

Chinese Website Operator Dismissed from Copyright Infringement Suit in United States

D.C. District Court lacks personal jurisdiction over Chinese video hosting website, providing guidance for analyzing jurisdiction over foreign internet companies.

US law governing whether a court has personal jurisdiction over foreign internet companies is imprecise. However, a recent opinion from the District Court for the District of Columbia — *Triple Up Ltd. v. Youku Tudou Inc.* — sheds new light on the how courts analyze personal jurisdiction over foreign entities pursuant to the US Constitution’s due process requirements.¹ At the very least, courts require that plaintiffs plead facts sufficient to show that the foreign entity’s contacts with the United States in general, and the forum state in particular, go beyond mere accessibility to and basic interactivity with the entity’s website in the United States.

The Background of *Triple Up Ltd. v. Youku Tudou Inc.*

Youku Tudou Inc. (“Youku”) is a China-based Cayman Islands corporation.² Youku provides online platforms for consumers to view both user-generated and professionally-produced content.³ With over 400 million unique visitors to Youku’s websites each month, less than 1% of those views originate from the United States.⁴ Youku does not market itself in the United States, nor does it have any offices or employees in the United States.⁵

Triple Up Limited (“Triple Up”), a Seychelles corporation, brought a copyright infringement suit in the District Court for the District of Columbia alleging that Youku violated Triple Up’s exclusive rights to broadcast three Taiwanese movies over the internet in the United States.⁶ Youku claimed that it uploaded the movies “pursuant to an express license to display the films in China, and that it implemented geoblocking to prevent the Youku-uploaded versions from being displayed in the US.”⁷ Youku maintained that any non-geoblocked versions of the films on its websites must have been uploaded by Youku’s users.⁸

Personal Jurisdiction and Due Process

Prior to addressing the merits of a case, a court must determine that it has jurisdiction over the parties.⁹ To comport with due process, for a court to exercise jurisdiction over a foreign defendant, the foreign defendant must have sufficient contacts with the United States such that it should “reasonably anticipate being haled into court [h]ere.”¹⁰ Courts often refer to this requirement as “purposeful availment.”¹¹ When a plaintiff alleges a theory of specific jurisdiction, as Triple Up did here, the plaintiff’s claims must arise out of or relate to the defendant’s contacts with the jurisdiction.¹²

While the Supreme Court has not yet weighed in on the question of personal jurisdiction over foreign defendants in the context of online activity, the *Youku* court held that a website's "mere accessibility" within the United States is insufficient to assert jurisdiction over a foreign operator.¹³ However, courts have found "internet-based" personal jurisdiction over foreign entities where the website functions as a storefront in the forum or where the foreign entities' conduct is "aimed at or has an effect in the forum state."¹⁴

When a claim against a foreign entity arises under federal law, as Triple Up's copyright claims did, "if a summons has been served, and if the defendant is beyond the jurisdiction of any one state's courts, then federal courts may exercise jurisdiction — without regard to the forum's long-arm statute — so long as due process requirements are met."¹⁵ Thus, the *Youku* court faced a single, dispositive question: "[We]re Youku's contacts with the United States as a whole constitutionally sufficient to justify the exercise of specific personal jurisdiction over it with respect to Triple Up's asserted claims?"¹⁶

The Court's Analysis of Triple Up's Arguments

Triple Up advanced five main arguments to establish contacts beyond the mere accessibility of Youku's website in the United States. Triple Up identified three internet-based contacts and two non-internet based contacts between Youku and the United States: (1) Youku's use of geoblocking technology; (2) the third-party, English-language video advertisements that occasionally preceded Youku's videos when viewed in certain regions; (3) the purported "interactivity" of Youku's site; (4) the listing of Youku stock on the New York Stock Exchange; and (5) Youku's contracts with certain US advertising, software and entertainment firms.¹⁷ The court rejected each of Triple Up's attempted jurisdictional hooks.¹⁸

The court first addressed Youku's geoblocking capabilities — calling it Triple Up's "most novel argument."¹⁹ Geoblocking allows a website provider to restrict access to content based on a user's location.²⁰ Youku employs geoblocking for professionally produced content, but not for user-uploaded videos.²¹ Triple Up argued that because Youku *could* block US viewers from seeing certain videos, by failing to do so, it "'purposefully transmitted specific broadcasts' . . . 'with full knowledge that they would be viewed'" in the United States.²² The court rejected this theory outright, noting that such a rule "would invite a sea change in the law of internet personal jurisdiction" and "effectively mandate geoblocking for any website operator wishing to avoid suit in the United States."²³ Further, the court stated that it was "unaware of any authority suggesting that a *failure to act* might constitute purposeful availment."²⁴

