence in the U.S., (2) Triple Up’s complaint did not allege that Youku engaged in any business transactions with U.S. viewers as per D.C.’s long-arm statute, and (3) Triple Up, as a Seychelles-based company, did not allege any business operations in the U.S. that were harmed by Youku’s conduct.¹⁴²

¹³⁵ *Id.* at *29 (citing *Panavision Int’l L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998)).

¹³⁶ *Id.*

¹³⁷ *Id.* at *30. The court also analyzed additional conduct that Triple Up argued was evidence of purposeful availment: advertisements included with the videos, Youku’s listing on the New York Stock Exchange, and its website’s interactivity. *Id.* However, the court was not persuaded and found that the conduct did not subject Youku to personal jurisdiction. *Id.*

¹³⁸ *See generally Triple Up Ltd. v. Youku Tudou Inc.*, No. 17-7033, 2018 WL 4440459, at *1 (D.C. Cir. July 17, 2018).

¹³⁹ Triple Up abandoned its claim for statutory damages on appeal. *See id.* at *1. On the issue of injunctive relief, the Court of Appeals affirmed the district court’s ruling that Triple Up lacked personal jurisdiction over Youku Tudou because Triple Up did not allege an immediate, real threat of harm, as Triple Up’s exclusive licenses in broadcasting the subject movies in the United States expired by November 2017. *See id.*

¹⁴⁰ *Id.* at *2 (citing *Mwani v. bin Laden*, 417 F.3d 1, 11 (D.C. Cir. 2005)).

¹⁴¹ *Id.* (citing *Walden v. Fiore*, 571 U.S. 277, 284 (2014)).

¹⁴² *See id.* at *2.

Notably, the court was unpersuaded by Triple Up's arguments that the court could exercise personal jurisdiction over Youku because it passively allowed video access in the U.S.¹⁴³ Unlike in *Spanski*, the facts alleged did not show that Youku acted intentionally or in bad faith by allowing viewership in the U.S.¹⁴⁴ The court distinguished Youku's behavior from that of defendants who established contacts with the U.S., holding that, "personal jurisdiction 'cannot be based solely on the ability of District residents to access the defendant[']s websites, for this does not by itself show any persistent course of conduct by the defendant[] in the [forum].'"¹⁴⁵

The district court's analysis of the specific jurisdiction inquiry was also important to understanding the complexities of determining whether to exercise personal jurisdiction over a nonresident defendant's internet activities. Discussing whether the third-party English-language advertisements for U.S. products created the minimum contacts necessary to exercise specific personal jurisdiction over Youku, the D.C. Circuit Court noted that part of the inquiry required determining whether Triple Up's lawsuit arose from or related to those ads.¹⁴⁶ It also noted a circuit split on determining the appropriate approach.¹⁴⁷ The three different approaches are as follows: (1) the defendant's acts must be the proximate cause of the plaintiff's injury, which is the strictest standard; (2) the defendant's acts were the but-for causation of the injury; or (3) there is a discernible relationship between the defendant's acts and the plaintiff's injury, which is the least strict of the standards—this last approach looks at the totality of circumstances.¹⁴⁸ Ultimately, the court held that the discernible relationship test did not provide the predictability that due process requires.¹⁴⁹ Therefore, even under a but-for

¹⁴³ See *id.* at *3.

¹⁴⁴ See *id.*

¹⁴⁵ *Id.* at *2 (citing *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349 (D.C. Cir. 2000)).

¹⁴⁶ See *Triple Up Ltd. v. Youku Tudou Inc.*, 235 F. Supp. 3d 15, 26 (D.D.C. 2017), *aff'd*, No. 17-7033, 2018 WL 4440459 (D.C. Cir. July 17, 2018) (citing *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984))).

¹⁴⁷ See *id.* (citing *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 318 (3d Cir. 2007)).

¹⁴⁸ See *id.* at 26–27 (citing *O'Connor*, 496 F.3d. at 318–23).

¹⁴⁹ See *id.* at 27–28.

approach, there was insufficient relatedness regarding the third-party ads.¹⁵⁰ The court emphasized the importance of providing potential defendants with consistency in determining when courts may exercise personal jurisdiction so that those defendants may better evaluate the legal implications of their conduct.¹⁵¹

In these cases, the courts clearly had concerns about a ruling that would equate inaction with action, thereby disrupting existing principles of personal jurisdiction.¹⁵² The district court's discussion of Triple Up's argument that a failure to geoblock is evidence of purposeful availment showed that the court did not agree with the idea of making geoblocks mandatory.¹⁵³ Without affirmative steps by Youku to actively transmit the subject videos to viewers in the U.S., and where the videos were merely accessible outside of China, the court concluded that purposeful availment did not include "purposeful avoidance."¹⁵⁴ In this way, defendants could conduct themselves with knowledge of where they can and cannot be sued—otherwise they could face liability anywhere.¹⁵⁵ However, the district court also noted that there is no single approach to analyzing relatedness when it comes to specific personal jurisdiction, yet the goal of due process is to provide predictability.¹⁵⁶ Therefore, there is room for improvement to provide clarity with regard to personal jurisdiction of nonresident defendants who use—or do not use—geoblocks for their internet activities.¹⁵⁷ This Article will highlight this point in further discussion of general and specific personal jurisdiction, as well as the relevant case law.

¹⁵⁰ *Id.*

¹⁵¹ *See id.* at 27 (citing *GTE*, 199 F.3d at 1350).

¹⁵² *See id.* at 25.

¹⁵³ *See id.* at 24–25.

¹⁵⁴ *See id.* at 25–26 (discussing *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011), in which the court found that New Jersey had no personal jurisdiction over the defendant manufacturer despite failure to take steps to keep its goods out of the state).

¹⁵⁵ *See id.* at 23 (discussing *GTE*, 199 F.3d at 1350).

¹⁵⁶ *See id.* at 27.

¹⁵⁷ *See id.*

*F. General Jurisdiction and Application of the Copyright Act
Against Nonresident Defendants*

Of the cases discussed thus far, *Triple Up* and *Carsey-Werner* focused their inquiries on specific jurisdiction when analyzing foreign defendants in domestic copyright infringement cases; this is for good reason. Courts look at two forms of jurisdiction—general and specific—when determining whether it can exercise personal jurisdiction over a defendant.¹⁵⁸ However, as the following will show, the general jurisdiction inquiry has become less relevant in determining personal jurisdiction over nonresident defendants.

