

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

UMG RECORDINGS, INC., *et al.*,

Plaintiffs,

v.

KURBANOV, *et al.*,

Defendants.

Case No. 1:18-cv-00957-CMH-TCB

**DEFENDANT’S OBJECTIONS TO MAGISTRATE JUDGE’S DECEMBER 16, 2021
REPORT AND RECOMMENDATION AS TO DAMAGES AND
PERMANENT INJUNCTIVE RELIEF**

Pursuant to Fed. R. Civ. P. 72(b), Defendant Tofig Kurbanov (“Mr. Kurbanov”) hereby submits his objections to the Magistrate Judge’s December 16, 2021 Report and Recommendation as to the award of damages to the Plaintiffs and the grant of permanent injunctive relief. In support thereof, Mr. Kurbanov states as follows.

INTRODUCTION

On December 16, 2021, following a default issued against Mr. Kurbanov, Magistrate Judge Theresa Carroll Buchanan entered a Report and Recommendation in which she recommended that this Court award Plaintiffs damages of almost \$83 million and issue a worldwide permanent injunction against Mr. Kurbanov. Both recommendations, however, are in direct contravention of the law and should not be adopted by this Court.

In support of their request for damages and permanent injunctive relief, Plaintiffs chose not to provide the Court with evidence of actual damages, instead electing statutory damages under 17 U.S.C. §504. This was, of course, Plaintiffs’ right. Having done so, however, it was incumbent

on Plaintiffs to provide evidence to the Court of actual instances of infringement by United States-based visitors to Mr. Kurbanov's websites, www.flvto.biz and www.2conv.com (the "Websites"), as statutory damages are premised on a certain amount being awarded to the Plaintiffs *for each infringement*.

Remarkably, though, despite submitting to the Court more than 450 pages worth of materials, Plaintiffs failed entirely to provide any evidence of the one thing that is a prerequisite to *any* recovery: namely, proof of the existence of even a single improper download of Plaintiffs' copyrighted materials within the United States. This is not mere hyperbole. The Plaintiffs produced *no evidence whatsoever* that even a single person in the United States ever utilized Mr. Kurbanov's Websites to improperly download one of their copyrighted songs.

In her Report and Recommendation, the Magistrate held improperly that Plaintiffs did not need to prove any infringements of their works because such proof was presumed by virtue of her having ordered the default against Mr. Kurbanov. In addition, the Magistrate incorrectly recommended that this Court award Plaintiffs duplicative damages pursuant to two overlapping statutes.

Finally, the Magistrate incorrectly recommended that this Court issue a broad, worldwide injunction, which is in contravention of the Copyright Act itself as well as the limits on this Court's legal authority.

In further support of his Objection, Mr. Kurbanov states as follows.

ARGUMENT

I. The Magistrate Incorrectly Held That Plaintiffs Did Not Need to Prove Their Entitlement to Statutory Damages.

In their motion, Plaintiffs correctly noted that a successful Plaintiff in a copyright action (who has registered its copyrights) is entitled to elect to receive either an award of actual damages

or an award of statutory damages, as provided for by statute. *Plaintiffs' Request*, p. 14, citing 17 U.S.C. §504. For seemingly obvious reasons (namely that Plaintiffs were unable to prove that they suffered any actual damages from the alleged infringement),¹ Plaintiffs elected to receive statutory damages.

