20-602

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NIKE, INC., CONVERSE INC.,

Plaintiffs,

NEXT INVESTMENTS, LLC,

Interested Party Appellant,

v.

BANK OF CHINA, AGRICULTURAL BANK OF CHINA, BANK OF COMMUNICATIONS, CHINA CONSTRUCTION BANK, CHINA MERCHANTS BANK, INDUSTRIAL AND COMMERCIAL BANK OF CHINA LIMITED,

Appellees,

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On Appeal from the United States District Court
for the Southern District of New York, No. 1:13-cv-081012-CM-DCF

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF APPELLANT

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JIANYING CHEN, JIANYU TANG, JIE WANG, JIE WEI, JIM FRICKER, JINFENG ZHANG, JINGMEI ZHOU, JINHUI HUANG, JINHUI ZHENG, JINYING KE, JOE AUSTIN, JOHN PEIR, JOIN LIN, JORDAN BATTERS, JULIE LOCHHEAD, KATEILA SMITH, KATHY PEYTON, KAYLA MOORE, KE HAI HAI, KE TIANRONG, KERRY BOLTON, KRYSTIAN, KUN CHEN, KYLON BUTLER, LAI LI YING, LANG QING, LARRY RHODES, LATIN MALIN, LAUREN DARKE, LEO PAQUETTE, LI HAI DAO, LI HAIDAO, LI NING, LI QI MIN, LI RENFEN, LI YANGYANG, LI YAYUN, LI YU HONG, LI YUAN MAO YI YOU XIAN GONG SI, LIMING CAI, LIN BAO ZHU, LIN CHANGQING, LIN FANG, LIN FENGYING, LIN HUA CONG, LIN JI, LIN JIAN, LIN JUN DA, LIN LI-MEI, LIN MEI YING, LIN MEIQIN, LIN QINGFENG, LIN XIU YING, LIN ZHANG QING, FENGYUN LIN, LISU MOTOL, LIU GUI LAN, LIU KAI YANG, LIU MEIHUA, LIU QIAO QIN, LIU YIFEI, LIU ZHEN HU, LIU ZHENG BIN, LIU ZHI HONG, LIUYIFEI LIUYIFEI, LIZHU MA, LOUISA KORNBERGIN, LUO QIUHUA, LV HUIWU, LVZHONGTIAN, MABELLE WEIG, MALIK DAVIS, MAO GUANG YUAN, MARSHALL MATTHEW, MARTIN LESSMANN, MEILIAN HUANG, MEIXIA ZHENG, MEIYAN LIU, MELVIN SAUNDERS, MICHAEL MARCOVICI, MICHAEL VICK, MING FANG, MING YUAN MAO YI YOU XIAN GONG SI, MOTAO, JOHN MURRAY, NATORIOUS DOUGLAS, NIAN HUA, NIANHUA TANG, NICOL DUCHAINE, NIKOLAJ CHERNETS, NO BUH, OU KAI SEN, PAN BING HUANG, PANG NIAN, PEIR JUNCK, PHILLIP BELL, PIN PAI51, PING FANG, PING LI, QI MIN LI, QIAN SHUYING, QIAN XIANGONG, QIMING TRADE CO. LTD, QIN YAO, QING LANG, QING WEN CHEN, QINGSHI FANG, QUI JING, QUNAR LEE, QUNHONG KE, REBECA FOSBURGH, REN GUOYING, REN QING HUANG, REN ZHI JIE, REN ZHI MIN, REN ZHI TONG, REN ZHIMIN, RENE PALEY, RENFEN LI, RICK LI, DBA 163.CA INC., ROBBIE CLARK, ROBERT SMITH, RONNY SEFFNER, ROY STOTTS, SACAJ BOXANGEL, SALE JORDANER, SAMANTA BANGAREE, SAN ZHANG, SANCHUN WU, SANDYC, SAN ZHANG, SAWYER LIN, SEBASTIAN SCHWARZ, SHANNON BENNETT, SHANSHAN GAO, SHAOTONG QIANG, SHEN QINGSHUI, SHENGZE YANG, SHI HUA, SHI SHAO LIAN, SHI SHENG XU, SHIJIE CHEN, SHINSAKU DROCK, SHIYU XU, SHURONG LIN, SMITH CHEN, SONG YONG GAN, SONG YONG JIN, STACY PEACOCK, STEFANO CECCONI, SUN JIN, SUQIN YANG, SURONG ZHU, TAMERRA BARRETT, TANG GUO, JIAN TANG YING, TANG NIANHUA, TANIESHA SYMISTER, TIANRONG KE, TIE NING ZHUO, TIFFANY JARVIS, TIM RHUDY, TIMOTHY SAULMON, TINGTING XIA, TODD AMIRA, TONG

