

## You Can Have Some Lovin’—But No Personal Jurisdiction

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The US Court of Appeals for the Sixth Circuit dismissed claims against a recording artist and music publishing company for, finding that the court lacked personal jurisdiction over one of the accused artists, a UK resident, in a suit related to allegations of copyright infringement where the infringement allegations lacked a nexus to the venue where the suit was brought. *Parker v. Winwood*, Case No. 18-5305 (6th Cir. Sept. 17, 2019) (Griffin, J) (Donald, J, dissenting).

The appeal in this case addressed whether Mervyn Winwood was subject to personal jurisdiction in Tennessee. Mervyn Winwood is the lesser-known brother of pop-rock star Steve Wynwood, who is perhaps best known for his 1986 smash hit “Higher Love,” along with such memorable songs as “The Finer Things,” “Back in the Highlife” and “Valerie.” Mervyn and Steve wrote the hit song “Gimme Some Lovin’” in 1965. The plaintiffs alleged that Mervyn and Steve and their company infringed the plaintiffs’ copyright by lifting a bass line from plaintiffs’ song “Ain’t That a Lot of Love” and using it in “Gimme Some Lovin’.” In the district court, Steve and his company won summary judgment of non-infringement. The claims against Mervyn were dismissed for lack of personal jurisdiction. Plaintiffs appealed.

The Sixth Circuit panel majority determined that there could be no specific personal jurisdiction over Mervyn, who resides in the United Kingdom, because Mervyn’s suit-connected conduct lacked a substantial nexus with Tennessee. The plaintiffs contended that Mervyn’s alleged willful copyright infringement, which occurred in England, qualified as purposeful activity in Tennessee because Mervyn intentionally harmed Tennessee residents. But the Sixth Circuit held that this argument was foreclosed by *Walden v. Fiore*. There, the Supreme Court of the United States held that a federal district court in Nevada lacked jurisdiction over a defendant from Georgia who, in Georgia, created a false affidavit knowing it would harm two plaintiffs in Nevada. To find jurisdiction in such scenarios, the Court explained, would be to mistake a plaintiff’s forum connections for a defendant’s forum connections. The Court also rejected a “stream of commerce” theory of personal jurisdiction because there was no evidence Mervyn had specifically directed the distribution of “Gimme Some Lovin’” in Tennessee.

The Sixth Circuit panel majority also rejected plaintiffs’ argument that the district court had jurisdiction under Fed. R. Civ. P. 4(k)(2). That rule provides personal jurisdiction over a defendant if (1) the defendant is not subject to jurisdiction in any state’s courts of general jurisdiction, and (2) exercising jurisdiction is consistent with the US Constitution and laws. The Sixth Circuit wrote that “exercising jurisdiction over Mervyn would conflict with due process because he has not purposely

availed himself of the privilege of acting in Tennessee.”

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In her dissent, Judge Donald chided the majority for failing to view the evidence in the light most favorable to plaintiffs, and argued that under the stream of commerce “plus” approach for assessing “purposeful availment” (as articulated in the 1997 Supreme Court case *Asahi Metal Indus. v. Superior Court*), “personal jurisdiction over a defendant exists based on a product’s availability in the forum state when the defendant placed the product into the stream of commerce and there is evidence of some ‘[a]dditional conduct . . . [that] may indicate an intent or purpose to serve the market in the forum State.’” Donald argued that the conclusion by the majority “that Plaintiffs could not properly assert personal jurisdiction over Mervyn because Plaintiffs did not set forth evidence or affidavits establishing jurisdiction . . . is incorrect, as Plaintiffs have submitted evidence supporting the district court’s ability to exercise personal jurisdiction over Mervyn.” She then reviewed declaration evidence, including evidence regarding a nationwide distribution agreement, in support of personal jurisdiction.

**Practice Note:** It appears that the Sixth Circuit misapplied Rule 4(k)(2), which comes into play precisely when minimum contacts with the forum state and any particular state are lacking but the defendant does have minimum contacts with the United States itself. In any event, Mervyn Winwood will go on to rock another day.

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