Though the first case, *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, involved two domestic corporations, the Ninth Circuit Court of Appeals' analysis added insight to the overall inquiry regarding general jurisdiction for foreign defendants and conduct abroad.¹⁵⁹ In *Perkins v. Benguet Consolidated Mining Co.*, a case from 1952, the Supreme Court also highlighted the high level of scrutiny required for finding general jurisdiction over a foreign defendant.¹⁶⁰ Finally, the District Court for the Southern District of New York in *Freeplay Music, LLC v. Nian Infosolutions Private Ltd.* showed the importance of a nonresident defendant's ties to the forum, regardless of the magnitude of infringement or the amount of U.S. visitors to the defendant's website.¹⁶¹

¹⁵⁸ See *IMAPizza, LLC v. At Pizza Ltd.*, 334 F. Supp. 3d 95, 109–10 (D.D.C. 2018). The court discussed:

Personal jurisdiction is not a mere technicality, but “an essential element...” without which the court is powerless to proceed...The Court must address this issue before turning to the merits... Under the first type, known as general or “all-purpose” jurisdiction, courts located where defendants are at “at home” may exercise jurisdiction over *any* claim...The second type, known as specific or “case-linked” jurisdiction, exists when there is a connection between the forum and the facts of the case.

Id. (internal citations omitted).

¹⁵⁹ *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223–28 (9th Cir. 2011).

¹⁶⁰ See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 441 (1952).

¹⁶¹ *Freeplay Music, LLC v. Nian Infosolutions Private Ltd.*, No. 16-CIV-5883, 2018 WL 3639929 (S.D.N.Y. July 10, 2018).

1. Cases Showing the Utility (Or Futility) of General Jurisdiction

In *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, plaintiff Mavrix, a Florida celebrity photo agency that paid photographers for photos to use in magazines, brought a copyright infringement claim against defendant Brand, an Ohio company that operated a celebrity gossip website.¹⁶² Both parties had specific ties to California. Mavrix, for example, had an office in Los Angeles, photographers based in Los Angeles, and a registered agent for service of process.¹⁶³ While Brand did not have office space or staff in California, its ties to California included agreements with California businesses, solicitation and advertisements on its website from a California-based ad agency, and a “Ticket Center” with a link to a third-party vendor for ticket sales to events in California.¹⁶⁴ The case arose when, in 2008, a photographer took photographs of singer Stacy Ferguson, better known as Fergie from the Black Eyed Peas, and actor Josh Duhamel.¹⁶⁵ Mavrix held the rights to the pictures, posted them to its website, and Brand subsequently posted the pictures to its own website.¹⁶⁶ When Mavrix brought suit in the District Court for the Central District of California, Brand moved to dismiss for lack of personal jurisdiction, which the court granted and Mavrix appealed.¹⁶⁷

The Ninth Circuit Court of Appeals discussed general jurisdiction in depth. The court held, “A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”¹⁶⁸ Discussing the application of general jurisdiction toward a defendant who must “engage in ‘continuous and systematic general business contacts,’” the court noted that the Supreme Court found general jurisdiction in only one

¹⁶² *Mavrix*, 647 F.3d at 1221.

¹⁶³ *Id.* at 1221–22.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1222–23.

¹⁶⁷ *Id.* at 1223.

¹⁶⁸ *Id.* (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

instance.¹⁶⁹ In reaching its conclusion, the Ninth Circuit compared *Mavrix* with two other cases in which foreign defendants were not subject to general jurisdiction.¹⁷⁰

The *Mavrix* court noted that in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Supreme Court held that foreign subsidiaries of the U.S. tire manufacturer, which operated in France, Luxembourg, and Turkey, were not subject to general jurisdiction in a wrongful death lawsuit brought by the estates of the deceased in North Carolina.¹⁷¹ The *Mavrix* court also noted that the Supreme Court “refused to permit the exercise of general jurisdiction based on contacts that were not so substantial, continuous, or systematic.”¹⁷² Furthermore, the court pointed out that in *Goodyear*, the subsidiaries were “not registered to do business in North Carolina; had no places of business, no employees, and no bank accounts . . . did not solicit business . . . and did not themselves sell or ship tires to customers in North Carolina.”¹⁷³ Additionally, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the Court found that Helicopteros, a Colombian company, was not subject to general jurisdiction for a wrongful death lawsuit in Texas, despite the fact that the company’s CEO went to Texas for a contract negotiation, sent pilots to train in Texas, received millions in contract payments from funds from a Texas bank, sent personnel to Texas for technical consultation, and spent millions to purchase aircraft, parts, and accessories from a Texas supplier.¹⁷⁴

¹⁶⁹ *Id.* at 1223–24.

¹⁷⁰ *Id.* at 1224–25.

¹⁷¹ *Id.* (discussing *Goodyear*, 564 U.S. at 919).

¹⁷² *Id.* at 1224.

¹⁷³ *Id.* (citing *Goodyear*, 564 U.S. at 921).

¹⁷⁴ *Id.* at 1225 (citing *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 417 (1984)). In *Helicopteros*, the Court held that a single trip for negotiations in Texas was not systematic and continuous contact with the State. It also held that the checks drawn on the Texas bank were of little significance to the payee since it is ultimately a matter for the drawer to decide. The Court held that training and “mere purchases” which occurred in Texas were insufficient to exercise personal jurisdiction. With regard to the purchases, even if done in regular intervals, the Court held—drawing on precedent—that such purchases were not enough. Finally, regarding the training, the Court held that the “brief presence” of the company’s employees in the forum for training was part of the “goods and services” and thus was insufficient for purposes of personal jurisdiction. See *Helicopteros*, 466 U.S. at 416–18.

Similarly, the Ninth Circuit in *Mavrix* held that Brand did not have the requisite contacts with California for the court to exercise general personal jurisdiction.¹⁷⁵ The court highlighted the fact that “Brand has no offices or staff in California, is not registered to do business in the state, has no registered agent for service of process, and pays no state taxes.”¹⁷⁶ However, the court did find Brand subject to specific personal jurisdiction, reversing the district court’s dismissal and remanding the case.¹⁷⁷

Discussing the interactivity of Brand’s website, the Ninth Circuit made an important point regarding a “sliding scale” test developed in the Western District of Pennsylvania in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*¹⁷⁸ The *Zippo* court formulated this test to “characterize the ‘nature and quality of commercial activity that an entity conducts over the Internet.’”¹⁷⁹ However, the court in *Mavrix* held that *Mavrix* incorrectly relied on the *Zippo* test in arguing that the court could exercise general jurisdiction over Brand.¹⁸⁰ The court noted that “the level of interactivity of a nonresident defendant’s website provides limited help in answering the distinct question whether the defendant’s forum contacts are sufficiently substantial, continuous, and systematic to justify general jurisdiction.”¹⁸¹ The court added:

¹⁷⁵ *Mavrix*, 647 F.3d at 1225–27. For the Ninth Circuit’s analysis of whether it could exercise specific personal jurisdiction over Brand, see *id.* at 1227–32.

¹⁷⁶ *Id.* at 1225.

¹⁷⁷ *Id.* at 1232.

¹⁷⁸ *Id.* at 1226–27 (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)).

¹⁷⁹ *Id.* at 1226 (quoting *Zippo*, 952 F. Supp. at 1124).

¹⁸⁰ *Id.* at 1227.