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ZHENGGANG, TONI WU, TRACY DRIVER, WAGNER CHRIS, WANG BAO GUO, WANG BING YUAN, WANG FULONG, WANG JIE, WANG RU JUN, WANG XIANG, WANG XIN FEN, WANLU HUANG, WATER LIN, WEI HUANGJIE, WEIJIA YIN, WEN BEN ZHOU, WENG QING YUN, WENG QING ZHONG, WENG TIAN RONG, WENG XUE JING, WENG YANCHUN, WILLA WHARTON, WILLIAM CLARK, WINCHESTER DEAN, KEION WOODSON, WU JIU MEI, WU QINGFENG, WU SONG YE, WU XIUYAN, WU YAN, WU ZIQIANG, XIA LING QIN, XIANG YONG ZHENG, XIANGHANG003 LIN, XIAO LIN ZHENG, XIAO XIAO PING, XIAOFEI WANG, XIAOQING ZHANG, XIAOQIONG WU, XIAOSI FU, XIAOYUN WANG, XIE HAN ZHOU, XIN ZHANG, LIN XIONG, XIONGFEI TRADE CO. LTD, XU JIN TIAN, XU LI LI, XU LINYING, XU MIN FANG, XU SHI YI, XU WEIHAI, XU ZHI QIANG, YANG HAIQI, YANG HUI XIN, YANG JUN JIE, YANG LI, YANG LIN, YANG RONG'E, YANG SU QIN, YANQING ZHU, YE DONG, YEGENG TIAN, YIDA TRADE CO.,LTD, YONG LIN HUANG, YONG LIN LIN, YONG ZHENG, CONOR YOUNCOFSKI, YU BIN BIN, YU HANG, YU JIE, YU XIAN WU, YU XIAO, YU ZHI QIANG, YUAN XIAOYAN, YUANQIU CAI, YUE MANAGER, YURONG HUANG, YUYANG LV, ZELDA SPINGARN, ZENYU LIN, ZEYNAB BSTALVEY, ZHAN CUI BIN, ZHAN CUIBIN, ZHANG FENG CHUN, ZHANG FENG LAN, ZHANG FENG YU, ZHANG FENGCHUN, ZHANG GUOFU, ZHANG JIA FU, ZHANG JIU CHU, ZHANG SAN, ZHANG SANSAN, ZHANG SHAN, ZHANG WEI, ZHANG WEI PING, JUN ZHAO PU, ZHAO MIN GUI, ZHAO ZEYING, ZHENG JIAN FEN, ZHENG JIN HUI, ZHENG JIN TAO, ZHENG JIN ZHAO, ZHENG JINHUI, ZHENG LAN YING, ZHENG LIMEI, ZHENG SHI JIE, ZHENG WEN ZONG, ZHENG XIANG YONG, ZHENG YANG MEI, ZHENG YUEFEN, ZHENG ZHI HONG, LANYING ZHENG, ZHENGYU LIN, ZHEYU LIN, ZHI JIEREN, ZHIXIONG HUANG, ZHIYUAN DAI, ZHONG ZHENNING, ZHOU DADI, ZHOU KAI, ZHU FU, ZHUO TIE NING, ZHUO ZHEN, ZITA BINDER, ZUSONG CHEN, SECUREONLINEPAY@HOTMAIL.COM, DBA WWW.SOCCERUMARKET.COM, UNIVERSITY JHUG LIMITED, DBA WWW.YES-SHOE.COM, DBA WWW.YESSHOE.NET, GUO JIANCONG, REN GUO YING, YAN LI FANG, YINGCHUN YUAN, YUAN YING CHUN,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae, the Association of American Publishers ("AAP"), is a non-profit association of book, journal, and education publishers. AAP has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

Dated: June 5, 2020

/s/ Matthew J. Oppenheim

Counsel of Record

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STATEMENT OF IDENTITY AND INTEREST[1]

AAP is the national trade association of the United States book and journal publishing industry. AAP represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions and enable publishers to effectively enforce their intellectual property rights.

The publishing industry routinely protects its books and journals by asserting rights in copyright, on which AAP primarily focuses, in U.S. federal courts. Because publishers' works often bear their trademarks, publishers asserting claims for copyright infringement often simultaneously assert claims for trademark infringement. Although the case at bar involves trademarks, if upheld, the District Court's decision below would have the same negative impact on copyright holders' efforts to enforce their rights as it would on trademark owners.[2]

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[1] Pursuant to Fed. R. App. P. 29(a)(2) & (4)(E) and Local Rule 29.1(b), AAP states that all parties to this appeal have consented to the filing of this brief; none of the parties or their counsel authored this brief in whole or in part; and other than AAP, no one contributed funding toward this brief.

[2] Moreover, in the absence of applicable trademark law under the Lanham Act, courts will look to analogous provisions of the Copyright Act. *See, e.g., Coach, Inc. v. Allen,* No. 11-cv-359-CM-FM, 2012 WL 5359579, at *3 (S.D.N.Y. July 20, 2012) ("courts often have looked for guidance to the better developed case law under the Copyright Act, 17 U.S.C. § 504(c), an analogous statute that authorizes an award of

The publishing industry has long fought against the unauthorized reproduction and distribution of both physical and digital copies of published works. Counterfeit books typically come into the United States from overseas, where they are printed at low cost printers without licenses from the rights owners. Likewise, sellers of unauthorized digital (i.e., pirated) publications are typically based overseas.

For many years, infringement occurring overseas was localized to those overseas regions. However, with the widespread availability of the Internet, as well as the rapid low-cost global delivery of goods, counterfeit and pirated products have now infected the U.S. market on a massive scale. This infringement denies U.S. publishers legitimate sales. Additionally, because infringers sell at prices that are well below market, counterfeit and pirated goods devalue publishers' legitimate works in the eyes of consumers. The ripple effect of this illegal behavior not only undermines publishers' investments in scholarly and creative books and journals, but also undermines the entire U.S. economy.

Overseas infringers routinely use foreign financial institutions to hide the proceeds from their illegal sales in the United States. After being paid for illegal sales, infringers frequently, and quickly, transfer ill-gotten gains through U.S.

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statutory damages for willful copyright infringement"); *Sara Lee Corp. v. Bags of New York, Inc.*, 36 F. Supp. 2d 161, 166 (S.D.N.Y. 1999) (noting that the copyright and trademark laws are "similar in principle").

financial institutions to foreign banks, assuming the illegal proceeds will remain outside the publishers' reach.

In order to stop ongoing infringement and secure potential recoveries, publishers often seek and obtain preliminary relief in the form of temporary restraining orders and preliminary injunctions, which include asset freezes. As infringers are, by definition, violating the law, publishers also routinely obtain judgments in their favor; however, these are often default judgments, because infringers frequently do not appear in court to answer for their actions. Because asset freezes are frequently disregarded by defendants and their foreign financial institutions, default judgments have all too often become hollow victories. Our founding fathers recognized the critical need to protect copyrights in the U.S. Constitution, by instructing Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. Const. art 1 § 8, cl. 8. That Constitutional imperative should not be left toothless.

