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## Ayla LLC v. Alya Skin Pty. Ltd., 2021 WL 38233624 (9th Cir. Aug. 27, 2021)

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***Ayla LLC v. Alya Skin Pty. Ltd.*, 2021 WL 38233624 (9th Cir. Aug. 27, 2021).**

*Liya Levin\**

**I. BACKGROUND OF THE CASE**

Ayla LLC is a San Francisco-based beauty and wellness brand, offering skincare and hair products through its online and retail stores, as well as health and personal care advice on its website.<sup>2</sup> Ayla is the registered owner of three trademarks for use of the “AYLA” word mark, in connection with on-site beauty services, online retail beauty products, cosmetics, and cosmetic services.<sup>3</sup>

In 2019, Ayla LLC filed an action against Alya Skin, an Australian skin-care company for trademark infringement, false designation origin, and unfair competition.<sup>4</sup> Ayla alleged that its promotion efforts generated significant consumer goodwill toward its brand and that Ayla’s exclusive and continuous use of the AYLA mark has led the public to associate the mark with Ayla products.<sup>5</sup>

Defendant Alya Skin is an Australian skincare company.<sup>6</sup> Its place of incorporation and principal place of business is in Australia. However, Alya Skin sells and ships its products worldwide.<sup>7</sup> Ayla alleges Alya Skin began to use the marks “AYLA” and “AYLA SKIN” in connection with beauty products and online retail services in early 2018.<sup>8</sup> In November 2018, Alya Skin posted several advertisements for a “Black Friday” sale of

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<sup>2</sup> *Ayla LLC v. Alya Skin Pty. Ltd.*, 2021 WL 38233624 1 (9th Cir. Aug. 27, 2021).

<sup>3</sup> *Id.* at 4-6.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Ayla, LLC v. Alya Skin Pty. Ltd.*, 11 F.4th 972, 978 (9th Cir. 2021).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

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“AYLA” and “AYLA SKIN” products on its Facebook page.<sup>9</sup> Additionally, it advertised on Instagram, a popular social media platform worldwide<sup>10</sup>, “ATTENTION USA BABES WE NOW ACCEPT Afterpay.”<sup>11</sup> These advertisements were further promoted by US-based social media influencers, apparently hired by Ayla Skin.<sup>12</sup> Further, Ayla Skin’s website included statements of its products being featured in renowned American magazines, such as *Vogue* and *Teen Vogue*.<sup>13</sup> The Ayla Skin website also listed United States dollars as its default currency and advertised two-to-four day shipping to New Zealand and Australia, and five-to-ten day shipping outside those countries.<sup>14</sup> In December 2018, Ayla Skin filed a trademark registration application in the United States and represented to its current and potential customers that its products were approved by the U.S. Food and Drug Administration.<sup>15</sup>

Ayla filed a trademark infringement, false designation of origin and unfair competition action in the federal district court for the Northern District of California.<sup>16</sup> Ayla specifically alleged that Ayla Skin “capitalize[d] on Ayla’s valuable reputation and customer goodwill . . . by using the confusingly similar AYLAL and AYLAL SKIN marks in connection with the advertisement, marketing, promotion, sale and/or offer for sale of beauty supplies and retail store services.”<sup>17</sup> The trademark infringement and false designation of origin claims were asserted pursuant to the Lanham Act, 15 U.S.C. § 1114, 1125(a), and the unfair competition allegation was brought under the California Business & Professions Code, as well as California Common Law.<sup>18</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Afterpay is a “buy now, pay later” company offering short term financing options to eligible shoppers at participating retailers. You can see a full explanation at <https://www.afterpay.com>.

<sup>12</sup> *Ayla, LLC*, 11 F. 4<sup>th</sup> at 978.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Ayla, LLC*, 11 F. 4<sup>th</sup> at 978.