¹ See, e.g., The Copia Institute, *The Sky is Rising 2019: A detailed look at the state of the entertainment industry*, pp. 2-3 (April 2019) <https://skyisrising.com/TheSkyIsRising2019.pdf> (“In January of 2012, we released the very first Sky is Rising report, highlighting how – despite numerous doom and gloom stories about the impact of the internet on the creative communities – nearly all of the actual data showed tremendous, and often unprecedented, growth in both earnings and creative output.... [S]tepping back and looking at the data, frequently from the industry itself, showed that the sky wasn’t falling because of the internet – it was rising.... It has been over seven years since that first report, and plenty has changed, so it felt like time to revisit the original questions explored in that original report: how is the global market for entertainment faring – and is the sky now rising or falling? Has the internet decimated entertainment, or enabled a golden era? The data in this report show that, once again, the sky is rising. We are in, as Professor Joel Waldfogel has noted, a true ‘Digital Renaissance.’ [Sic] No matter where you look, there are signs of an incredible abundance of not just creation of new content, but myriad ways to make money from that content. Contrary to clockwork complaints of content creation being killed off – all evidence points to an internet that has enabled stunning growth and opportunity for content. The internet has provided new tools and services that have enabled more creation, more distribution, more promotion, more access to fans and more ways to make money than ever before. There is almost no evidence we can find anywhere of the internet decreasing content creation or the size of any aspect of the content creation industry. If anything, the internet has opened up the opportunity for millions of new content creators to create, promote, distribute and profit off their works.... [T]here is no evidence whatsoever to support the idea that either content creators or the general public have been harmed by the internet revolution.”); *Newsweek*, “Inside the Piracy Study the European Union Hid: Illegal Downloads Don’t Harm Overall Sales” (Sept. 22, 2017) <https://www.newsweek.com/secret-piracy-study-european-union-669436> (“Your illegal downloads of video games, top music acts and even e-books don’t harm sales, according to a landmark report on piracy that the European Commission ordered but then buried when the findings didn’t tell officials what they wanted to hear. The 300-page study offered the counterintuitive conclusion that illegal downloads actually help the gaming industry and have no negative impact on music sales by big stars or on e-book profits.”); *BBC News*, “Music sales are not affected by web piracy, study finds” (March 20, 2013) <https://www.bbc.com/news/technology-21856720> (“A report published by the European Commission Joint Research Centre claims that music web piracy does not harm legitimate sales.... They also found that freely streamed music provided a small boost to sales figures.”); *TechDirt*, “GAO Concludes Piracy Stats Are Usually Junk, File Sharing Can Help Sales Studies” (April 13, 2010) <https://tdrt.io/a7q> (“The GAO’s study unsurprisingly found that U.S. government and industry claims that piracy damages the economy to the tune of billions of dollars ‘cannot be substantiated due to the absence of underlying studies.’

Plaintiffs based their request for statutory damages on their assertion that 1,618 copyrighted sound recordings were infringed upon by users of Mr. Kurbanov’s Websites. Plaintiffs and their declarants conceded, however, that they are unable to state “the full extent of Plaintiffs’ harm from Defendant’s infringement.” Plaintiffs’ Reply, pp. 16-17, *citing* Declarations of Cohen, Lean, and McMullen. Understandably, Plaintiffs attributed their inability to calculate the “full extent” of their damages to Mr. Kurbanov’s failure to cooperate with discovery in this case. If the relevant question had been *how many times* each of the 1,618 recordings were infringed, Plaintiffs might have had a point. However, the *scope* of the infringement of each recording only becomes relevant once Plaintiffs have first established that there has been *any* infringement of a given file by a website user within the United States. In other words, if Plaintiffs had proven that a given song had been downloaded by a user in the United States, then an entitlement to statutory damages would be triggered and the scope of the infringement of that song would be relevant to the Court’s determination of the precise amount of statutory damages to be awarded. (The statute provides that, in general, an award can range between \$750 and \$30,000 per file infringed, though that amount can be increased to \$150,000 for willful infringement, or reduced to \$200 for innocent infringement).

Here, however, Plaintiffs failed to provide evidence that any of their copyrighted works were infringed by even one user of Kurbanov’s Websites (much less by a user located in the United States). Indeed, the closest that Plaintiffs come to explaining their assertion that there are 1,618 copyrighted sound recordings at issue in this case is the declaration of their expert witness, Robert Schumann. Mr. Schumann does *not* say that he himself downloaded any of the works in suit from

The full GAO report ... not only argues that claims of economic impact have not been based on substantive science – but that file sharing can actually have a positive impact on sales....”).

the Websites, but rather says that he “understand[s]” that the Plaintiffs’ investigator did so. Schumann Declaration, ¶31 (Docket Entry 131-1). Oddly, though, Plaintiffs failed to submit a declaration from their investigator providing this Court with any first-hand evidence that such downloads took place or – *crucially* – that they took place from within the United States. *See, e.g., Elsevier Ltd. v. Chitika, Inc.*, 826 F. Supp. 2d 398, 402-03 (D. Mass. 2011)(finding no actionable infringement to have occurred where Plaintiff’s investigator downloaded copies of works from outside the United States because it “is well established that copyright laws generally do not have extraterritorial application...” and in “order for U.S. copyright law to apply, at least one alleged infringement must be completed entirely within the United States.”)