If upheld, the District Court's decision, concluding that the injunctions did not bind the Chinese banks ("Banks") and declining to hold them in contempt, renders traditional and equitable asset freezes worthless—or at least seriously diminishes their value. Such a decision would ultimately frustrate rights holders' abilities to avail themselves of the protections the U.S. intellectual property laws are intended to afford. AAP urges this Court to reverse the decision below and issue a ruling that corrects the legal errors in the decision and remands for a finding of contempt, as argued by the Appellant Next Investments, LLC ("Appellant"). Such a ruling will help ensure that victims of infringement have effective legal recourse.

SUMMARY OF ARGUMENT

Counterfeiting and piracy have a devastating effect on the U.S. and global economy. Among other harms, counterfeit and pirated goods displace legitimate sales, reduce incentives to create new products, damage business reputations, and disadvantage consumers. Finding effective ways to control counterfeiting and piracy has become a priority for the federal government.

As detailed below, the U.S. publishing industry, which forms an integral part of the overall U.S. economy, is particularly hard-hit by counterfeiting and piracy. U.S. publishers are a critical element of the worldwide educational system and enable the exchange of ideas through the written word. Publishers invest heavily in the creation and promotion of their works and the building of their reputations for publishing quality goods. In turn, publishers rely on their rights in copyright and trademark to protect these investments.

Publishers often seek enforcement of their intellectual property rights by bringing actions in federal court. In actions against counterfeiters and digital pirates, obtaining injunctive relief in the form of asset freezes has become essential to ensuring that assets remain to provide the publishers with the relief to which they are entitled. Federal courts routinely grant asset freezes based on their inherent equitable powers and the provisions of the Copyright Act and the Lanham Act authorizing broad injunctions. However, asset freeze orders are only effective if the financial institutions holding the defendants' ill-gotten proceeds comply with the orders.

In concluding that the Banks could not be held in contempt for their failure to comply with the asset freeze orders in the case at bar, the District Court negated the prior orders it had entered to protect the plaintiff trademark owners. The District Court's untenable decision undermines, if not eliminates, the utility and value of asset freezes, particularly in the case of piracy, where infringers commonly operate from overseas and, via U.S. financial institutions, transfer the proceeds from their illegal sales to foreign financial institutions. If left to stand, the decision will enable foreign banks to act with impunity in ignoring U.S. court orders; embolden defendant infringers to continue their illegal businesses and collect their ill-gotten proceeds with no meaningful accountability; and allow infringement by international actors to continue to flourish, causing incalculable damages to the publishing industry and the U.S. economy as a whole.

In addition to these problematic outcomes, the District Court's decision is legally flawed. While the Appellant's brief addresses the array of legal errors in the decision, AAP focuses here on several of the issues that it believes are most likely to arise in its members' cases. First, the District Court's decision can be construed to create a "routine banking" exception to Federal Rule of Civil Procedure 65(d)(2) that is not grounded in law and would all but eliminate the purpose of asset freezes in infringement cases. Second, the District Court erred in concluding that a post-judgment asset freeze order is invalid, where the Federal Rules of Civil Procedure, the Copyright Act, and the Lanham Act make clear that such orders fall within the federal courts' equitable powers and authority created by the statutes (and where such orders are needed to ensure that rights holders ultimately obtain relief against infringers, who are likely to secrete their assets before and after judgment is entered). Third, the District Court mistakenly applied the New York state "separate entity" rule, which does not apply to the case at bar because federal courts have the inherent equitable authority to issue asset freezes based on federal law, and which is irrelevant in any event where the District Court already had specific personal jurisdiction over the Banks.

AAP respectfully submits that the District Court's decision should be reversed and remanded with direction to hold the Banks in contempt.

ARGUMENT

I. PIRACY HAS A SEVERE, NEGATIVE IMPACT ON THE PUBLISHING INDUSTRY AND THE U.S. ECONOMY GENERALLY.

A. The Publishing Industry Is Integral to the U.S. Economy.

Publishing forms an integral part of the nation's core copyright industries, which collectively add more than $1.3 trillion in annual value to the U.S. gross domestic product, accounting for 6.85% of the U.S. economy. Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2018 Report* at 6, https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf. Indeed, for the first three months of 2020, U.S. book publisher sales have totaled $2.6 billion. AAP StatShot Report, https://publishers.org/news/aap-march-2020-statshot-report-publishing-industry-declines-8-4-for-month-flat-year-to-date/ (last visited June 5, 2020). Not surprisingly, the U.S. publishing industry supports an extensive network of American businesses and hundreds of thousands of jobs.[3] Moreover, the U.S. publishing industry serves not only as a critical component of the national economy, but also functions as an essential part of the worldwide educational system—

[3] For instance, in January 2020, over 766,000 people were estimated to be working in print or software publishing companies in the United States. Amy Watson, *Employment in U.S. Publishing Industries from 2001 to 2020*, https://www.statista.com/statistics/184360/employment-in-us-publishing-industries-since-2001/ (Apr. 24, 2020).

publishing education materials and enabling the exchange of ideas through the written word.

B. Piracy Has Wreaked Havoc on the Economy.

The increasing prevalence of counterfeiting and digital piracy has wreaked havoc on the global economy. In 2016, international trade in counterfeit and pirated products amounted to as much as $509 billion—an astounding 3.3 percent of world trade—compared to $200 billion in 2005.[4] Organisation for Economic Co-operation and Development, *2019 Trends in Trade in Counterfeit and Pirated Goods* at 11, http://www.oecd.org/corruption-integrity/reports/trends-in-trade-in-counterfeit-and-pirated-goods-g2g9f533-en.html. In the United States, the International Trade Administration estimated that in 2016, counterfeiting and piracy cost the U.S. economy $200-$250 billion and 750,000 jobs annually. Better Business Bureau, *Fakes Are Not Fashionable: A BBB Study of the Epidemic of Counterfeit Goods Sold Online* at 3, https://www.bbb.org/globalassets/local-bbbs/st-louis-mo-142/st_louis_mo_142/studies/counterfeit-goods/BBB-Study-of-Counterfeit-Goods-Sold-Online.pdf ("BBB Report"). In 2019, U.S. customs agencies seized some $1.5 billion in counterfeit goods. U.S. Customs and Border Protection, *Intellectual Property Rights Seizure Statistics Fiscal Year 2019* at 2,

[4] These numbers actually understate the overall problem, as they do not take into account domestically-produced counterfeit and pirated goods or pirated digital products. *Id.*

https://www.cbp.gov/sites/default/files/assets/documents/2020-May/FY%202019%20IPR%20Seizure%20Powerpoint%20FINAL%20PBRB%20APPROVED_0.pdf. Moreover, according to the BBB Report, a quarter of American consumers have admitted to purchasing a pirated or counterfeited product online. BBB Report at 1.