¹⁸¹ *Id.* The Ninth Circuit also discussed the difference between “passive” and “interactive” websites, an important point noted in *Zippo* with regard to minimum contacts necessary for personal jurisdiction:

At one end of the scale were active sites “where a defendant clearly does business over the Internet” and “enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet,” which support jurisdiction. At the other end were passive sites “where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions,” and which do not support jurisdiction.

To permit the exercise of general jurisdiction based on the accessibility in the forum of a non-resident interactive website would expose most large media entities to nationwide general jurisdiction. That result would be inconsistent with the constitutional requirement that “the continuous corporate operations within a state” be “so substantial and of such a nature as to justify suit against [the nonresident defendant] on causes of action arising from dealings entirely distinct from those activities.”¹⁸²

The Ninth Circuit’s holding that Brand did have the requisite minimum contacts for specific—but not for general—jurisdiction highlighted the differences in personal jurisdiction analysis, particularly with websites.¹⁸³ *Mavrix* was an instructive case, and the Ninth Circuit Court of Appeals had guidance from the Supreme Court in the *Perkins* case.

2. General Jurisdiction and *Perkins v. Benguet Consolidated Mining Co.*

In *Perkins v. Benguet Consolidated Mining Co.*, “[a] textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum,”¹⁸⁴ the Supreme Court looked at whether an Ohio court could exercise personal jurisdiction over a mining company, organized under Filipino law, in a lawsuit filed by a company stockholder.¹⁸⁵ The facts of the case were unique because although the company’s operations were

See id. at 1226-27 (citing *Zippo*, 952 F. Supp. at 1124). For further discussion of *Zippo* and passive versus interactive websites, see Jane C. Ginsburg, *Copyright Without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 CARDOZO ARTS & ENT. L. J. 153, 160 (1997).

¹⁸² *Mavrix*, 647 F.3d at 1227 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

¹⁸³ *Id.* at 1232.

¹⁸⁴ *Id.* at 1224 (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 928 (2011) (internal citation and quotation marks omitted)).

¹⁸⁵ *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438-39 (1952). The petitioner filed actions in Clermont County, Ohio—where the company’s president resided—against Benguet, claiming (1) dividends due as a stockholder, and (2) \$2,500,000 in damages based on Benguet’s failure to issue her stock certificates. *Id.*

in the Philippines, the interim president maintained an office in Ohio where he handled various affairs on Benguet's behalf.¹⁸⁶ To determine if it could exercise personal jurisdiction over the mining corporation, the Court looked at:

[W]hether, as a matter of federal due process, the business done in Ohio by the respondent mining company was sufficiently substantial and of such a nature as to permit Ohio to entertain a cause of action against a foreign corporation, where the cause of action arose from activities entirely distinct from its activities in Ohio.¹⁸⁷

Ultimately, the Court found that although, “[p]laintiff’s cause of action . . . did not arise in Ohio and [did] not relate to the corporation’s activities there,”¹⁸⁸ the level of the president’s, and thus the company’s, ties to Ohio allowed for the exercise of general jurisdiction against Benguet without violating due process.¹⁸⁹ Consequently, the Supreme Court held that there would be no due process concerns if Ohio were to exercise jurisdiction over the company.¹⁹⁰

The facts in *Perkins*, where a company’s president spent years in the forum running various functions of the company, were unique and quite different from *Mavrix*.¹⁹¹ The Supreme Court in *Perkins* showed the extent of contacts with the forum required for a court to exercise general jurisdiction over a nonresident defendant.¹⁹²

¹⁸⁶ *Id.* at 447–48.

¹⁸⁷ *Id.* at 447.

¹⁸⁸ *Mavrix*, 647 F.3d at 1224 (quoting *Perkins*, 342 U.S. at 438).

¹⁸⁹ *Id.* at 1224 (noting “the president kept business files in Ohio; handled corporate correspondence from Ohio; drew employees’ salaries from accounts in Ohio banks and distributed paychecks; held directors’ meetings while . . . in Ohio; and ‘carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company.’”)

¹⁹⁰ *Perkins*, 342 U.S. at 448–49.

¹⁹¹ See *Mavrix*, 647 F.3d at 1221–23.

¹⁹² *Perkins*, 342 U.S. at 445.

3. *Freeplay Music, LLC v. Nian Infosolutions Private Ltd.* and Beyond

The District Court for the Southern District of New York has also analyzed, in a copyright case, whether a plaintiff can exercise general jurisdiction over a foreign company. In *Freeplay Music, LLC v. Nian Infosolutions Private Ltd.*, Freeplay, a New York based online music library that licensed the use of its musical works, claimed that defendant Nian, an entertainment and news website owner based in India, used its registered musical recordings without its permission.¹⁹³ Nian used 115 of Freeplay's recordings without permission, and Nian used the recordings for 379 videos that it uploaded to YouTube.¹⁹⁴ Additionally, Nian's website received over 1 million hits from approximately 130,000 users in the U.S.¹⁹⁵ Consequently, Freeplay attempted to assert general jurisdiction over Nian for its copyright infringement claims.¹⁹⁶

The court noted, “[i]n the Second Circuit, ‘before a court grants a motion for default judgment, it may first assure itself that it has personal jurisdiction over the defendant.’”¹⁹⁷ It added:

The quintessential case for general jurisdiction over a foreign corporation in a particular state exists where the corporation is incorporated or has its principal place of business . . . however, the Supreme Court has made clear that general jurisdiction plays a “reduced role” in its modern jurisprudence, stating that a plaintiff asserting general jurisdiction over a foreign corporation bears a very heavy burden and that general jurisdiction will be found only in an “exceptional case.”¹⁹⁸

¹⁹³ *Freeplay Music, LLC v. Nian Infosolutions Private Ltd.*, No. 16-CIV-5883, 2018 WL 3639929, at *1–2 (S.D.N.Y. July 10, 2018).

¹⁹⁴ *Id.* at *2.

¹⁹⁵ *Id.*

¹⁹⁶ *See id.*

¹⁹⁷ *Id.* at *4 (internal citation and quotation marks omitted).

¹⁹⁸ *Id.* at *5 (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924–25); *Lopez v. Shopify, Inc.*, 16-CIV-9761, 2017 WL 2229868, at *5 (S.D.N.Y. May 23, 2017).

The court held that Freeplay's claims did not meet the high standard because evidence that Nian's interactive website provided information regarding movies shown in New York, and that Nian uploaded videos containing infringing material, failed to show that Nian was operating as if its home base were in New York.¹⁹⁹

In its analysis, the court relied on another Southern District of New York case: *Lopez v. Shopify, Inc.* In that case, Lopez registered a copyright and trademark for clothing line products and claimed that defendant Shopify Inc., a Canadian e-commerce website provider that offered website services for apparel companies, infringed on its rights when a third-party used a website to market clothing under Lopez's trademark and registered design.²⁰⁰ Lopez sent takedown notices to Shopify Inc. and subsequently sued Shopify Inc. for damages.²⁰¹ Drawing on precedent regarding general jurisdiction²⁰² and relying on the fact that neither Shopify Inc. nor its U.S. subsidiary Shopify USA have a principal place of business in New York,²⁰³ the court held that Shopify Inc.'s ties to New York were insufficient for general jurisdiction.²⁰⁴

Similar to the courts in *Freeplay*, *Mavrix*, and *Perkins*, the *Lopez* court recognized the high threshold for evaluating whether a defendant can be subjected to general jurisdiction. The court held, "general jurisdiction is appropriate in the case of a corporation where the defendant's 'continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those

¹⁹⁹ *Freeplay*, 2018 WL 3639929, at *5.