Ayla Skin moved to dismiss for lack of personal jurisdiction pursuant to Federal Civil Procedure 12(b)(2).<sup>19</sup> In support of its motion, Ayla Skin submitted a declaration by one of its cofounders that asserted that Ayla Skin has no retail stores, offices or branches, officers, directors, or employees, bank accounts, or real property in the United States.<sup>20</sup> Further, Ayla Skin asserted it did not sell its products “in any retail store in the United States,” or solicit business from Americans, advertise “in any publications that [were] directed primarily toward California residents,” or otherwise direct advertising toward California through online, television, or radio marketing.<sup>21</sup> Ayla Skin stated that although it ships its products worldwide, “less than 10% of its sales have been to the United States and less than 2% of its sales have been to California.”<sup>22</sup> Another cofounder provided a declaration stating Ayla Skin does not employ or contract directly with social media influences.<sup>23</sup> Rather, it works with a Philippines-based firm to contact Instagram influences worldwide.<sup>24</sup> However, Ayla Skin did admit it has a contract with “a third-party logistics company” in Idaho, named Dollar Fulfillment, utilized to “fulfill all of [Ayla Skin’s] shipments outside of Australia and New Zealand.”<sup>25</sup>

The district court granted the motion to dismiss and determined it did not have nationwide jurisdiction over Ayla Skin pursuant to Federal Rule of Civil Procedure 4(k)(2).<sup>26</sup> Because Ayla’s Lanham Act action relating to trademark infringement and false designation undisputedly arose under federal law, Ayla only challenged the district court’s holding with respect to nationwide jurisdiction.<sup>27</sup> However, the Ninth Circuit Court of Appeals held that

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<sup>19</sup> *Id.* at 979–980.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Ayla, LLC*, 11 F. 4<sup>th</sup> at 980.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 978.

<sup>27</sup> *Id.* at 977, 985.

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Ayla Skin was subject to person jurisdiction under Federal Rule of Civil Procedure 4(k)(2) and reversed.<sup>28</sup>

## II. MINIMUM CONTACTS ANALYSIS IN SOCIAL MEDIA CONTEXTS

To understand the Court decisions in this matter, it is important to discuss the jurisdictional standards for trademark controversies, as they are paramount to the outcome of this case. The most significant threshold issue in the enforcement of trademark infringement controversies on the internet is that of personal jurisdiction.

Federal Rule of Civil Procedure 4(k)(2) provides a forum for federal claims in situations where a foreign defendant lacks substantial contacts with any single state, but has sufficient contacts with the U.S., as a whole, to satisfy due process standards and justify the application of federal law.<sup>29</sup> Rule 4(k)(2) approximates a federal long arms statute, allowing district courts to exercise personal jurisdiction, even if the defendant's contacts with the forum state would not support jurisdiction under the state's long arm statute.<sup>30</sup> Personal jurisdiction is proper under Rule 4(k)(2) when (1) the action arises under federal law; (2) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (3) the court's exercise of jurisdiction comports with due process.<sup>31</sup>

Under Rule 4(k)(2), the due process analysis "is nearly identical to traditional personal jurisdiction analysis, however, rather than considering contacts between the defendant and the forum state, the court must consider contacts with the nation as a whole."<sup>32</sup> To determine whether the assertion of personal jurisdiction

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<sup>28</sup> *Id.*

<sup>29</sup> See Fed. R. Civ. P. 4 (k)(2).

<sup>30</sup> See *Autogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 566 F.3d 1012, 1017 (Fed. Cir. 2009).

<sup>31</sup> *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1159 (9th Cir. 2006).

<sup>32</sup> *Holland Am. Line Inc. v. Wärtsilä N. Am., Inc.*, 485 F.3d 450, 462 (9th Cir. 2007).

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under Rule 4(k)(2) violates due process, a court must analyze whether a defendant has sufficient “minimum contacts” with the forum state, such that “maintenance of the suit does not offend traditional notions of fair play and substantial justice.”<sup>33</sup>

A defendant’s minimum contacts can give rise to either general or specific jurisdiction. Issues involving foreign defendants, as in *Ayla*, typically do not satisfy general jurisdiction, considering the defendant’s principal place of business or place of incorporation is generally abroad. Thus, the nonresident defendant cannot be considered “at home” in the United States. Accordingly, the sole potential basis for personal jurisdiction, in trademark disputes involving a foreign infringer, rests upon specific jurisdiction.

Many courts apply a three-part approach to specific jurisdiction due process analysis. Specific jurisdiction exists over a nonresident defendant where (1) the company “performed some act or consummated some transaction” by which it “purposefully directed its activities” toward the United States or “purposefully availed itself of the privilege of conducting business” in the United States; (2) the claims must arise out of or result from the defendant’s forum-related activities; and (3) the exercise of jurisdiction is reasonable.<sup>34</sup>

Courts employ various frameworks for determining whether a foreign defendant’s activities satisfy the purposeful direction requirements. The purposeful availment requirement ensures that a non-resident defendant will not be hauled into court based upon random, fortuitous, or attenuated contacts with the forum state.<sup>35</sup> A non-resident defendant purposefully avails itself of the forum if its contacts with the forum are attributable to (1) intentional acts; (2) expressly aimed at the forum; (3) causing harm,

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<sup>33</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>34</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *Haisten v. Grass Valley Med. Reimbursement Fund*, 784 F.2d 1392, 1397 (9th Cir.1986).