The same holds true here. Plaintiffs provided the Court with no competent evidence from which the Court could conclude that *any* infringement took place at all in connection with the 1,618 works in suit, much less that such infringement took place within the boundaries of the United States. Without such evidence, the Magistrate could not properly find that Plaintiffs were entitled to any statutory damages, since the evidence of actual infringement did not exist.

In reaching her conclusion, however, the Magistrate held that Plaintiffs were absolved of having to provide evidence of the alleged infringements because such infringement could be presumed as a matter of law by virtue of the default entered against Mr. Kurbanov by the Court. *See Report and Recommendation*, p. 19 (“This entry of default judgment is equivalent to a finding of liability on all counts of Plaintiff’s Complaint, including the violations alleged under the Copyright Act. ... The Plaintiffs therefore do not have the burden of proving the elements of the alleged Copyright Act violations, and merely need to survive, as they have, a 12(b)(6) evaluation

of the Complaint.”)² This is an incorrect statement of law, at least insofar as it applies to the present case.

Although it is certainly true that a “defendant, by his default, admits the plaintiff’s well pleaded allegations of fact... and is barred from contesting on appeal the facts thus established,” it is equally true that this applies only to the well-pleaded facts of the complaint and, even then, only insofar as those facts relate to a finding of liability and *not* insofar as the allegations relate to either an issue of law or questions of damages. *Ryan v. Homecomings Fin. Network*, 253 F.3d 778, 780-81 (4th Cir. 2001), *quoting Nishimatsu Constr. Co., Ltd. v. Houston Nat’l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) (itself *quoting Thomson v. Wooster*, 114 U.S. 104, 113, 29 L. Ed. 105, 5 S. Ct. 788 (1884)). “In short, ... a default is not treated as an absolute confession by the defendant of his liability and of the plaintiff’s right to recover.” *Id.* Instead, the Court “must, therefore, determine whether the well-pleaded allegations in Appellants’ complaint support the relief sought in this action.” *Id.*

In the present case, Plaintiffs have not even alleged in their Complaint that someone within the United States used Mr. Kurbanov’s Websites to infringe on Plaintiffs’ copyrighted works. Instead, the Magistrate extrapolated from Plaintiffs pleading that Mr. Kurbanov was liable for various forms of copyright infringement and that Plaintiffs, therefore, were able to plead the necessary facts to support this legal conclusion. They were not and they did not, as is further evidenced by their inability, even now, to substantiate such facts as part of their 450-plus page submission to this Court.

² It is unclear what “12(b)(6) evaluation of the complaint” the Magistrate is referring to: Mr. Kurbanov moved for dismissal of Plaintiffs’ complaint under Rule 12(b)(2) for lack of personal jurisdiction, not rule 12(b)(6).

Moreover, the Magistrate was mistaken in believing that a default judgment serves to admit allegations concerning the Plaintiffs' damages. It does not, and it remains Plaintiffs' burden to prove such damages. *See, e.g., Commodity Futures Trading Comm'n v. Tate St. Trading*, 2021 U.S. Dist. LEXIS 215358, at *15 (E.D. Va. June 1, 2021)(“Although well-pleaded factual allegations are accepted as true for default judgment purposes, a party who defaults does not admit the allegations in the claim as to the amount of damages. ... Thus, once liability is established, the Court must independently determine damages”); *BMO Harris Bank N.A. v. 64 Ways Trucking/Hauling LLC*, 2020 U.S. Dist. LEXIS 231376, at *3 (E.D. Va. Dec. 9, 2020)(same); *Wilcox v. Transmodal Sols., LLC*, 473 F. Supp. 3d 574, 584 (E.D. Va. 2020)(“when a court determines that liability has been established in a default judgment setting, the court cannot accept damage-related allegations as true, and must ‘make an independent determination regarding damages’”)(citations omitted); *Augustin v. Sectek, Inc.*, 2012 U.S. Dist. LEXIS 202493, at *11-13 (E.D. Va. Mar. 1, 2012)(“even if Plaintiff's Complaint stated a claim for a breach of the duty of fair representation, the motion for default judgment must still fail because Plaintiff's claim for damages is unsupported. ... Although a defendant in default admits the allegations set forth in the complaint, the Court must make an independent determination of the amount of damages a plaintiff is entitled to recover. ... Plaintiff seeks a significant amount of damages—two million dollars—but has provided no materials in support of that damage award. The application for default judgment provides no information regarding the nature of damages sought or the legal bases for entitlement to those categories of damages. Simply put, Plaintiff has not legally or factually substantiated his entitlement to the precise damages sought. Therefore, even if Plaintiff established Defendants' liability in this action, the undersigned would still recommend that default judgment be denied.”); *Dundee Cement Co. v. Howard Pipe & Concrete Products, Inc.*, 722 F.2d 1319 (4th