²⁰⁰ *Lopez*, 2017 WL 2229868, at *1.

²⁰¹ *Id.* at *1–2. Shopify ignored the first takedown notice, claiming the notice did not comply with the Digital Millennium Copyright Act. However, Shopify did comply with the second notice. *Id.*

²⁰² *Id.* at *7. The court explained, "Therefore general jurisdiction would only be appropriate here if this were the 'exceptional case' where Shopify's forum operations are 'so substantial and of such a nature as to render the corporation at home in' New York." *Id.* (citing *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19 (2014)).

²⁰³ *Id.* Shopify USA is a Delaware corporation. *See id.* at *2.

²⁰⁴ *Id.* at *7. Shopify had many customers in New York, traded on the New York Stock Exchange, ran promotional events in New York, and had an office (though not its principal place of business) in New York. *See id.*

activities.”²⁰⁵ Cases that established this precedent gave general jurisdiction a “reduced role” which, “emphasized the limited circumstances in which [the court] held that a defendant’s contacts were substantial enough to warrant the exercise of such jurisdiction.”²⁰⁶ The court held that there were insufficient contacts for it to exercise general over Shopify Inc. since it was not incorporated and did not hold its principal place of business in New York, even though Shopify Inc. traded on the New York Stock Exchange, and it ran promotional events and had customers in New York.²⁰⁷

Overall, courts have seldom held that the facts and the law support the exercise of general jurisdiction in copyright infringement claims against nonresident defendants, such that general jurisdiction is of minimal concern.²⁰⁸ Furthermore, cases in which courts analyzed the exercise of specific jurisdiction against nonresident defendants highlighted the complexities involved, given the facts of each case. The following section will discuss how the “reduced role” of general jurisdiction, as well as the results of the cases that focused on specific jurisdiction, support the proposition to amend the Copyright Act.

II. ANALYSIS

A. *Putting it all Together*

The Copyright Act should be amended to apply greater weight to geoblock usage with regard to a court’s analysis of whether to exercise personal jurisdiction over a nonresident defendant. In *Span-ski*, one of the factors that guided the court’s legal analysis was a public policy concern that U.S. copyright law enforcement would be futile if offenders could escape liability in foreign destinations that

²⁰⁵ *Id.* at *5 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)).

²⁰⁶ *Id.* (citing *Goodyear*, 564 U.S. at 925).

²⁰⁷ *Id.* at *7. The court also held that Shopify’s conduct did not meet the requirements for specific jurisdiction because (1) there was no nexus between Shopify’s contact with New York and Lopez’s infringement claims, and (2) Shopify did not expressly aim its conduct at New York. *See id.* at *7–9.

²⁰⁸ *See Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223–27 (9th Cir. 2011); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445–49 (1952); *Freeplay Music, LLC v. Nian Infosolutions Private Ltd.*, No. 16-CIV-5883, 2018 WL 3639929, at *4 (S.D.N.Y. July 10, 2018).

would effectively become copyright havens.²⁰⁹ The court's concerns were valid. The Copyright Clause of the U.S. Constitution provides Congress with the power "to promote the progress of science and useful arts"²¹⁰ Authors, artists, composers, producers, and others would not have an incentive to create original works if the law did not provide them with protection, and thus, an incentive to continue to create. Furthermore, a contrary ruling in *Spanski* could have given future potential copyright infringers a loophole to avoid liability for infringement. The loophole could be exploited if television stations in California and Texas could move their broadcast antennae to Mexico,²¹¹ and thus avoid liability if infringing conduct that originated abroad cannot be a violation of U.S. copyright law even if it resulted in domestic harm.

Though the *Spanski* court's holding did not require all internet actors to use geoblocks or similar technology to avoid infringement under the U.S. Copyright Act, the court noted that personal jurisdiction would likely be an available defense for cases involving "casual internet user[s]."²¹² The *Spanski* court was correct, as seen previously in the *Triple Up* decision, where lack of personal jurisdiction provided grounds for that court to dismiss the case. Although *Spanski* and *Triple Up* were factually similar in some ways,²¹³ the *Spanski* court had a basis to exercise personal jurisdiction over the non-resident defendant due to an exception to the Foreign Sovereign Immunities Act.²¹⁴ However, the *Triple Up* court worried about the potential policy implications of exercising personal jurisdiction over a nonresident defendant because the defendant did not use a geoblock.²¹⁵

²⁰⁹ *Spanski Enters., Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904, 915–16 (D.C. Cir. 2018).

²¹⁰ U.S. CONST. art. 1, § 8, cl. 8.

²¹¹ *Spanski*, 883 F.3d at 915.

²¹² *Id.* at 915–16.

²¹³ In *Spanski* and *Triple Up*, (1) the defendants in both cases had geoblocking technology but failed to block certain content from reaching the U.S., and (2) both of the plaintiffs discovered the alleged infringement when their counsel accessed the website within the U.S. *Spanski*, 883 F.3d at 908; *Triple Up Ltd. v. Youku Tudou Inc.*, 235 F. Supp. 3d 15, 19 (D.D.C. 2017), *aff'd*, No. 17-7033, 2018 WL 4440459 (D.C. Cir. July 17, 2018).

²¹⁴ *Spanski*, 883 F.3d at 908.

²¹⁵ *Triple Up*, 235 F. Supp. 3d at 25.

In *Triple Up*, the District Court for the District of Columbia—discussing the specific personal jurisdiction “effects test” analysis from the Ninth Circuit, which was also discussed in *Carsey-Werner*—noted the difficulty with finding that Youku’s posting of the films were aimed at the U.S.²¹⁶ Likewise, the *Carsey-Werner* court noted the difficulty, based on the facts, with finding that BBC aimed its conduct at the forum when the videos became accessible in the U.S.²¹⁷

In *Carsey-Werner*, BBC had technology in place for its online streaming website to prohibit VPNs and proxy servers outside of the United Kingdom from accessing the program.²¹⁸ However, despite BBC’s use of material in their program that was registered under U.S. copyright law, the *Carsey-Werner* court held that BBC’s conduct did not meet the “purposeful direction” test for specific jurisdiction in California.²¹⁹ Among the factors supporting dismissal was the court’s holding that ineffective geoblocking efforts did not rise to a purposeful direction determination.²²⁰ As the court stated, “BBC implemented technology . . . to prevent California viewers from accessing the Program. That those efforts may not have been completely effective does not amount to purposeful direction.”²²¹ The court held that the relationship between the nonresident defendant and the forum must arise out of that defendant’s “contacts that they themselves created with the state,” not by unauthorized viewership from the U.S.²²² Furthermore, regardless of evidence of BBC’s likely awareness of user access in California, the court found a lack of evidence regarding the “extent of viewership” of the defendants’ program in the state.²²³

Notably, courts have recognized that there are no set standards to determine when an alleged infringer’s online activities satisfy the

²¹⁶ *Id.*; see also *Carsey-Werner Co. v. BBC*, No. CV 17-8041 PA (ASX), 2018 WL 1083550, at *5 (C.D. Cal. Feb. 23, 2018).