Triple Up's allegations regarding interactivity suffered a similar fate. Within the D.C. Circuit, interactivity of a website is only relevant to a jurisdictional analysis "insofar as it illustrates whether the website allows its operator 'to engage in real-time transactions with District of Columbia residents.'"²⁵ Users' abilities to make personal accounts and to upload videos to Youku's website did not fall under this umbrella.²⁶ The court opined that Youku's subscription service was the only sufficiently transactional evidence of interactivity to even warrant consideration.²⁷ However, Triple Up did not raise the subscription service as a basis for jurisdiction, and the court indicated that such an argument, if raised, would likely have failed because the subscription service was unrelated to the claims at issue.²⁸

The other factors alleged by Triple Up — third-party ads, listing on the NYSE and contracts with US companies — were not sufficiently related to Triple Up's copyright infringement claims to provide a jurisdictional hook.²⁹ For example, regarding the occasional presence of English-speaking ads for American products before videos, the court agreed with Youku's argument that "even if Youku's websites featured only Chinese-language ads for Chinese products aimed at Chinese consumers — or if they featured no advertisements at all — Triple Up's allegations would remain the same."³⁰

Room for Improvement

The D.C. District Court flagged two main areas where Triple Up, given further factual development, may have been able to make a stronger showing for the exercise of personal jurisdiction over Youku. First, the court pointed out in a footnote that Youku has an agent for service of process in New York, so “arguably [Youku] consented to jurisdiction in New York when it designated an agent for service of process there . . . and accepted service of process through that agent in this case.”³¹ However, the court did not go in to detail on this point, noting that the parties did not raise the issue and that recent jurisprudence had called that doctrine into question.³²

Second, the court noted that Triple Up had failed to make an argument under the “effects test,” whereby jurisdiction can be established if a nonresident’s intentional acts are “expressly aimed” at the forum, and, as a result, “the brunt of the harm” is felt there.³³ The court indicated that even if Triple Up had argued that the effects test applied, it likely would not have provided a basis for jurisdiction in light of certain facts.³⁴ Specifically, Youku’s websites were written entirely in Mandarin Chinese, the films at issue were Taiwanese with Mandarin captions, the alleged copyright holder was unconnected to the United States, and scant evidence of US viewership existed.³⁵

On February 22, 2017, Triple Up appealed the final order entered by the D.C. District Court to the United States Court of Appeals for the District of Columbia Circuit.³⁶

Conclusion

The D.C. District Court’s opinion in *Youku* makes clear that, at least for now, mere accessibility of a website is insufficient to establish the minimum contacts required for purposes of exercising personal jurisdiction over a foreign entity based solely on that entity’s virtual presence in the United States. Prospective plaintiffs must assert strong factual bases specifically related to the alleged claims that support the foreign entity’s contacts within the United States as a whole and/or the “effects” of the foreign entity’s actions within the United States. Finally, in light of these jurisdictional hurdles, prospective plaintiffs should also consider employing strategies within the foreign entity’s home country to stop the potentially infringing conduct.

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Endnotes

¹ See *Triple Up Ltd. v. Youku Tudou Inc.*, No. 1:16-CV-00159-RDM, 2017 WL 354093 (D.D.C. Jan. 24, 2017), *appeal filed*, No. 17-7033 (D.C. Cir. Feb. 22, 2017).

² *Id.* at *1.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at *2.

⁶ *Id.* at *1.

⁷ *Id.* at *2.

⁸ *Id.*

⁹ *Sinochem Int'l Co. Ltd. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007).

¹⁰ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

¹¹ 2017 WL 354093, at *5, *7.

¹² *Id.* at *5 (citing *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014)).

¹³ *Id.*

¹⁴ *Id.* at *6.

¹⁵ *Id.* at *4 (citing Fed. R. Civ. P. 4(k)(2); *Mwani v. bin Laden*, 417 F.3d 1, 10 (D.C. Cir. 2005)).

¹⁶ *Id.* at *5

¹⁷ *Id.* at *6.

¹⁸ *Id.*

¹⁹ *Id.* at *7.

²⁰ *Id.* at *1.

²¹ *Id.*

²² *Id.* at *7.

²³ *Id.*

²⁴ *Id.* (emphasis in original).

²⁵ *Id.* at *9 (quoting *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 513 (D.C. Cir. 2002)).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at *8–10.

³⁰ *Id.* at *9 (internal quotation marks omitted).

³¹ *Id.* at *4 n.2.

³² *Id.*

³³ *Id.* at *6, *10 (citing *Calder v. Jones*, 465 U.S. 783, 789 (1984)).

³⁴ *Id.* at *10.

³⁵ *Id.*

³⁶ See *Triple Up Ltd. v. Youku Tudou Inc.*, No. 17-7033 (D.C. Cir. appeal filed Feb. 22, 2017).