Cir.1983) (finding that upon default judgment, allegations relating to damages are not taken as true) (citing *Pope v. United States*, 323 U.S. 1 (1944)); *Amini Innovation Corp. v. KTY Intern. Marketing*, 768 F.Supp.2d 1049 (CD. Cal. 2011), quoted in *Augustin, supra* (“If [a] plaintiff is seeking money damages through default judgment, [the] plaintiff must prove-up its damages; [that is, a] plaintiff is required to provide evidence of its damages”); *United States v. Vardoulakis*, 2010 U.S. Dist. LEXIS 130327, at *12-16 (D. Md. Dec. 9, 2010)(“An allegation ‘relating to the amount of damages’ is not deemed admitted based on a defendant's failure to deny in a required responsive pleading”; *Trs. of the Elec. Welfare Trust Fund v. MH Passa Elec. Contracting, Inc.*, 2009 U.S. Dist. LEXIS 83737 (D. Md. Sept. 14, 2009)(“Upon default, the well-pled allegations in a complaint as to liability are taken as true, although the allegations as to damages are not.”); *Pentech Fin. Servs. v. Old Dominion Saw Works, Inc.*, 2009 U.S. Dist. LEXIS 55786 (W.D. Va. 2009)(“Upon default judgment, Plaintiff's factual allegations are accepted as true for all purposes excluding determination of damages.”)

The law on this point is exceedingly clear: regardless of the fact that the Court defaulted Mr. Kurbanov, Plaintiffs were required to prove the facts that would entitle them to recover the damages sought. Here, they neither alleged, nor proved, the facts necessary for an award of either actual or statutory damages. As such, the Court should reject the recommendation of the Magistrate, find that Plaintiffs have failed to make a showing of monetary damages and deny them recovery of the same.

II. Even if Statutory Damages Were Appropriate, the Magistrate Erred In Recommending That the Court Award Plaintiffs More Than the Minimal Amount Available Under the Statute.

Even if the Court had been presented with evidence from which it could conclude that actionable infringement had occurred (which it was not), the Magistrate, for a variety of reasons,

erred in not recommending that the Court utilize its discretion to award only the lowest level of statutory damages available. First, it is important to remember that the infringement at issue in this case was not direct, but rather contributory. The allegation was not that Mr. Kurbanov himself utilized the Websites to download copyrighted materials, but rather that visitors to his Websites used the Websites' functionality to do so.

Next, the Court can (and should) consider the fact that Mr. Kurbanov is an individual who has, for his entire life, lived in Russia; who created the Websites in Russia; and who is (as a result) not conversant in the laws that apply to copyright infringement within the United States.

Most significantly, though, in considering the proper amount of statutory damages to award (assuming that *any* are awardable) is the fact that the Websites simply utilized open-source software, freely available to anyone on the Internet. This open-source software is known as "youtube-dl." It is Plaintiffs' contention that the youtube-dl software (which Mr. Kurbanov did not himself create) circumvents technological measures put in place by Youtube (and not by the Plaintiffs). It is far from clear, however, that youtube-dl "circumvents" anything and, indeed, many experts have concluded that it does not.