²¹⁷ *Carsey-Werner*, 2018 WL 1083550, at *6.

²¹⁸ *Id.* at *5 (discussing BBC’s Software Engineering Manager’s declaration about the company’s “technological means”).

²¹⁹ *Id.* at *6.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* (internal citation omitted).

²²³ *Id.* at *7.

minimum contacts necessary to subject them to personal jurisdiction in a foreign forum.²²⁴ While courts, “generally agree that the ability of forum residents to access a defendant’s website, standing alone, does not suffice to establish minimum contacts with the forum state,”²²⁵ courts could further the goal of promoting progress by giving greater weight to the use of geoblocks. Rather than creating more confusion for internet users and authors of creative works, this would actually clarify the parameters under which internet actors may operate.

Amending the Copyright Act—to provide that the use of a geoblock would shield a foreign defendant from general jurisdiction in the U.S.—is a logical solution with support from the cases discussed. The *Mavrix* and *Freeplay* courts showed the decreased significance that general jurisdiction has played in determining whether to exercise jurisdiction over a nonresident defendant.²²⁶ Furthermore, amending the Copyright Act would reflect the point noted by the *Triple Up* court that, “the proposition that a website’s affirmative geoblocking efforts should weigh against the exercise of personal jurisdiction is unobjectionable.”²²⁷

In terms of general jurisdiction, under such an amendment, internet actors based outside of the U.S. would not be required to have a geoblock for their website. However, those internet actors might consider using geoblocking technology, knowing that a geoblock will provide protection from being subject to U.S. personal jurisdiction. Since courts exercise general jurisdiction in “limited circumstances,” foreign actors would be assured that they would not be brought into a U.S. court without facts similar to the interim

²²⁴ See *Smarter Every Day, LLC v. Nunez*, No. 2:15-CV-01358, 2017 WL 1247500, at *3 (N.D. Ala. Apr. 5, 2017); see also *Triple Up Ltd. v. Youku Tudou Inc.*, 235 F. Supp. 3d 15, 18 (D.D.C. 2017), *aff’d*, No. 17-7033, 2018 WL 4440459, *5 (D.C. Cir. July 17, 2018); *IMAPizza, LLC v. At Pizza Ltd.*, 334 F. Supp. 3d 95, 113–14 (D.D.C. 2018).

²²⁵ *Smarter Every Day*, 2017 WL 1247500, at *3; see also *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349–50 (D.C. Cir. 2000); *A Corp. v. All Am. Plumbing, Inc.*, 812 F.3d 54, 61 (1st Cir. 2016).

²²⁶ See *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1225–26 (9th Cir. 2011); see also *Freeplay Music, LLC v. Nian Infosolutions Private Ltd.*, No. 16 Civ. 5883, 2018 WL 3639929, at *5, *13 (S.D.N.Y. July 10, 2018).

²²⁷ *Triple Up*, 235 F. Supp. 3d at 25.

president in *Perkins*²²⁸ or to TVP's exemption from the protections of the Foreign Sovereign Immunities Act in *Spanski*.²²⁹ Theoretically, that person or corporate entity could take a calculated risk by not using a geoblock, yet still have the choice of whether or not to restrict access. However, by using a geoblock, they would avoid being subjected to the general jurisdiction of a U.S. court while also fostering an environment in which internet actors have an incentive to take additional steps to prevent infringement of a protected work.

The proposed amendment would also benefit nonresident defendants under a specific jurisdiction analysis. Foreign internet actors could avoid the purposeful direction element of specific jurisdiction by taking steps to restrict access by forums within the U.S. to content on their website which may be protected under the Copyright Act. With a geoblock in place, the likelihood of a public performance from abroad reaching the U.S., thereby infringing on an author's exclusive rights, would be limited to circumstances where (1) third-party U.S. based users circumvent the geoblock through a VPN, a proxy server, or some other circumvention technology, or (2) as in *Spanski*, the person or entity fails to implement the geoblock.

In the first scenario, a court would be unlikely to find that it could exercise personal jurisdiction over a nonresident defendant who uses a geoblock. The *Triple Up* court noted that there are situations where a "nonresident's purely online activities . . . give rise to personal jurisdiction,"²³⁰ but a scenario in which a nonresident defendant uses a geoblock would not be one.²³¹ In the second scenario, the geoblocker—by failing to implement a geoblock—would succumb to court analysis of specific jurisdiction inquiry. Consequently, this proposed amendment would decrease the chances of

²²⁸ See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447–48 (1952).

²²⁹ See *Spanski Enters., Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904, 916 (D.C. Cir. 2018).

²³⁰ *Triple Up*, 235 F. Supp. 3d at 24.

²³¹ The *Triple Up* court explained that situations in which a nonresident's online conduct could result in the court's exercise of personal jurisdiction included (1) a website where residents of the forum can conduct electronic transactions with the nonresident defendant, and (2) where, under the "effects test," the facts show that the nonresident defendant's conduct was aimed at the forum. *Id.*

infringing public performances reaching the U.S. while still allowing for the legal dissemination of creative works, particularly those that originate abroad.

B. Counterarguments

Some of the criticisms against a proposed amendment to the Copyright Act regarding geoblocking technology include whether restriction of access to the internet is appropriate, whether implementing geoblocking technology is cost effective, and whether standards exist to evaluate a geoblock's effectiveness. For example, while recognizing the need of content owners to protect their exclusive rights, critics have suggested that geoblocking technology is not the proper manner to balance the protection of those rights while also providing access to the internet. One commentator provided examples of geoblocking technology in other parts of the world to make the argument about its impracticalities.²³² Looking at how other countries such as New Zealand and Australia dealt with geoblocking, the commentator noted that restricting access on the basis of location did not make sense.²³³ VPN users in foreign countries trying to access content in another country are willing to pay for access to that content, so denying access to potential customers willing to pay can actually lead to piracy. This denial of access and variation in prices charged to access content is viewed as a form of discrimination.²³⁴

There is also criticism about the practicality of implementing a geoblock. As another commentator notes, the cost of geolocation technology could "burden innovation and commerce" and could also form the basis for imposing a tax on customers based on their location.²³⁵ Additionally, privacy is an issue when, as previously mentioned, geoblocking technology includes ICANN's use of public databases that contain contact information for registrants.²³⁶ Public access to that information could lead to its abuse and deprive internet

²³² See Sabrina Earle, *The Battle Against Geo-Blocking: The Consumer Strikes Back*, 15 RICH. J. OF GLOB. L. & BUS. 1, 11 (2016).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Wandell, *supra* note 58, at 298.

