

A Cautionary Tale On Social Media And US Jurisdiction

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The U.S. District Court for the Central District of California recently determined that a foreign company was subject to the jurisdiction of U.S. courts based, in part, on its social media activity.

The Aug. 3 Miles Park McCollum v. Opulous decision involves rapper Lil Yachty, the online music distribution company Ditto Music, and its founder.

The ruling is factually specific, but it is an important decision for all foreign companies, individuals, their respective advisers, and those seeking to sue them before the U.S. courts because the majority of the court's analysis was based on the defendants' social media activities.

Although the decision does not engage in a state-based personal jurisdiction analysis, it provides useful guidance to domestic U.S. defendants about how their social media presence may lead them to be subject to jurisdiction in other states.

The decision is particularly notable because the U.S. Supreme Court has provided little guidance about how social media activity may provide virtual contacts sufficient to establish personal jurisdiction.

In its 2014 decision in *Walden v. Fiore*, the high court left the issue "for another day,"[1] despite former Justice Stephen Breyer's fortuitous warnings over a decade ago in *J. McIntyre Machinery Ltd. v. Nicastro* on the impact of advertising goods and services on websites for personal jurisdictional analyses[2] — warnings now extensible to social media as a primary method of modern advertising.

The lack of guidance from the Supreme Court also makes lower courts' rulings — especially the *Opulous* decision[3] — instructive for companies, businesses and individuals.

The Facts of the *Opulous* Case

Lil Yachty met with defendant Lee James Parsons — the founder of both other defendants, *Opulous* and *Ditto Ltd.* — to pitch the *Opulous* platform, which is described as "the only platform to mint Music Fungible Tokens." [4]



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The parties allegedly never agreed on any terms, nor entered into any agreement. However, the defendants later launched a "press and advertisement campaign that [allegedly] falsely represented" Lil Yachty as being affiliated with Opulous, allegedly falsely represented that his works would be sold on Opulous, and allegedly used his name, trademark and photographic likeness without authorization.

Ditto and Parsons[5] moved to dismiss Lil Yachty's case for lack of personal jurisdiction, under Federal Rule of Civil Procedure 12(b)(2) — because Ditto was formed and is headquartered in England.

Parsons is domiciled in England, and both had insufficient contacts to allow California courts to exercise personal jurisdiction over them.

The Court's Holdings

On FRCP 4(k)(2)

The court found that it had personal jurisdiction over both Ditto and Parsons under Federal Rule of Civil Procedure 4(k)(2)[6] — which requires that:

- The relevant claim arises under federal law;
- The defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
- Exercising jurisdiction upholds due process — which requires the traditional personal jurisdiction analysis, although the court considers the defendant's contacts with the nation as a whole rather than with only the forum state.

The purpose of Rule 4(k)(2) is to provide courts with jurisdiction over aliens who have sufficient contacts with the U.S. as a whole but "insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the 14th Amendment limitation on state court territorial jurisdiction." [7]

For Ditto, the court found that the first two prongs were easily satisfied and focused on the third limb — i.e., due process — which is dealt with below.

On Due Process

The court's analysis of due process is critical in examining the practical impact of the Opulous decision. The third prong requires:

- Ditto to purposefully avail itself of the privileges of doing business in the U.S.;
- The relevant claim to arise out of Ditto's activities related to the U.S.; and
- The exercise of jurisdiction over Ditto to comport with notions of fair play and substantial justice.

The court found all three prongs satisfied, on the basis that Ditto:

- Had offices in Los Angeles and New York City;

- Posted job advertisements for its LA and NYC offices;
- Had employees with LinkedIn profiles indicating their residence in the U.S.; and
- Critically, made an array of social media posts directed at the U.S. — including one which "utilized an American flag 'emoji,'" another referencing competitions involving U.S. consumers, and others advertising events in the U.S.

Regarding those posts and Ditto's general social media activity, the court emphasized that the evidence established that:

First, Ditto has social media followers in the [U.S.], as evidenced by the substance and interactive style of its posts. Second, Ditto knows it has followers in the [U.S.], as evidenced by its advertising of specific live music events taking place in Los Angeles. And finally, when Ditto wishes to advertise or promote an event in the [U.S.], it uses social media to connect with [U.S.] consumers.

Similarly, the court held that "Ditto's social media activities connect Ditto to the [U.S.]."