Backing up for a moment, it is important to remember that Plaintiffs make *all* of the relevant works readily available at no cost to anyone with an internet connection. In other words, the music which Plaintiffs complain has been infringed by visitors to Mr. Kurbanov's Websites is music which those visitors could legally stream for free simply by going to YouTube.com and watching the music videos that Plaintiffs permit YouTube to transmit to anyone with an internet connection. The issue here is not that visitors to Mr. Kurbanov's Websites were able to listen to the relevant songs – the issue is that Mr. Kurbanov's Websites enabled users to *save* those songs

(presumably so that they could listen to them at a different time or in a different location)³ by virtue of their use of the youtube-dl software.

With that in mind, YouTube incorporates what is sometimes known as a “rolling cipher” when providing music videos to its visitors. The Electronic Frontier Foundation (“EFF”) explains the use of this “cipher” thusly:

For a subset of videos, YouTube employs a mechanism it calls a “signature.” Here is our understanding of how it works: when a user requests certain YouTube videos, YouTube’s servers send a small JavaScript program to the user’s browser, embedded in the YouTube player page. That program calculates a number referred to as “sig.” That number then forms part of the Uniform Resource Locator that the user’s browser sends back to YouTube to request the actual video stream. This mechanism is completely visible to the user simply by viewing the source code of the player page. The video stream is not encrypted, and no secret knowledge is required to access the video stream. JavaScript is a ubiquitous technology found on millions of websites and understandable by numerous software programs. Any software capable of running JavaScript code can derive the URL of the video stream and access the stream, regardless of whether the software has been approved by YouTube. To borrow an analogy from literature, travelers come upon a door that has writing in a foreign language. When translated, the writing says “say ‘friend’ and enter.” The travelers say “friend” and the door opens. As with the writing on that door, YouTube presents instructions on accessing video streams to everyone who comes asking for it.

See **Exhibit 1**, Letter from EFF to Github.

As the EFF explains, the youtube-dl software does nothing more than provide YouTube’s servers with the same code that any web browser would provide if an individual went to YouTube looking to play one of the songs that Plaintiffs make freely available to the entire world:

youtube-dl works the same way as a browser when it encounters the signature mechanism: it reads and interprets the JavaScript program sent by YouTube, derives the “signature” value, and sends that value back to YouTube to initiate the video stream.

³ Given the Supreme Court’s landmark case of *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), where the court found that individuals had the right to create a personal recording of a broadcast television show so that the individual might “time shift” when he or she viewed the program, Mr. Kurbanov had every reason to believe that downloading freely available songs from YouTube was similarly non-infringing conduct.

youtube-dl contains no password, key, or other secret knowledge that is required to access YouTube videos. It simply uses the same mechanism that YouTube presents to each and every user who views a video.

Id.

From this, the EFF concluded that youtube-dl does not circumvent technological measures as that term is defined under the law:

youtube-dl does not “circumvent” it as that term is defined in Section 1201(a) of the Digital Millennium Copyright Act, because YouTube provides the means of accessing these video streams to anyone who requests them. As federal appeals court recently ruled, one does not “circumvent” an access control by using a publicly available password. *Digital Drilling Data Systems, L.L.C. v. Petrolink Services*, 965 F.3d 365, 372 (5th Cir. 2020). Circumvention is limited to actions that “descramble, decrypt, avoid, bypass, remove, deactivate or impair a technological measure,” without the authority of the copyright owner. “What is missing from this statutory definition is any reference to ‘use’ of a technological measure without the authority of the copyright owner.” *Egilman v. Keller & Heckman, LLP.*, 401 F. Supp. 2d 105, 113 (D.D.C. 2005). Because youtube-dl simply uses the “signature” code provided by YouTube in the same manner as any browser, rather than bypassing or avoiding it, it does not circumvent, and any alleged lack of authorization from YouTube or the RIAA is irrelevant.

Similarly, youtube-dl does not violate section 1201(b) of the DMCA because the “signature” code does not “prevent[], restrict[], or otherwise limit[] the exercise of a right of a copyright owner”—in other words, the code does not prevent copying of video data. Any program capable of running JavaScript programs can run YouTube’s “signature” code, regardless of whether it can also save a copy of the video streams it receives.

Id. See also **Exhibits 2-4**.