²³⁶ Wandell, *supra* note 58, at 302.

users of online anonymity.²³⁷ Questions may also arise on how courts would interpret the minimum standards necessary for a potential defendant to have made “reasonable efforts” to implement a geoblock, as well as whether such legislative or judicial action would comport with U.S. obligations under our international agreements. These are valid concerns which can be individually addressed.

The question of cost has not been sufficiently studied to determine its impact, and much of the privacy arguments fail when faced with the realities of a reasonable expectation of privacy on the internet, as well as the benefits of geolocation technology such as identification and surveillance for law enforcement and content holders.²³⁸ Furthermore, regulations that have been passed to combat some of the effects of geoblocking technology have, thus far, not completely banned its use to the detriment of the exclusive rights of content owners. Although the European Union passed legislation banning geoblocks for various online content²³⁹—largely to deal with price discrimination among the member states—an exception applies to video games, streaming services such as Netflix and Amazon, e-books, and other digital copyrighted content.²⁴⁰ The EU will decide on whether it will lift the exemptions in 2020.²⁴¹ Efforts in New Zealand by companies trying to provide what they considered a legitimate work-around for geoblocked content ultimately failed

²³⁷ Wandell, *supra* note 58, at 302.

²³⁸ Wandell, *supra* note 58, at 298, 303.

²³⁹ Deutsche Welle, *Netflix, Other Streaming Services, Escape New European Union Geoblocking Ban*, USA TODAY (Feb. 7, 2018), [<https://perma.cc/9KLT-CFJG>].

²⁴⁰ *Id.*

²⁴¹ *Id.* In November 2020, the European Commission published a report of its review of the geoblocking regulation, noting positive results and that it will continue to monitor the effects of the regulation. Regarding the possibility of extending the regulation’s applicability to “copyright-protected content,” the Commission would “launch a stakeholder dialogue with the audiovisual sector in order to discuss concrete ways to foster the circulation of, and improve consumers’ access to audiovisual content across the EU” before it would consider how to proceed. It also determined that, “regarding online content services partially covered by the current Regulation” such as videogames and e-books, that extending the scope of the regulations would not be beneficial. Finally, Finally the Commission would “continue monitoring data and evidence related to the application” of the regulation. *Commission publishes its short-term review of the Geo-blocking Regulation*, European Commission (Nov. 30, 2020), [<https://ec.europa.eu/digital-single-market/en/news/commission-publishes-its-short-term-review-geo-blocking-regulation>].

when several media companies threatened suit for infringing on their exclusive rights to the content.²⁴² Notably, concerns about violating data privacy laws led many U.S. news websites to block access to Europe when the EU's General Data Protection Regulation, or GDPR, went into effect on May 25, 2018.²⁴³

In support of using geoblocking technology, it is important to note that, as one commentator proposes, geoblocks are “becoming more effective, less costly, and are standard features of internet operations.”²⁴⁴ Another commentator noted the lack of studies available to determine the cost of widespread usage of geoblocking technology to evaluate whether such costs would have any prohibitive effects.²⁴⁵ In fact, eliminating geoblocking may have major effects on licensing, among other consequences.²⁴⁶ For example, content owners who may have economic and other reasons for territorial restrictions would effectively be forced to (1) issue global licenses of their content, (2) refrain from making their work available to the public, or (3) provide exclusive licenses to big corporations that have the resources to manage globally-licensed content.²⁴⁷ Furthermore, geoblocking is not mandated by the Copyright Act, but, as one commentator notes, “[t]he territorial limits of the Act imply that

²⁴² Earle, *supra* note 232, at 14–15. Notably, as Earle points out, the WIPO Copyright Treaty of 1996 provides, under Article 11, that parties “shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures,” such as a geoblock. Earle, *supra* note 232, at 14 (quoting WIPO Copyright Treaty art. 11, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 121 [hereinafter WIPO Copyright Treaty]).

²⁴³ Steve Dent, *Major US News Sites Are Still Blocking Europeans Due to GDPR*, ENDGADGET (Aug. 9, 2018), <https://www.engadget.com/2018/08/09/us-news-sites-unavailable-europe-gdpr/> [<https://perma.cc/H2GZ-L4LJ>].

²⁴⁴ Marketa Trimble, *Copyright and Geoblocking: The Consequences of Eliminating Geoblocking*, 25 B.U. J. SCI. & TECH. L. 101, 108 (2019) (citing Trimble, *The Role of Geoblocking in the Internet Legal Landscape*, 23 IDP: REVISTA D'INTERNET, DRET I POLÍTICA 45, 49 (2016) (Spain)) [hereinafter Trimble, *Copyright and Geoblocking*].

²⁴⁵ Wandell, *supra* note 58, at 298. For further discussion of geoblocking cost, with examples, see *id.* at 298–300.

²⁴⁶ For a discussion of additional consequences of eliminating geoblocking, including the needless expansion of licensing shrinking the public domain, pricing out smaller internet actors due to less profit and higher costs, creation of “sterile” content to comply with worldwide standards of what is/is not objectionable, and potentially eradicating language diversity, see Trimble, *Copyright and Geoblocking*, at 124–28.

²⁴⁷ *Id.* at 122–24.

some means must be employed to comply with its territorial limits”²⁴⁸ Without mandating geoblocking, a proposed amendment regarding the exercise of personal jurisdiction to give greater weight to those who use a geoblock will both balance the promotion of original works with a user’s ability to access to information and allow courts the ability to provide clear guidance to nonresident defendants.

Regarding the ability to provide standards for reasonable efforts for implementing geoblocking technology, such standards can be based on language used by practitioners in contractual agreements.²⁴⁹ There are viable options for minimum standards such as “utiliz[ing] an industry standard geolocation service,” and requiring that the technology used to provide location information and detection of IP addresses is being used by users outside of the territory.²⁵⁰ This would provide a practical threshold for internet actors and courts. By providing this threshold, whether through an amendment to the Copyright Act or through judicial action, such a standard would not get into specifics about the kind of technology to use and would allow for adaptation for continual technological advancements.²⁵¹

Finally, an amendment would not be contrary to U.S. treaty obligations. The U.S. is a party to the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”).²⁵² The Berne Convention has 177 signatories, it “deals with the protection of works and the rights of their authors,” and it “contains a series of provisions determining the minimum protection.”²⁵³ The Berne Convention has three principles: (1) national treatment; (2)

²⁴⁸ *Id.* at 111.

²⁴⁹ Trimble, *supra* note 53, at 57–58.

²⁵⁰ *Id.* at 58.