The harm inflicted by counterfeiting and piracy on American consumers and businesses is so substantial that eradicating it has become a national priority. On April 3, 2019, the White House released a memorandum declaring that "[p]reventing the manufacture, importation, and sale of counterfeit and pirated goods is a priority" for the U.S. government. Presidential Memoranda, *Memorandum on Combating Trafficking in Counterfeit and Pirated Goods*, https://www.whitehouse.gov/presidential-actions/memorandum-combating-trafficking-counterfeit-pirated-goods/ (Apr. 3, 2019). Similarly, on January 24, 2020, the Department of Homeland Security ("DHS") released a report proclaiming that it finds "the current state of e-commerce to be an intolerable and dangerous situation that must be addressed firmly and swiftly by strong actions . . . ." DHS, *Combating Trafficking in Counterfeit and Pirated Goods*, *Report to the President of the United States* at 10, https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf (Jan. 24, 2020) ("DHS Report"). A week later, President Trump issued an executive order aimed at blocking the sale of contraband

and counterfeit goods online. Executive Order, *Ensuring Safe & Lawful E-Commerce for US Consumers, Businesses, Government Supply Chains, and Intellectual Property Rights*, https://www.whitehouse.gov/presidential-actions/ensuring-safe-lawful-e-commerce-us-consumers-businesses-government-supply-chains-intellectual-property-rights/ (Jan. 31, 2020).

In particular, the DHS Report noted that "[c]ounterfeits . . . erode U.S. economic competitiveness and diminish the reputations and trustworthiness of U.S. products and producers." DHS Report at 7. Counterfeit goods are routinely sold at low prices to unsuspecting consumers through mainstream e-commerce platforms and third-party online marketplaces, diminishing businesses' abilities to sell their genuine items and compete. *See id.* at 8. And when plaintiffs attempt to stop and secure judgments against counterfeiters, they are met with considerable barriers. Even the U.S. government acknowledges that legal action against foreign counterfeiters is "extremely difficult," and "existing laws and regulations largely shield foreign counterfeiters from any accountability." *Id.* at 19-20 ("When sellers of illicit goods are in another country, they are also exposed to relatively little risk of criminal prosecution or civil liability under current law enforcement and regulatory practices.").

C. The Publishing Industry, In Particular, Is Hard-Hit by Piracy.

Digital piracy and counterfeiting are rampant and pervasive problems in the publishing industry. As consumers increasingly rely on digital forms of written content, the illicit reproduction and electronic distribution of copyrighted material has continued to grow, impacting the return on sizeable investments made by publishing houses in the development, production, and publication of books and journals. *See* Brett Danaher, Michael D. Smith & Rahul Telang, *Piracy Landscape Study: Analysis of Existing and Emerging Research Relevant to Intellectual Property Rights (IPR) Enforcement of Commercial-Scale Piracy* at 4, https://www.uspto.gov/sites/default/files/documents/USPTO-Piracy%20Landscape-03-20-2020nr.pdf (Mar. 20, 2020).

The physical counterfeiting problem is growing. Sales of counterfeit books displace sales of legitimate books. The proliferation in recent years of popular online marketplaces as venues to sell counterfeit books inexpensively and anonymously has intensified the problem. *See* AAP Submission, *Request for Public Comment: Report on the State of Counterfeit and Pirated Goods Trafficking and Recommendations* at 1-2, https://www.regulations.gov/document?D=DOC-2019-0003-0022 (July 29, 2019) ("AAP Comments"). As advances in technology have made it easier to replicate books, their illegal reproduction has become less expensive, making counterfeiting faster and more profitable for infringers, thus increasing its prevalence. For instance, while counterfeiting originally concentrated on academic textbooks and higher education markets, in recent years it has spread to commercial fiction and non-fiction books. *See Comments of the Authors Guild, Inc. in the Matter of the State of Counterfeit and Pirated Goods Trafficking and Recommendations* at 2-3, https://www.authorsguild.org/industry-advocacy/the-current-state-of-counterfeiting-and-recommendations/ (July 29, 2019).

Publishers devote significant resources to the creation, support, and promotion of literary works. Piracy undermines these investments and steals the fruits of publishers' and authors' intellectual labors. Beyond direct financial harm, piracy undermines publishers' brands. Many publishers have spent decades cultivating their reputations, which are indisputably damaged by the sale of counterfeit or pirated publications of inferior quality, bearing their famous trademarks. *See* AAP Comments at 4-5 ("For the publishing industry, the availability of counterfeit and pirated books inflicts significant harm with respect to lost sales, or loss of goodwill arising from a disappointing consumer experience when a poorly produced counterfeit book is received in place of the expected legitimate version."). The sale of counterfeit or pirated publications also causes harm to unsuspecting consumers, such as the students who buy textbooks that fall apart or, worse, are missing pages. In addition, piracy undercuts the perceived value of authentic works, impacting publishers' ability to sell those works, as well as their relationships with consumers, authors, distributors, and others in the legitimate chain of commerce.

II. THE DISTRICT COURT'S DECISION PROTECTS FOREIGN INFRINGERS' BUSINESS MODELS AND, IF UPHELD, WOULD DENY RIGHTS OWNERS RELIEF.