<sup>35</sup> See *Burger King*, 471 U.S. at 475.

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the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum.<sup>36</sup>

In the context of internet cases, courts generally apply the *Zippo* sliding scale Test for minimum contacts questions.<sup>37</sup> This test divides internet website landscapes into three categories- active, passive and interactive.<sup>38</sup> An “active” defendant is one who deliberately makes extensive use of the Internet, such as where it enters into contracts with residents in different jurisdictions.<sup>39</sup> The middle ground, or “interactive” website considers whether the level of interactivity and commercial nature of the exchange of information that occurs on the website, is sufficient that the website creators could reasonable expect to be sued in the forum.<sup>40</sup> Finally, a “passive” websites involve situations where the web host has done little more than make information available to the user, and thus personal jurisdiction does not exist.<sup>41</sup> In application, the *Zippo* test has proven less “bright-line” than anticipated. Several problems have arisen under the *Zippo* test, primarily confusion about the doctrine’s scope, issues with its application, and a failure to adapt with the evolving technological landscape. The most prominent confusion under the *Zippo* test centers around corporations, like Ayla and Ayla Skin, and whether homepages demonstrate “purposeful availment” for jurisdictional purposes.

In the past, the Ninth Circuit has deliberately evaded this question, until *Cybersell, Inc. v. Cybersell, Inc.* There, the Ninth Circuit considered the exercise of specific jurisdiction over a website advertiser, as in *Ayla*.<sup>42</sup> The website advertiser had done nothing other than register a domain name and post an essentially

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<sup>36</sup> See *Calder v. Jones*, 465 U.S. 783, 788–89, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) (establishing an “effects doctrine” for intentional action aimed at the forum); *Core Vent Corp. v. Nobel Industries, AB*, 11 F.3d 1482, 1485–86 (9th Cir.1993).

<sup>37</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418–20 (9th Cir.1997).

passive website.<sup>43</sup> Certainly, it had done nothing to encourage residents of the forum state to access its site.<sup>44</sup> The court held that these acts were insufficient to confer jurisdiction over a non-resident defendant. The objectionable webpage “simply was not aimed intentionally at [the forum state] knowing that harm was likely to be caused there.”<sup>45</sup> Under the *Zippo Test*, “something more” was required to indicate that the defendant purposefully directed its activity in a substantial way to the forum state.<sup>46</sup> In fact, the court noted “no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff’s home state.”<sup>47</sup> Yet, in *Ayla*, a factually analogous case, the Ninth Circuit reached a conflicting conclusion. These contradictory conclusions reinforce the confusion permeating the predated minimum contacts tests.

The traditional personal jurisdiction analysis, discussed above, has resulted in a body of law that lacks clarity, consistency, and uniformity, particularly in internet trademark cases like *Ayla*. This lack of uniformity undermines the policy of the Lanham Act, which promotes national uniformity in trademark law.

### III. THE EXTRATERRITORIAL REACH OF THE LANHAM ACT IN CYBERSPACE

In addition to highly attuned issues of personal jurisdiction, internet trademark controversies must battle another jurisdictional obstacle: subject-matter jurisdiction. Although *Ayla* did not challenge subject-matter jurisdiction on its appeal, most trademark issues dealing with foreign defendants in the cyberspace involve extensive, ongoing disputes on the justification of extending U.S. trademark law in foreign jurisdictions. Notably, without an action

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<sup>43</sup> *Id.* at 419.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 420.

<sup>46</sup> *Id.* at 418.

<sup>47</sup> *Id.*; See also *Smith v. Hobby Lobby Stores*, 968 F.Supp. 1356 (W.D.Ark.1997) (no jurisdiction over Hong Kong defendant who advertised in trade journal posted on the Internet without sale of goods or services in Arkansas).

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arising under federal law, such as the Lanham Act, district courts are unable to establish personal jurisdiction over foreign defendants under Rule 4(k)(2).