²⁵¹ *Id.*

²⁵² *WIPO Administered Treaties*, WIPO, https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 [<https://perma.cc/45M5-VCSM>].

²⁵³ Berne Convention for the Protection of Literary and Artistic Works, *as revised at Stockholm* July 14, 1976, 828 U.N.T.S. 221 [hereinafter “Berne Convention”]; *see also Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WIPO, https://www.wipo.int/treaties/en/ip/berne/summary_berne.html [<https://perma.cc/NM3Z-B98C>].

automatic protection; and (3) independence.²⁵⁴ The U.S. is also a party to the WIPO Copyright Treaty (“WCT”), which is “a special agreement under the Berne Convention that deals with the protection of works and the rights of their authors in the digital environment.”²⁵⁵

The proposed amendment would not run afoul of the basic principles of the Berne Convention. The amendment would continue to allow foreign authors who are signatories to the Berne Convention the same rights in their works that the U.S. affords its nationals. It does not impose any legal formalities for protection, it still allows authors of other contracting parties to the Berne Convention to receive the same protection given in the U.S. independent of the protection given by that author’s country’s laws, and does not contradict the substantive provisions—e.g., duration, minimum standards, economic rights.

In fact, the U.S.’s treaty obligations might actually encourage the use of geoblocking technology. As one commentator noted, Article 11 of the WCT requires “adequate legal protection” as well as “effective legal remedies” against the circumvention of technological measures used by authors to protect their [intellectual property] rights.²⁵⁶ The commentator—though questioning whether geoblocking was “primarily used to enforce copyright”—made a point regarding circumvention of geoblocks: “[a]s geolocation tools are understood to be measures used in connection with the exercise of

²⁵⁴ Berne Convention. The “three basic principles” of national treatment, automatic protection, and independence state, respectively are:

- (a) Works originating in one of the Contracting States... must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals;
- (b) Protection must not be conditional upon compliance with any formality;
- (c) Protection is independent of the existence of protection in the country of origin of the work.

Id.

²⁵⁵ WIPO Copyright Treaty, *supra* note 242; see also *Summary of the WIPO Copyright Treaty (WCT) (1996)*, WIPO, https://www.wipo.int/treaties/en/ip/wct/summary_wct.html [<https://perma.cc/5TP8-YAMA>].

²⁵⁶ Tal Kra-Oz, *Geoblocking and the Legality of Circumvention*, 57 *IDEA* 385, 415 (2017), https://www.ipmall.info/sites/default/files/hosted_resources/IDEA/kra-oz_formatted.pdf [<https://perma.cc/YQY2-PJH4>] (citing WIPO Copyright Treaty, *supra* note 242).

intellectual property rights, any circumvention attempts would appear to run awry of the treaty.”²⁵⁷

C. *Examples from Other Areas of Law*

To formulate an effective amendment to the Copyright Act regarding geoblocking and personal jurisdiction, legislators can look to various sources of state and federal law. In compliance with the Uniform Interstate Family Support Act (“UIFSA”), states have laws which dictate when courts may exercise personal jurisdiction over nonresident defendants for modification of child support orders from another state.²⁵⁸ The statutes list the bases for when courts may exercise personal jurisdiction over a nonresident defendant to enforce or establish a support order, or to determine the child’s parentage.²⁵⁹ However, they also contain provisions stating that the bases

²⁵⁷ *Id.* at 415–16.

²⁵⁸ *See, e.g.*, FLA. STAT. § 88.2011 (2018); N.Y. FAM. CT. ACT § 580-201 (2016); CAL. FAM. CODE § 5700.201 (2016), S.C. CODE ANN. § 63-17-3010 (2018); V.A. CODE ANN. § 20-88.35 (2018).

²⁵⁹ *See* sources cited *supra* note 258. For example, FLA. STAT. § 88.2011 states: Bases for jurisdiction over nonresident. —

(1) In a proceeding to establish or enforce a support order or to determine parentage of a child, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual’s guardian or conservator if:

- (a) The individual is personally served with citation, summons, or notice within this state;
- (b) The individual submits to the jurisdiction of this state by consent in a record, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
- (c) The individual resided with the child in this state;
- (d) The individual resided in this state and provided prenatal expenses or support for the child;
- (e) The child resides in this state as a result of the acts or directives of the individual;
- (f) The individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;
- (g) The individual asserted parentage of a child in a tribunal or in a putative father registry maintained in this state by the appropriate agency; or

provided in the statute, or in any other state law, cannot be used as a means to exercise personal jurisdiction over the nonresident defendant to modify support orders unless other requirements are met.²⁶⁰ Although the UIFSA relates to family law and not to intellectual property, state laws dealing with modification of support orders are helpful examples of statutes that limit when courts may exercise personal jurisdiction over a nonresident defendant.

Another example is the Foreign Trade Antitrust Improvements Act (“FTAIA”). The FTAIA serves as a limit to the Sherman Act’s extraterritorial reach, providing that the Sherman Act “does not apply to purely foreign activity.”²⁶¹ The FTAIA provides as follows:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(h) There is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

(2) The bases of personal jurisdiction set forth in subsection (1) or in any other law of this state may not be used to acquire personal jurisdiction for a tribunal of this state to modify a child support order of another state unless the requirements of s. 88.6111 are met, or, in the case of a foreign support order, unless the requirements of s. 88.6151 are met.

²⁶⁰ See FLA. STAT. § 88.2011(2).

²⁶¹ 15 U.S.C. § 6a; Abram Ellis, Jonathan Myers & John Terzaken, *Extraterritorial Reach of U.S. Antitrust Laws*, LEXIS PRACTICE ADVISOR J. (Feb. 21, 2019), <https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/extraterritorial-reach-of-u-s-antitrust-laws> [<https://perma.cc/L74K-ZWEY>].

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.²⁶²

Using the FTAIA as a template, an amendment to the Copyright Act could use similar, limiting language for personal jurisdiction over nonresident defendants that use a geoblock. However, the FTAIA deals with a law that has an extraterritorial reach. Section 1 of the Sherman Antitrust Act provides, “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”²⁶³ Thus, the phrase “or with foreign nations” implies an extraterritorial reach of the law to any agreements that restrain commerce or trade with a foreign state.²⁶⁴ The FTAIA, therefore, serves as a limit to how far the Sherman Act can apply to foreign conduct.²⁶⁵ However, the Copyright Act does not apply extraterritorially,²⁶⁶ thus the FTAIA, while helpful, would not be best suited as a sole source for a proposed amendment to the Copyright Act.

Finally, the Foreign Sovereign Immunities Act (“FSIA”) may also provide guidance on crafting an effective amendment to the Copyright Act. The FSIA provides the limited instances in which a foreign state may be subjected to a lawsuit in the U.S.²⁶⁷ Consequently, the FSIA may also provide guidance on how to structure an amendment to the Copyright Act in which there are limited instances where a court may exercise personal jurisdiction over a nonresident defendant who uses a geoblock. However, this may not be the most

²⁶² 15 U.S.C. § 6a.