A. Many Infringers' Business Models Depend on Foreign Financial Institutions.

Foreign infringers are no longer content to profit from infringement in their own communities and have turned to the U.S. marketplace to grow their illegal businesses. Time and again, U.S. publishers have experienced how overseas infringers take the profits they have collected from their illegal U.S. sales and quickly transferred them from U.S. to overseas financial institutions. *See id.* at 4. By way of example, overseas infringers using online marketplaces, such as Amazon and eBay, will often i) charge purchasers using financial intermediaries, such as Amazon's built-in financial system, or independent payment processors, such as PayPal or Stripe; ii) link foreign bank accounts to their financial intermediary accounts; and iii) transfer their proceeds to the foreign banks, which may require that another U.S. financial institution, such as a U.S. branch of the foreign bank, facilitate the transaction. *See, e.g., Cengage Learning, Inc. v. Morena for International Trading*, No. 19-cv-1727 ("*Morena*"), Decl. of Michele Murphy (filed with default judgment motion) at 5 (ECF No. 57-6) (N.D. Ill. June 6, 2019) ("Accounts affiliated with at least 12 banks are linked to Defendants' PayPal and Amazon accounts used to conduct their infringing activity. Relatively little remains in these accounts as Defendants consistently moved the proceeds from their illegal activities overseas."); *accord Nike, Inc. v. Wu*, No. 13-cv-8012-CM ("*Nike*"), Exh. 8 to Decl. of Sara Perles (ECF No. 208-1) (S.D.N.Y. July 19, 2019) (chart reflecting foreign bank accounts linked to counterfeiters' PayPal accounts). The foreign infringers need the foreign banks to ignore the U.S. court orders in order for them to reap the proceeds from their blatantly illegal behavior. *Cf. McGraw Hill LLC v. Doe 1 d/b/a abetterdeal3*, No. 20-cv-356-LJL, Decl. of Matthew Fleischman at 7 (filed with TRO/PI motion) (ECF No. 5) (S.D.N.Y. Jan. 23, 2020) ("In my experience representing Plaintiffs . . . I have repeatedly seen defendants (all online sellers of counterfeit textbooks) violate injunctions restraining their assets and inventory of Plaintiffs' textbooks in an attempt to thwart Plaintiffs' enforcement efforts."); *accord Nike*, Decl. of Jan Maarten Laurijssen at 8-9 (ECF No. 7) (S.D.N.Y. Nov. 21, 2013).[5]

B. An Asset Freeze Issued by a Federal Court Must Be Enforceable.

Given these challenges posed by foreign infringers, effective equitable injunctions—particularly asset freezes—are critical. Without them intellectual

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[5] U.S.-based infringers have also capitalized on this business model. For instance, certain domestic online pirates rely on foreign banks, payment processors, and other intermediaries, such as foreign web hosts and domain registrars, to support their illegal businesses, hide their identities, and ultimately enable the sale of infringing publications in the United States.

property owners will frequently have no mechanism by which to vindicate their rights, and deter counterfeiting and piracy. As Judge Pauley has recognized, "the best way to prevent future infringement is to enjoin future infringement." *John Wiley & Sons, Inc. v. Book Dog Books, LLC*, 327 F. Supp. 3d 606, 638 (S.D.N.Y. 2018). The District Court's decision in the case at bar severely undermines the important safeguards that injunctions like asset freezes are intended to provide.

Indeed, asset freezes are commonly sought by plaintiffs and granted by courts in infringement cases. *See, e.g., Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 132 (2d Cir. 2014) (citing rulings by Fifth, Ninth, and Eleventh Circuits and "[c]ountless district courts" in Lanham Act cases holding that "district courts have the authority to issue a prejudgment asset restraint injunction in favor of plaintiffs seeking an accounting against allegedly infringing defendants"); *Cengage Learning, Inc. v. Doe 1*, No. 18-cv-403-RJS, 2018 WL 2244461, at *3 (S.D.N.Y. Jan. 17, 2018) (issuing an injunction as to "assets that are proceeds of [d]efendants' counterfeiting operations" in copyright and trademark infringement case); *Warner Bros. Entm't Inc. v. Doe*, No. 14-cv-3492-KPF, 2014 WL 12543818, at *4 (S.D.N.Y. May 29, 2014) (enjoining defendants from transferring or withdrawing funds pursuant to the Lanham Act and Copyright Act); *Balenciaga Am., Inc. v. Dollinger*, No. 10-cv-2912-LTS, 2010 WL 3952850, at *7 (S.D.N.Y. Oct. 8, 2010) (recognizing that courts have "authority to freeze [defendants'] assets insofar as they could be used to satisfy an award of their profits pursuant to [p]laintiffs' Lanham Act claims").

A court's inherent equitable powers provide a basis for issuing asset restraints. *See, e.g.*, *Balenciaga*, 2010 WL 3952850, at *7 ("where plaintiffs seek both equitable and legal relief in relation to specific funds, a court retains its equitable power to freeze assets") (quoting *Wishnatzki & Nathel, Inc. v. H.P. Island-Wide, Inc.*, No. 00-cv-8051-JSM, 2000 WL 1610790, at *1 (S.D.N.Y. Oct. 27, 2000)). In addition, a federal court has broad statutory power to grant injunctions as necessary under the Lanham Act and the Copyright Act. *See* 15 U.S.C. § 1116(a) (authorizing injunctions "according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark"); 17 U.S.C. § 502(a) (a court may "grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright"); *see also WowWee Grp. Ltd. v. Haoqin,* No. 17-cv-9893-WHP, 2019 WL 1316106, at *5 (S.D.N.Y. Mar. 22, 2019) (imposing an asset freeze and finding that "the Lanham Act and the Copyright Act both endow courts with the power to grant injunctive relief"). When it comes to asset freezes and injunctions, overseas financial institutions that are subject to personal jurisdiction should be subject to the same obligations as a U.S. financial institution.