In an ever-expanding world of commerce, it becomes more and more important for companies to protect trademarks. The cornerstone of federal trademark law is the Lanham Act. The Lanham Act protects owners of federally registered trademarks by preventing unauthorized use of a logo, phrase or other mark in a way that would likely cause consumer confusion.<sup>48</sup> Specifically, it subjects to liability any person who shall use in commerce “any colorable imitation of a registered mark,”<sup>49</sup> or any person who uses in commerce any “word, false description, or false designation of origin” that is likely to deceive consumers as to the affiliation, origin or sponsorship of any goods.<sup>50</sup> Notably, “commerce” is defined in the Lanham Act as “all commerce which may lawfully be regulated by congress.”<sup>51</sup>

Section 1121(a) of the Lanham Act confers “broad jurisdictional powers upon the courts of the United States,” in conjunction with 28 U.S.C. § 1331. Actions involving trademark infringement under the Lanham Act can be heard in either state or federal courts in the United States. The Lanham Act vests federal district courts with subject matter jurisdiction over all actions arising under it.<sup>52</sup> Although the jurisdiction of the United States Federal Courts is limited, the Supreme Court and lower courts have allowed jurisdiction to extend to extraterritorial disputes when a trademark is exploited outside the United States.<sup>53</sup> Essentially, these

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<sup>48</sup> Lanham Act, 15 U.S.C. § 1051(a).

<sup>49</sup> *Id.* at § 1114(a).

<sup>50</sup> *Id.* at § 1125(a)(1).

<sup>51</sup> *Id.* at § 1127. *See also Steele v. Bulova Watch Co.*, 344 U.S. 280, 283 (1952).

<sup>52</sup> 15 U.S.C. § 1121.

<sup>53</sup> *See Steele*, 344 U.S. at 283 (Supreme Court found the manufacturer and seller of fake “Bulova” watches in Mexico fell within the scope of the Lanham Act, where the court allowed the extraterritorial application of the Act because the infringer’s operations and effects were not confined within the territorial limits of a foreign nation.); *See Ocean Garden, Inc v. Marktrade Co.*, 953 F.2d 500 (9<sup>th</sup>

courts have utilized the Lanham Act's broad interpretation of commerce to extend, at least partly, to infringing acts outside the United States in order to combat the sale of forgeries.

The first instance in which the United States Supreme Court applied the extraterritorial reach of the Lanham Act occurred in *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952). There, the Supreme Court held the Lanham Act confers jurisdiction over extraterritorial disputes involving trademark infringement and unfair competition when: (1) the Defendant is a United States Corporation; (2) the foreign activity had substantial effects in the United States; and (3) exercising jurisdiction would not interfere with the sovereignty of another nation.<sup>54</sup> As technology advances and the internet expands with its unregulated nature, courts have relied on *Steele's* broad jurisdictional standard to justify foreign application of the Lanham Act. As a result, more and more foreign acts of infringement fall under the Lanham Act umbrella, making the Act an effective tool for protecting trademarks from foreign infringers.

#### IV. THE NORTH DISTRICT OF CALIFORNIA DECISION

In November 2019, District Court Judge Haywood S. Gilliam Jr., dismissed Ayla's action for lack of personal jurisdiction.<sup>55</sup> The district court concluded the Australian company lacked sufficient contacts with the United States to justify federal jurisdiction over it.<sup>56</sup> The court reasoned because Ayla Skin's principal place of business was in Australia, the court lacked general jurisdiction over it.<sup>57</sup> Further, the court stated it lacked specific jurisdiction over Ayla Skin because it did not aim its sales efforts at

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Cir. 1991) (shipping infringing canned fish from Mexico to Far East was held to effect the American foreign trade zone to divert American foreign sales.)

<sup>54</sup> *Id.*

<sup>55</sup> *Ayla, LLC v. Alya Skin Pty. Ltd.*, No. 19-cv-00679-HSG 2019 WL 5963149 \*1 (N.D. Cal. Nov. 13, 2019).

<sup>56</sup> *Id.* at \*5.

<sup>57</sup> *Id.* at \*3-4.