The point here is *not* that Mr. Kurbanov was asking the Court to find that the Websites did not circumvent technological measures (although they did not). That would be an example of a liability argument that Plaintiff waived by virtue of his having been defaulted in this case. However, the operation of the Websites – and their use of freely available open-source software – is still relevant to the Court in its determination of the proper level of statutory damages to be awarded. Here, given that even some industry experts say that the use of the youtube-dl software

does not circumvent technological measures, and given that Mr. Kurbanov did not himself use the software to download Plaintiffs' songs (but rather visitors to his Websites did), this Court can find that Mr. Kurbanov's infringement of Plaintiffs' works was innocent in nature, meriting only the lowest amount of statutory damages, or \$200 per work in suit.

In rejecting this argument, the Magistrate simply ignored the evidence referenced above and instead said that a higher amount of damages was appropriate because Mr. Kurbanov had been informed *by the Plaintiffs* that his Websites were infringing and circumventing technological measures. Report and Recommendation, p. 19. It is, however, simply Plaintiffs' *contention* that the Websites are infringing and circumventing technological measures – a contention that has been disputed by independent groups such as the EFF. Again, this is not to say that the Court should find that the youtube-dl software does not circumvent technological measures, but rather that – to the extent that Mr. Kurbanov's knowledge and intent are relevant to the Court's exercise of discretion, the Magistrate erred in concluding that Mr. Kurbanov "knew" that his Websites circumvented technological measures when the evidence suggests to the contrary.

III. The Magistrate Erred In Her Recommendation that Plaintiffs Be Awarded Duplicative Damages.

The Magistrate also erred in recommending that, separate and apart from an award of statutory damages for copyright infringement, the Court should award duplicate damages for the same 1,680 works because (Plaintiffs argued) *each instance of infringement is also an instance of circumvention of technological measures.* As with the Plaintiffs' failure to prove that any infringements took place or that they took place within the United States, Plaintiffs also failed to show that any circumvention took place or that it took place within the United States. For that reason alone, damages should be denied for circumvention of technological measures.

Even if Plaintiffs had presented the Court with evidence of circumvention occurring within the United States, awarding statutory damages to Plaintiffs for such circumvention would be duplicative of any amounts awarded to Plaintiffs for the infringement itself, as the circumvention and the infringement are each part of a single violation. *See, e.g., Echostar Satellite LLC v. Rollins*, 2008 U.S. Dist. LEXIS 8173, at *10-11 (S.D. W. Va. Feb. 4, 2008)(denying duplicative recovery under copyright statute and overlapping statutes because, “In most jurisdictions, ‘it is well settled that where a defendant is found to have violated [multiple] statutes, the court should award damages pursuant to the mo[st] severe statutory damages provision’”)(citations omitted).

Here, where the means by which the songs were infringed was also the circumvention (had there actually been proof of either infringement or circumvention), Plaintiffs cannot recover twice for the same “injury” and the Magistrate erred in recommending otherwise. *See, e.g., Cengage Learning, Inc. v. Shi*, 2017 U.S. Dist. LEXIS 40554, at *8 (S.D.N.Y. Mar. 21, 2017)(“the Report’s conclusion that a plaintiff should not be awarded statutory damages under both the Copyright Act and the Lanham Act... is not clearly erroneous. ...I agree with Magistrate Judge Maas that a recovery of statutory damages under both Acts seems inappropriate here, as the awards would compensate the same injury and ‘[a] plaintiff seeking compensation for the same injury under different legal theories is of course entitled to only one recovery.’ Further, I agree with Magistrate Judge Maas’s conclusion that recovery under the Copyright Act, rather than the Lanham Act, is the appropriate remedy here because ‘Defendants’ unauthorized sale of Plaintiff’s copyrighted materials is the substantial cause of their damages.’”)(citations omitted). Here too, Plaintiffs are impermissibly seeking compensation for the same injury under different legal theories.

Additionally, under 17 U.S.C. §1203(c)(5), this Court is permitted to remit – in part or in whole – any amount that it would otherwise award as statutory damages for circumvention if it

finds that Mr. Kurbanov “was not aware and had no reason to believe that [his] acts constituted a violation.” Once again, given the fact that even legal experts question whether the youtube-dl software utilized by the Websites circumvents any technological measures, Mr. Kurbanov – a lay person – could hardly be expected to know that use of that software might be considered a circumvention of technological measures. Accordingly, the Court should reject the Magistrate’s recommendation that the Court order duplicative damages under §1203(c).