Asset restraints ensure that an infringers' revenue from illegal infringement is preserved and available to satisfy an eventual judgment, by preventing the improper dissipation of those assets. Indeed, courts have specifically recognized that the "purpose of freezing assets" in this manner "is to preserve security for [plaintiffs'] future recovery on an accounting of the counterfeiter's profits." *Cengage Learning*, 2018 WL 2244461, at *3 (quoting *N. Face Apparel Corp. v. TC Fashions, Inc.*, No. 05-cv-9083-RMB, 2006 WL 838993, at *3 (S.D.N.Y. Mar. 30, 2006)). Meanwhile, such asset freezes also pose a strong and immediate deterrent to unlawful counterfeiting and piracy activities, both by undermining the profit motive to participate in piracy activities in the first place, and by limiting infringers' ability to shift their operations and pay the manufacturers, employees, and third-party service providers necessary for the continuation of their illegal business.

If Courts cannot issue asset freezes that are meaningful, infringers are free to transfer their illicit revenues to overseas accounts, making it impossible for plaintiffs to recover the relief to which they are entitled. Indeed, the facts of the case at bar and similar cases make clear that, by the very nature of their illegal business, counterfeiters and pirates (especially those who operate anonymously online) have shown a willingness to disregard U.S. law and can be expected to ignore asset freeze orders and secrete assets if given the chance. *See, e.g.*, *Dama S.P.A. v. Does*, No. 15-cv-4528-VM, 2015 WL 10846737, at *2 (S.D.N.Y. June 15, 2015) (freezing assets in PayPal accounts of likely foreign defendants with incentive and capacity to hide assets and who are not likely to preserve sufficient funds to satisfy judgment); *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 327 (S.D.N.Y. 2005) (finding prejudgment attachment appropriate where defendants are "foreign individuals and corporations who have both incentive and capacity to hide their assets"); *Elsevier, Inc. v. Does 1-10*, No. 16-cv-1245-RA, Ex Parte Order (ECF No. 13) (S.D.N.Y. Feb. 2, 2016) (finding that use of aliases, among other measures, to operate infringing enterprise demonstrates the likelihood that, if defendant counterfeiters were to receive advance notice of the application for an injunction, "[d]efendants could moot [p]laintiffs' ultimate relief by moving their assets beyond the reach of the [c]ourt"). This makes it all the more critical that asset restraint orders apply to and are followed by the defendants' financial institutions holding the defendants' assets.

Finally, as a corollary to hiding and dissipating assets, Congress has specifically recognized that counterfeiters are likely to take steps to evade enforcement of trademark and copyright laws through evidence destruction. *See* Joint Statement, 130 Cong. Rec. H 12,080 (1984) ("[M]any of those who deal in counterfeits make it a practice to destroy or transfer counterfeit merchandise when a day in court is on the horizon."); *see also Pearson Educ., Inc. v. Awan*, Case No. 18-cv-402-DLC (ECF No. 92) (S.D.N.Y. Sept. 28, 2018) (case where defendants destroyed textbooks published by plaintiffs in their inventory and liquidated all funds from U.S. financial accounts in violation of temporary restraining order); *Pearson Educ., Inc. v. Heliosbooks Inc.,* Case No. 17-cv-00203-DAB (ECF No. 93) (S.D.N.Y. July 24, 2017) (case where, after receiving notice of complaint, defendants directed Amazon to remove more than 3,600 potentially counterfeit textbooks from defendants' inventory and one defendant shipped its books to an entity that subsequently shipped them to Africa). Such conduct underscores the need for injunctive relief to extend to financial institutions and other intermediaries that assist defendants' infringing enterprises.

C. The Publishers' Litigation Experiences Demonstrate the Critical Need for Effective Asset Freezes.

Like Nike and Converse, U.S. publishers suing for infringement frequently obtain temporary restraining orders ("TRO(s)") and preliminary injunctions ("PI(s)") that include asset freezes, along with expedited discovery orders to enable them to identify defendants and their financial accounts. However, such relief is only meaningful if the courts' orders are enforceable. All too often, defendants and their foreign financial institutions ignore these orders, believing they are beyond the court's reach. Further, infringers frequently refuse to appear to defend their actions, leaving the plaintiffs unable to determine the true scope of the infringement, identify the infringers' sources of pirated goods, and, ultimately, enforce and collect on the default judgments they obtain. Indeed, such default judgments have little value if the court's injunctions and asset freezes cannot be effectuated. And, in the absence of real relief, not only are publishers uncompensated for the specific infringement that was part of the case, but the infringers are undeterred from continuing in their illegal conduct. Indeed, they end up being rewarded for their illegal behavior.

This pattern has repeated itself in numerous cases brought by AAP members, including in the examples below. In each case, educational publishers sued for copyright and/or trademark infringement and obtained asset freezes and expedited discovery orders. Similar to the orders in the case at bar, these asset freezes make clear they apply to financial institutions that receive actual notice thereof, including language requiring, in sum and substance, that financial institutions and/or third parties immediately locate accounts holding or receiving money or other assets owned by or connected to the defendants, and immediately cease transferring, withdrawing, or otherwise disposing of such monies or assets.

In *Elsevier Inc. v. Siew Yee Chew*, 17-cv-6225-JGK (S.D.N.Y.), four publishers sued multiple defendants, including four based in Malaysia, who sold counterfeit textbooks through online storefronts. The Malaysian defendants operated under multiple business names and aliases that changed often in order to conceal their true identities. The publishers learned through discovery that, notwithstanding the TRO/PI enjoining further infringement, the defendants continued to sell counterfeits through other previously unidentified online storefronts, reaping substantial profits. For instance, PayPal's records showed that

$7.6 million had passed through just one of the accounts linked to one of the defendants' storefronts. These funds were then transferred to accounts at Malaysian banks. The publishers later learned through discovery that the defendants were the same website operators they had previously sued in another infringement lawsuit years before, *Cengage Learning, Inc. v. Bhargava*, Case No. 14-cv-3174-DAB (S.D.N.Y.). The defendants never responded to the complaints in either case, and, due to their efforts to hide assets in foreign banks, the publishers have been unable to collect on the $700,000 and $3,000,000 default judgments that the courts awarded.