The court went on to distinguish the line of authorities holding that the mere operation of a website was insufficient to establish jurisdiction by ruling that:

Ditto is not merely posting information on a passive website — Ditto is posting information to its social media account, which is a place it regularly uses to interact with American consumers.

Parsons and the Fiduciary Shield

Regarding Parsons, the court held that it had personal jurisdiction over him because the fiduciary shield doctrine did not apply.

This was because Parsons was a primary participant in the alleged wrongdoing and "actively and personally involved" in the conduct giving rise to the relevant claims — as Parsons met with, and pitched to, Lil Yachty and knew there was no deal or agreement reached, yet later made various social media posts suggesting that Lil Yachty was involved with Opulous.

The Importance and Impact of the Opulous Decision

While the court gave weight to Ditto's offices, employees and job advertisements in the U.S., the court also gave significant weight and attention to Ditto's array of social media contacts to establish personal jurisdiction.

The court therefore provides a clear warning to international defendants that their social media activities may be highly relevant to, and potentially determinative of, an aggregate personal jurisdiction analysis under Rule 4(k)(2).

Implicit in the court's decision is the idea that social media provides businesses and individuals with a social marketplace where they can best interact with consumers, advertise their goods and services, and ultimately sell those goods and services to consumers.

While such an idea comports with the reality of modern social media use, it is worrying for many international businesses and individuals because the main purpose of most businesses' social media use

is to interact with, and sell products to, consumers — especially U.S. consumers, as they comprise an exceedingly lucrative market.

According to the *Opulous* decision, that usage of social media is likely to bring those businesses before U.S. courts. As such, *Opulous* provides foreign defendants with a stark warning to be extremely cautious about, and closely monitor, their social media activity.

The clear limitation on this social media-related jurisdictional reach under Rule 4(k)(2) is that the relevant claims against a foreign defendant must arise out of that defendant's social media activities. This may provide some comfort to foreign defendants, but it does not detract from the importance of the above.

The *Opulous* decision also cautions U.S. domestic businesses and individuals to be wary about how their social media use may affect analysis of personal jurisdiction under state long-arm legislation.

Further, the court's decision regarding *Parsons* serves as a timely reminder to foreign corporate officers and agents that their actions on social media, regardless of their innocuousness or repetition, may lead them to be subject to the personal jurisdiction of U.S. courts.

It is true that such activities must show those officers' or agents' involvement in the relevant wrongdoing — under the fiduciary shield doctrine — but it remains important for them to be conscious of the impact of their social media activity.

If *Parsons* had not made the relevant posts, it seems unlikely that the court would have found that the fiduciary shield was breached.

An overarching lesson from the *Opulous* decision is that foreign entities, businesses and individuals that do any business in the U.S. should be cognizant of U.S. laws, especially intellectual property laws, to ensure that no claim can be made against them in the first place.

If they are prudent in this respect, the jurisdictional analysis does not come into play.

Practical Guidance for Foreign Companies and Individuals

The *Opulous* decision stands as a clear cautionary tale for foreign companies and individuals about the impact of their social media usage in compelling them to defend claims in U.S. courts.

As practical matters after *Opulous*, all foreign companies and individuals should:

1. Closely reevaluate the nature of their corporate and personal social media usage;
 2. Scrutinize any applicable policies and procedures regarding social media;
 3. Ensure that business and marketing personnel are adequately trained, so that they do not unwittingly engage U.S. courts' jurisdiction or generate other legal issues; and
 4. Always err on the side of caution when posting on social media, as it is an increasingly integral and omnipresent aspect of contemporary business.
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[1] *Walden v. Fiore*, 571 U.S. 277, 290, n. 9 (2014) ("We leave questions about virtual contacts for another day.").

[2] *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 890 (2011) ("But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case.").

[3] See also *Wright & Miller*, Fed. Prac. & Proc. Civ. § 1073 (4th ed.) and the cases there cited, particularly *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1121 (W.D. Pa. 1997).

[4] <https://opulous.org/>.

[5] *Opulous* had not been served, nor appeared in the action, so the court did not make any findings regarding *Opulous*.

[6] Plaintiff admitted that the court lacked general jurisdiction over both defendants.

[7] *Sunshine Distribution, Inc. v. Sports Auth. Michigan, Inc.*, 157 F. Supp. 2d 779, 788 (E.D. Mich. 2001) (citing Advisory Committee Notes regarding Rule 4(k)(2).); also see 5 Patry on Copyright § 17:141.