**IV. Plaintiffs Are Not Entitled to the Injunctive Relief Recommended
By the Magistrate.**

Finally, the Magistrate recommended the entry of a permanent injunction against Mr. Kurbanov which, as written at least, would seem to preclude Mr. Kurbanov from allowing visitors to the Websites from anywhere in the world to utilize the Websites’ functionality. In its current form, the proposed injunction exceeds this Court’s jurisdictional powers and so, at a minimum, should only be adopted insofar as it enjoins Mr. Kurbanov and his Websites from providing certain services to visitors from the United States. And, indeed, given that Mr. Kurbanov voluntarily blocked access to the Websites from the United States, it is questionable as to whether *any* such injunction is necessary.

As a starting point, it is widely recognized that United States copyright laws have no extraterritorial application and, as such, United States Courts have no jurisdiction over acts of infringement that occur outside of the United States. *See, e.g., Tire Eng’g & Distribution, Ltd. Liab. Co. v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 306 (4th Cir. 2012) (“As a general matter, the Copyright Act is considered to have no extraterritorial reach.”); *Nintendo of Am., Inc. v. Aeropower Co.*, 34 F.3d 246, 249 n.5 (4th Cir. 1994) (“[T]he Copyright Act is generally considered to have no extraterritorial application.”). *See, also, Palmer v. Braun*, 376 F.3d 1254, 1258 (11th Cir. 2004) (“Federal copyright law has no extraterritorial effect, and cannot be invoked

to secure relief for acts of infringement occurring outside the United States.... Thus, it is only where an infringing act occurs in the United States that the infringement is actionable under the federal Copyright Act, giving the federal courts jurisdiction over the action.” (citing *Subafilms, Ltd. v. MGM-Pathe Communications*, 24 F.3d 1088, 1091 (9th Cir. 1994) (en banc)); *Foreign Imported Prods. & Publ., Inc. v. Grupo Indus. Hotelero, S.A.*, 2008 U.S. Dist. LEXIS 108705 (S.D. Fla. Oct. 24, 2008) (“Federal copyright law has no extraterritorial effect, and therefore it is only where an infringing act occurs in the United States that the infringement is actionable under the federal Copyright Act, giving the federal courts jurisdiction over the action.... Stated another way, district courts do not have subject matter jurisdiction over infringing acts that took place ‘wholly outside’ the United States or ‘entirely overseas.’”).

Pursuant to the plain words of the Copyright Act, this limitation explicitly extends to the Court’s power to order injunctive relief. Although section 502(a) empowers the Court to grant temporary and final injunctions as it deems reasonable to prevent or restrain copyright infringement, such powers are explicitly limited by section 502(b), which provides that:

Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person.

The Magistrate, however, did not simply recommend an injunction preventing Mr. Kurbanov from allowing people within the United States to use his Websites to convert audio tracks owned by Plaintiffs, but rather the Magistrate appears to have proposed that this Court issue a global order not limited to the boundaries of the United States. As section 502(b) makes abundantly clear, such an injunction is outside of the Court’s statutory power.

And, although it was certainly within the Magistrate’s power to recommend (and for this Court to issue) a much more limited injunction – for example, ordering Mr. Kurbanov to block visitors to the Websites from the United State from accessing any copyrighted materials owned by the Plaintiffs – even that relief is presently unnecessary. As Plaintiffs acknowledged in their Request, Mr. Kurbanov has blocked access to the Websites from the United States since July of 2021. *Plaintiffs’ Request*, p. 23. In other words – to the extent that Plaintiffs might properly be entitled to injunctive relief under section 502(b) – they are already receiving all of the benefit that such an injunction would afford them. And, although Plaintiffs complained that Mr. Kurbanov could, at any time, restore service to United States visitors, this argument counsels (at most) for the Court to issue a much more limited injunction, ordering Mr. Kurbanov to block visitors to the Websites from the United State from accessing any copyrighted materials owned by the Plaintiffs.