²⁶³ 15 U.S.C. § 1; Ellis et al., *supra* note 261.

²⁶⁴ Ellis et al., *supra* note 261.

²⁶⁵ Ellis et al., *supra* note 261.

²⁶⁶ See *Env’t Defense Fund, Inc. v. Massey*, 986 F.2d 528, 530 (D.C. Cir. 1993) (“[T]he primary purpose of this presumption against extraterritoriality is to protect against the unintended clashes between our laws and those of other nations which could result in international discord.”); *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); 5 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.02 (2020).

²⁶⁷ See, e.g., 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602, 1605, 1607; see also Ingrid Wuerth, *Personal Jurisdiction Over Foreign States and State-Owned Enterprises*, LAWFARE (July 19, 2019), <https://www.lawfareblog.com/personal-jurisdiction-over-foreign-states-and-state-owned-enterprises> [<https://perma.cc/M7XT-ZGCA>].

effective source of law. The FSIA deals with lawsuits against foreign states, and not every instance of copyright infringement will deal with a foreign state or state entity as *Spanski* did with TVP.

The most effective approach would be a hybrid of the UIFSA model and the FTAIA model. A proposed amendment to the Copyright Act regarding geoblock use and personal jurisdiction could be drafted based on the structure of those statutes in the following manner:

17. U.S.C. § X. Bases of Personal Jurisdiction over Nonresident Defendants

(1) A tribunal of this state may *not* exercise personal jurisdiction over a nonresident defendant if the nonresident defendant makes reasonable efforts to use a geoblock to restrict access from users of the forum in which the tribunal sits.

(2) A “geoblock” means technology which restricts access to content on the internet based on geographic location of the user.

(3) “Reasonable efforts” means implementing technological measures that meet current industry standards.

(4) The basis for a tribunal to forego the exercise personal jurisdiction over a nonresident defendant who uses geoblocking technology, as set forth in section 1, may not be used to deny a tribunal’s exercise of personal jurisdiction if the requirements of section 5 are met.

(5) Section 1 of this title shall not apply to conduct involving a nonresident defendant who uses geoblocking technology if –

(a) the nonresident defendant’s conduct is exempt from jurisdictional immunity under an applicable law, or

(b) per the terms of an agreement, the nonresident agrees to the contrary.

Using the UIFSA and FTAIA statutes as examples, the proposed amendment to the Copyright Act provides the requirements for

nonresident defendants, further defining boundaries for conduct by internet actors abroad, while also providing clear exceptions to the law. The definitions have also been tailored in a manner which is not so broad that they are vague, while also being adaptable to technological advancements and changes within the industry. The interests of fairness and justice are met because nonresident defendants who use geoblocks will be protected from the reach of the forum's courts, having a clear and concise law to refer to when evaluating possible consequences for their online conduct. However, they will be brought before a court in the applicable forum if they have agreed in a contract, or if they have acted in a manner consistent with any applicable law that allows a court to exercise personal jurisdiction. Accordingly, nonresident defendants may be encouraged to use a geoblock and to be more conscious of the potential that their online activities may be infringing on the exclusive rights of others.

D. Proposal in Action: A Hypothetical for Broadcasting the 2026 FIFA World Cup

In a hypothetical example with variations to the introductory World Cup scenario, suppose that a New York based network ("Network A") owns the rights to broadcast the 2026 FIFA World Cup in North America, and that it provided an exclusive license to a network based in the Middle East ("Network B") to broadcast and stream the matches in that region, knowing that Network B has streaming capabilities through its website. The terms of the licensing agreement provide that Network A will maintain the exclusive rights to broadcast in the U.S. However, despite its reasonable efforts to implement a geoblock to restrict access, a few internet users in the U.S. used a VPN and/or proxy server to circumvent Network B's geoblock, and Network B's broadcast reaches the U.S. in violation of Network A's exclusive rights. Under the proposed amendment to the Copyright Act to place greater weight on geoblock use, personal jurisdiction would not be a concern for Network B.

By amending the Copyright Act, not only would Network B—by utilizing geoblocking technology—decrease the likelihood that its broadcast would reach beyond its territorial restrictions, but Network B would also ensure that it will not be subjected to personal jurisdiction in the U.S. Since Network B is based in the Middle East,

it would be adding a layer of protection to shield itself from general personal jurisdiction by (1) being incorporated outside of the U.S. and (2) using a geoblock to restrict U.S. users from access. Network B would also increase the likelihood that it avoids liability if circumstances changed, as it did for Benguet in *Perkins*, such that Network B's principal place of business relocated to the U.S. or if Network B otherwise engaged in continuous, systematic conduct in a U.S. forum.

Network B would also shield itself from specific jurisdiction. For example, it would be difficult for the District Court for the Southern District of New York to exercise personal jurisdiction over Network B for an infringement claim brought by Network A by holding that Network B purposely directed its activities toward New York. In this scenario, Network B made reasonable efforts to avoid the forum by using a geoblock, so any claim by Network A would not arise out of Network B's conduct.

However, if Network B decided not to use a geoblock or if, as found in *Spanski*, those responsible for implementing the geoblock at Network B did not do so, Network B would be subject to the same analysis for personal jurisdiction as courts used in *Carsey-Werner*, *Triple Up*, and other previously-discussed cases, without the benefit of the conclusive weight given to those who use a geoblock. Furthermore, if Network B were situated as TVP in *Spanski*, the exception under the Foreign Sovereign Immunities Act would allow the exercise of personal jurisdiction over Network B, although as *Spanski* showed, that very reason is why Network B might consider using geoblocking technology. Consequently, Network B and potential defendants like Network B would have more certainty and clarity, as contemplated by the Due Process Clause, when evaluating the potential for a lawsuit in the U.S.

CONCLUSION

There are logical reasons for taking legislative action so that, under the U.S. Copyright Act, courts will not exercise personal jurisdiction over a nonresident defendant who uses geoblocking technology to restrict access to infringing content on the defendant's website. Not only will this provide more clarity to foreign internet

actors, but it will also encourage those actors to take a closer look at whether their conduct complies with U.S. copyright law. By not exercising general or specific jurisdiction over nonresident defendants who make reasonable efforts to implement geoblocking technology, U.S. copyright law will not require the use of a geoblock. Instead, it will further the goals of promoting progress by striking a balance between the rights of the creator and accessibility by the audience. It will also provide courts with clearer guidelines for exercising personal jurisdiction over nonresident defendants in accordance with federal due process.

The cases discussed in this Article show that use of the internet comes with unique legal challenges, especially with regard to the question of the exercise of personal jurisdiction over nonresident defendants in copyright infringement cases. This issue will persist as online streaming services and other technologies continue to gain popularity, especially for events with a global reach like the World Cup. By implementing the proposed solutions, the personal jurisdiction analysis can be simplified while simultaneously incentivizing internet actors to take more preventive measures against potentially infringing activities.