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California, there was an absence of physical presence in the state, and less than two percent of its online orders were placed by California users.<sup>58</sup>

The court's conclusion ultimately turned on a lack of nationwide jurisdiction.<sup>59</sup> Relying on *Cybersell*, the district court emphasized the Ninth Circuit's cautious application of Rule 4(k)(2) in past cases involving foreign defendants.<sup>60</sup> The court noted the Ninth Circuit has never countenanced jurisdiction under Rule 4(k)(2).<sup>61</sup> Following *Cybersell*, the court held Ayla Skin's advertisements directed at "USA BABES" and the promotion of Ayla Skin by influencers did not establish purposeful injection because the marketing was not targeted as a specific region.<sup>62</sup> It reasoned Ayla Skin's contacts with the United States are "very limited," rather Ayla Skin's marketing strategy was "global in nature, reaching customers around the world through Instagram influencers."<sup>63</sup>

For the reasons described above, the district court concluded Ayla's allegations failed to establish the level of contacts necessary to make the exercise of jurisdiction in this case reasonable.<sup>64</sup>

## V. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECISION

The Ninth Circuit disagreed. The Court held by advertising on Instagram with the words "ATTENTION USA BABES WE NOW ACCEPT afterpay," Ayla Skin targeted its promotional materials specifically towards the United States.<sup>65</sup> The Court concluded this post was an "intentional, explicit appeal to American

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Ayla, LLC*, No. 19-cv-00679-HSG 2019 at \*6.

<sup>62</sup> *Id.* at \*5.

<sup>63</sup> *Id.* at \*6.

<sup>64</sup> *Id.*

<sup>65</sup> *Ayla, LLC*, 11 F.4th at 980.

consumers and no others.”<sup>66</sup> Although the district court found that Ayla Skin’s marketing targeted sales internationally rather than specifically at Americans, in so finding, the district court ignored instances where Ayla Skin did target its sales specifically at Americans, most notably the “ATTENTION USA BABES” post.<sup>67</sup> Moreover, the court stated the district court improperly discounted the significance of Ayla Skin’s advertising for “Black Friday” sales—sales on the day after the U.S.’s distinctive Thanksgiving holiday.<sup>68</sup> Although Ayla Skin presented evidence that Black Friday is “slowly catching on in Australia,” Ayla Skin’s own evidence underscores that Black Friday originated in the U.S. and remains “America’s biggest shopping day.”<sup>69</sup>

In light of the “purposeful direction” of its sales efforts to the United States, the Ninth Circuit held it did not matter that less than 10 percent of the defendant’s worldwide sales are to this nation.<sup>70</sup> The Court reasoned Ayla Skin offers its products directly for sale to the United States on its website.<sup>71</sup> Though some of its sales to the United States may have occurred through third-party websites, like Instagram and Facebook, Ayla Skin operates those social media accounts.<sup>72</sup> The Court compared Ayla Skin to a parts manufacturer with no control over the ultimate distribution of its products, to emphasize Ayla Skin’s complete possession over the agency of its products.<sup>73</sup> The Court further noted that Ayla Skin publicizes its products as “FDA approved,” and by obtaining and advertising approval by the FDA, a United States regulatory agency, is an appeal specifically to American consumers for whom the acronym “FDA” has meaning.<sup>74</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 981.

<sup>70</sup> *Id.* at 983.

<sup>71</sup> *Ayla, LLC*, 11 F.4th at 983.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

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The Ninth Circuit's reversal of the district court decision also turned on the features of Ayla Skin's homepage.<sup>75</sup> Specifically, where the company's website advises: "Shipping within the USA takes between 1–4 business days. We have a warehouse in USA so that we can ship domestically to all our USA customers."<sup>76</sup> The website also stated Ayla Skin is "based in Melbourne, Australia" but ships from "two locations, Australia and USA. Depending on stock levels, [orders] will be shipped from either of our two warehouses." Notably, one of the warehouses was located in Idaho, USA.<sup>77</sup> In *Burger King*, the Supreme Court emphasized that courts must consider that "contemplated future consequences" of the contract in order to determine whether the defendant purposefully availed itself in the forum. Here, Ayla Skin not only contemplated its performance in the forum state, but also the location of its distributor so that Ayla Skin could better serve the American market and its American consumers.<sup>78</sup> The Ninth Circuit concluded that by contracting its distribution center in the United States, Ayla Skin's Website itself established purposeful direction and conferred personal jurisdiction.<sup>79</sup>

In light of the circumstances above, the Ninth Circuit reversed the district court's dismissal and revived the trademark dispute between Ayla and Ayla Skin.

## VI. THE NEED FOR PERSONAL JURISDICTION EXPANSION IN THE INTERNET AGE TO COMBAT TRADEMARK INFRINGEMENT

Personal jurisdiction has always been a tricky issue. Today, courts are forced to grapple with questions of cyberspace presence as business evolve alongside technology advancements. With companies across all industries relying increasingly on social media to connect with consumers, the issues of which activity trigger the

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<sup>75</sup> *Id.* at 982.