In *Morena* (No. 19-cv-1727 (N.D. Ill.)), four publishers brought suit against multiple defendants operating a massive counterfeiting ring with participants in Jordan, China, Hong Kong, the United Arab Emirates, and the United States. The defendants imported into the U.S. tens of thousands of counterfeit textbooks likely manufactured in China. Through discovery, the publishers identified numerous fake identities used by the defendants to sell their counterfeits to individual online purchasers and an extensive network of U.S. commercial resellers. The publishers also uncovered the defendants' attempts to destroy counterfeit books and documentary evidence, rather than appear before the court. Funds from the infringing sales were transferred abroad, including to Chinese, Jordanian, and UAE banks. The foreign banks refused to comply with the court's asset restraint or discovery order requiring the production of defendants' account records. Some simply ignored these orders; others responded but took the position that they did not need to cooperate because the U.S. court lacked the authority to restrain the defendants' accounts abroad. While the publishers ultimately received a default judgment that included $28,650,000 in damages, only pennies on the dollar have been collected.

Finally, in two ongoing cases, *Cengage Learning, Inc. v. Doe 1 d/b/a Allebooksvital.com* , Case No. 20-cv-769-JGK (S.D.N.Y.) and *Bedford, Freeman & Worth Publishing Group, LLC v. Does 1-30*, Case No. 19-cv-10524-LAK (S.D.N.Y), five publishers filed suit against the operators of 78 illegal websites selling pirated digital copies of Plaintiffs' eBooks. Through discovery, the publishers then identified hundreds of additional infringing websites operated by the defendants and transfers of millions of dollars between the defendants' accounts with U.S. payment processors and U.S. banks and foreign banks. For instance, in Case No. 20-cv-769-JGK, the payment processor Stripe identified more than $1,000,000 transferred out to over 40 foreign bank accounts. None of the foreign banks have produced the required banking records or made any effort to implement the asset freezes. Meanwhile, many defendants are continuing their infringing businesses, selling pirated eBooks to U.S. consumers on a massive scale and at a fraction of the price for legitimate eBooks. They are able to do so by concealing their identities, finding intermediaries, such as foreign webhosts, who will ignore injunctions and enable the infringing websites to remain active, and, critically, utilizing foreign banks that will continue to facilitate the infringing financial transactions while disregarding the court's asset freezes.

III. THE BANKS SHOULD HAVE BEEN HELD IN CONTEMPT FOR FAILING TO COMPLY WITH THE DISTRICT COURT'S ASSET FREEZE ORDERS.

A. The Banks Were Bound by the Court-Ordered Asset Freezes.

Federal Rule of Civil Procedure 65 and Second Circuit case law make clear that the Banks in the case at bar were bound by the District Court's asset freeze orders. *See* Appellant's Br. at 30-31. Pursuant to Rule 65(d)(2), asset restraints issued by a federal court bind all entities, including foreign banks, that have actual notice of the restraints and are "in active concert or participation" with the enjoined parties. As the Second Circuit has recognized, "once a district court issues a preliminary asset freeze order enjoining parties over whom it has jurisdiction, that injunction '*automatically forbids* others—who are not directly enjoined but who act "in active concert or participation" with an enjoined party—from assisting in [its] violation.'" *Gucci Am., Inc.*, 768 F.3d at 130 (quoting *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 243 (2d Cir. 2013)) (emphasis added).

1. The Orders Identified the Frozen Accounts.

As an initial matter, there is no dispute here that the Banks received actual notice of the asset freeze orders, and that those orders explicitly froze "any accounts held by, associated with, or utilized by" the defendant counterfeiters, whether "in the U.S. or abroad." *See* Appellant's Br. at 10, 24 (quoting ECF No. 3, at 10).

Moreover, the asset freeze orders included all the information necessary for the Banks to identify the frozen accounts, such as account numbers, accountholders' names, email addresses, and domain names. *See* Appellant's Br. at 24-27. Publishers routinely obtain asset freezes based on less-detailed information, which is often unavoidable given the challenges of identifying counterfeiters who operate online through anonymous websites or online storefronts. *See, e.g., Pearson Educ., Inc. v. ABC Books LLC,* No. 19-cv-7642-RA, TRO at 7 (ECF No. 29) (S.D.N.Y. Aug. 15, 2019).[6] Thus, Rule 65 makes it possible to bind financial institutions "in active concert or participation" with counterfeiters, so long as they receive actual notice of the restraint, without having to specifically identify the financial institutions in the first instance, secure entry of separate orders against them, or resolve issues of personal jurisdiction. Determining that asset freeze orders must include a higher level of detail to be enforceable against banks would not only be contrary to this principle, but would prove unworkable in practice. It would render

[6] When a plaintiff first brings an infringement case and is seeking preliminary relief, the plaintiff typically will not know the financial institutions, let alone the specific account numbers, that an infringer is using. *See, e.g.*, *id.* & Pl. Mem. of Law in Support of TRO at 34 (ECF No. 4) (S.D.N.Y. Aug. 15, 2019) (plaintiff publishers required discovery to learn the legal names and other identifying information regarding various Doe defendants).

unenforceable TROs and PIs against Doe defendants, allowing counterfeiters to abscond with funds in the interim, and unduly burdening courts with near-constant motions to amend injunctions with additional identifying information or bank account information.