Indeed, as the Fourth Circuit and other federal courts have made clear, the extraordinary relief of permanent injunctive relief must be narrowly tailored so that it targets only the wrongs it can legally prevent. *See, e.g., JTH Tax, Inc. v. H&R Block E. Tax Servs.*, 28 F. App’x 207, 217 (4th Cir. 2002)(partially reversing and remanding as overbroad an injunction ordered by the District Court in a trademark case: “Block also maintains that the injunction entered against it is overbroad insofar as it enjoins the use of its ‘rapid refund’ mark. We agree and reverse that portion of the court’s order. The Act vests district courts with the ‘power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to . . . prevent a violation under [§ 1125(a)].’ . . . It is well established, however, ‘that the essence of equity jurisdiction has been the power to grant relief no broader than necessary to cure the effects of the harm caused by the violation.’”)(citations omitted); *Forschner Grp., Inc. v. Arrow Trading Co.*, 124 F.3d 402, 406 (2d Cir. 1997)(“It is well-settled that the essence of equity jurisdiction has been

the power to grant relief no broader than necessary to cure the effects of the harm caused by the violation”); *Philip Morris USA, Inc. v. Otamedia Ltd.*, 331 F. Supp. 2d 228, 246 (S.D.N.Y. 2004)(“federal courts hesitate to sweep within an injunction a needlessly broad range of lawful conduct so as effectively to enjoin unlawful conduct”).

The scope of the injunction recommended by the Magistrate, then, appears to be both impermissible under 502(b), as it attempts to reach conduct entirely outside of the United States, and overly broad in that it attempts to preclude both conduct outside the United States and conduct wholly unrelated to Plaintiffs’ copyrighted songs. As such, the Magistrate’s recommendation should be rejected. Should this Court find injunctive relief appropriate, it should narrowly target such relief, ordering only that Mr. Kurbanov continue to block visitors to the Websites from the United State from accessing any copyrighted materials owned by the Plaintiffs.

CONCLUSION

For the reasons stated hereinabove, the Magistrate’s Report and Recommendation should be rejected, and this Court should deny Plaintiffs’ request for the recovery of monetary damages. In the alternative, to the extent that the Court finds that Plaintiffs have proven an entitlement to some measure of statutory damages, such damages should be minimal to reflect Mr. Kurbanov’s innocent infringement. Similarly, to the extent that the Court finds Plaintiffs are entitled to some form of permanent injunctive relief, such relief should be limited to an order requiring Mr. Kurbanov to take measures necessary to ensure that users from the United States cannot utilize the Websites to access Plaintiffs’ copyrighted materials.

Dated: December 30, 2021

Respectfully Submitted:

/s/ Jeffrey H. Geiger

Jeffrey H. Geiger (VSB No. 40163)
SANDS ANDERSON PC
1111 E. Main Street, Suite 2400
Bank of America Plaza
P.O. Box 1998 (23218)
Richmond, Virginia 23218-1998
Telephone: (804) 783-7248
Facsimile: (804) 783-7291
jgeiger@sandsanderson.com

/s/ Valentin Gurvits

Valentin D. Gurvits (*pro hac vice*)
Matthew Shayefar (*pro hac vice*)
BOSTON LAW GROUP, PC
825 Beacon Street, Suite 20
Newton Centre, Massachusetts 02459
Telephone: 617-928-1804
Facsimile: 617-928-1802
vgurvits@bostonlawgroup.com
matt@bostonlawgroup.com

/s/ Evan Fray-Witzer

Evan Fray-Witzer (*pro hac vice*)
CIAMPA FRAY-WITZER, LLP
20 Park Plaza, Suite 505
Boston, Massachusetts 02116
Telephone: 617-426-0000
Facsimile: 617-423-4855
Evan@CFWLegal.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

Scott A. Zebrak, Esquire
Matthew J. Oppenheim, Esquire
Lucy Grace D. Noyola, Esquire
Kellyn M. Goler, Esquire
Oppenheim + Zebrak, LLP
4530 Wisconsin Avenue, NW, 5th Floor
Washington, DC 20016
Email: scott@oandzlaw.com
matt@oandzlaw.com
lucy@oandzlaw.com
kellyn@oandzlaw.com
Counsel for Plaintiffs

/s/ Jeffrey H. Geiger

Jeffrey H. Geiger