<sup>76</sup> *Ayla, LLC*, Case No. 20-16214 at \*15.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at \*11.

exercise of personal jurisdiction in a given forum will only rise in prominence and complexity. The internet is moving to become more customized, ubiquitous and self-aware than ever before. Perhaps the only way to survive this digital age, is for the courts to stretch the bounds of jurisdictional analysis to the extent of modern-day online interactions.

Many courts, such as the Ninth and Fourth Circuit, have begun to pave the expansion of the scope of personal jurisdiction for website operators. In June 2020, the United States Court of Appeals for the Fourth Circuit issued a significant decision regarding the exercise of personal jurisdiction over a web-based defendant.<sup>80</sup> In *UMG Recordings, Inc. v. Kurbanov*, the Fourth Circuit reversed a lower court decision dismissing a copyright defendant for lack of personal jurisdiction and held that a Russian-based owner and operator of two websites allegedly used for music piracy was subject to personal jurisdiction in Virginia.<sup>81</sup> In reaching this conclusion, the Fourth Circuit shifted away from the traditional and narrow application of the interactivity test, developed in *Zippo*, and expanded its application by considering the sufficiency of website advertising practices for personal jurisdiction. Should other courts find the Fourth Circuit's in *Kurbanov* and the Ninth Circuit's decision in *Ayla* persuasive, website owners could potentially be subject to personal jurisdiction wherever their websites have a considerable number of users. Importantly, these expansive interpretations of traditional personal jurisdiction assessments is necessary to account for changing technologies to ensure fairness and predictability.

#### **A. DOWN WITH DUPES: TARGETING BEAUTY PRODUCT DUPING ON INTERNET PLATFORMS**

The crux of *Ayla* is a trademark infringement action involving an alleged cosmetic copycat. In the beauty industry, the

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<sup>80</sup> *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344 (4th Cir. 2020).

<sup>81</sup> *Id.* at 355.

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emergence of copycat brands is widespread, and the term for these legally problematic types is a “dupe.” Generally, the word “dupe” means a cheaper alternative to a higher-end product. Beauty dupes allow bargain shoppers to experience expensive, high-end cosmetics at lower, more affordable prices. The epicenter of dupe sales and information is the internet. Countless beauty gurus and social media influencers, like those utilized by *Ayla Skin* for its marketing, take to various internet platforms, such as YouTube, Instagram and TikTok, to compare and advertise dupes of beauty-related products. In fact, there are hashtags like #skincaredupes and #makeupdupes, which includes more than 300,000 posts on Instagram.

The concept of dupes has become a \$56.2 billion beauty industry in the United States. Many brands and consumers have called into question the legality of the widespread practice of beauty duping. Specifically, legality concerns of beauty dupes infringing on the trademark rights of copied brands. Unfortunately, many brands and companies, particularly smaller entities, are reluctant to take infringement actions against other copycat companies because of the many hurdles in established and enforcing trademark infringement. One of the more prominent hurdles being personal jurisdiction over foreign infringers. *Ayla* endorses this struggle and demonstrates the costly and complicated lengths companies must endure in order to protect their trademark rights against over-seas infringers, attempting to capitalize on their valuable reputation and customer goodwill. Until now, *Ayla* has not reached the merits of the trademark issue at hand but had to jump through various legal obstructions before the more complexing matter of a beauty product dupe could be addressed. Unfortunately, many companies do not have the resources to put up this fight, and are unwilling to combat their infringers, despite the dramatically negative impact these “dupers” may impose on their sales and industry reputation. A potential resolution to this reluctance is the expansion of personal jurisdiction to website operators. Adjusting the scope of personal jurisdiction on the internet to allow victims of trademark infringement to reach their foreign violators would provide these affected companies with a greater capacity to target these

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defendants and protect their intellectual property rights. It will improve their ability to establish their exclusive rights by expediting courts' ability to address the fundamental issues of infringements against international imitators who target the forum country through social media platforms and advertisements. This expansion is just considering the original brands spend large amounts of time and resources on product research, development and marketing, only for a foreign imitator to copy their beauty products, and confuse consumers with similar products, thereby infiltrating the original company's reputation and consumers. Expanding the scope of personal jurisdiction to internet contexts allows the original brands to efficiently address the merits of the infringement, and thereby recoup some of their investment in their product.