2. The Banks Acted "In Active Concert and Participation" with the Counterfeiters.

The record also makes clear that the Banks acted "in active concert or participation" with the counterfeiters and were therefore bound by the asset restraints under Rule 65. *See* Appellant's Br. at 32-33. The Banks "knowingly assist[ed]" the counterfeiters by permitting them to continue to transfer assets into and out of their accounts—despite the Banks' knowledge that these accounts were being used in connection with the sale of counterfeit products—thereby enabling the counterfeiters to violate the District Court's asset freeze orders and continue their illegal counterfeiting. *See Arista Records, LLC v. Tkach*, 122 F. Supp. 3d 32, 36 (S.D.N.Y. 2015) (finding that third party service providers "fall within an injunction's reach if those services are knowingly used to facilitate injunction violations.").

3. No "Routine Banking Activity" Exception Applies.

The District Court's decision that the Banks' activities were permitted notwithstanding the asset freezes is fundamentally flawed on two levels. First, Rule 65(d)(2) has no exception that permits any bank, U.S. or foreign, to disregard a court's order for "routine banking activity." *See* Appellant's Br. at 34-38. The notion that foreign financial institutions get the benefit of an implicit, unwritten exception to Rule 65 is contrary to the law and judicial process. Second, even if there was an exception for "routine banking activity," it cannot be the case that knowingly facilitating an infringer's illegal activities is "routine business activity." *See id.* at 33-34. Indeed, the type of activity undertaken by the Banks falls squarely within the "active concert or participation" language of Rule 65(d)(2). Recognizing an exception permitting foreign banks to knowingly allow counterfeiters to transfer assets in violation of court-ordered asset restraints would eviscerate Rule 65's protections and render recovery effectively impossible in cases in which the defendant counterfeiters fail to appear or otherwise ignore court orders. The Banks' "routine banking activity" argument in essence implies that they should not be bound by the injunction because they were not motivated by a desire to help defendants violate the injunction; rather, they were merely providing the same service to defendants that they would provide to anyone else. But the Second Circuit has "held that a court's inquiry into the fact of aiding and abetting is 'directed to the actuality of concert or participation, without regard to the motives that prompt the concert or participation.'" *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186, 193 (2d Cir. 2010) (citation omitted); *see also Reliance Ins. Co. v. Mast Constr. Co.*, 84 F.3d 372, 377 (10th Cir. 1996) (rejecting routine banking argument because the violation could not have occurred "without the aid and assistance" of the financial institution).

4. Courts Have Frequently Bound Banks Under Similar Circumstances.

Indeed, numerous courts, including the Second Circuit, have applied similar asset restraint orders to bar foreign banks from transferring or disposing of counterfeiters' assets under similar circumstances. For example, in *Gucci*, this Court upheld the district court's authority to enter comparable asset freeze orders, under Rule 65, that barred foreign banks—including the Bank of China—from "transferring, disposing of, or secreting" counterfeiters' assets. 768 F.3d at 126, 129-30. In *NML*, this Court similarly approved an injunction prohibiting "entities involved in the system through which Argentina pa[id]" its bonds from "forward[ing]" or "transfer[ring]" certain assets. 727 F.3d at 239. In neither of these cases did the Court recognize any exception to Rule 65 for the type of banking activity at issue here.

The district courts for the Southern District of New York have also repeatedly entered similar asset freeze orders in trademark and copyright infringement actions brought by AAP member publishers against counterfeiters. *See, e.g.*, *Cengage Learning, Inc. v. Doe 1 d/b/a Allebooksvital.com*, 20-cv-00769-JGK, Amended PI (ECF No. 25) (S.D.N.Y. Mar. 19, 2020) at 5-6 (ordering "all those in active concert or participation with" defendants, and "any financial institutions, i.e., banks . . . that engage in the processing or transfer of money and/or other assets," to "immediately cease transferring, withdrawing, or otherwise disposing of any money or other assets in Defendants' Accounts or allowing such money or other assets in Defendants' Accounts to be transferred, withdrawn, or otherwise disposed of without prior Court approval"); *Pearson Educ., Inc. v. ABC Books LLC,* 19-cv-7642-RA, PI (ECF No. 33) (S.D.N.Y. Sept. 11, 2019) at 5-6 (ordering "all those in active concert or participation with" defendants, and "other relevant third parties who . . . operate or control accounts holding or receiving money or other assets" related to defendants' counterfeiting, to "immediately cease transferring, withdrawing, or otherwise disposing of any money or other assets in [d]efendants' [a]ccounts . . . ."); *see also Pearson Educ., Inc. v. Does 1 d/b/a Anything You Can Imagine*, 18-cv-7380-PGG, PI (ECF No. 59) (S.D.N.Y. Sept. 12, 2018) at 3-4; *McGraw-Hill Global Educ. Holdings, LLC v. Does 1-30*, 17-cv-6222-GHW, PI as to Certain Doe Defendants (ECF No. 21) (S.D.N.Y. Sept. 1, 2017) at 4.

These orders all recognize that banking activity that assists counterfeiters and pirates in transferring and disposing of the proceeds of their illegal activity amounts to acting "in active concert or participation" with them. For the same reasons, the Banks were bound by the asset freeze orders in the case at bar, and the District Court should have held the Banks in contempt for failing to comply with those orders.

B. Post-Judgment Asset Restraints Are Valid.

The District Court was also mistaken in finding that the default judgment's statutory damages award rendered the post-judgment asset restraints unenforceable.

See Appellant's Br. at 48-54. To the contrary, the District Court had authority to enter a post-judgment continuance of the pre-judgment asset restraints imposed by the TRO and PI. Such post-judgment asset freezes are valid and regularly entered, even in cases involving statutory damages. *See, e.g.*, *Tiffany (NJ) LLC v. Forbes*, No. 11-cv-4976-NRB, 2015 WL 5638060, at *3-4 (S.D.N.Y. Sept. 22, 2015) (entering post-judgment asset restraint "to prevent the very harm initially contemplated by the preliminary injunction," that counterfeiters will seek to evade the asset freeze and hide their assets); *see also* Appellant's Br. at 50 n.1 (citing cases).

Post-judgment asset restraints serve important purposes. In cases where the plaintiff "seeks statutory damages in lieu of an accounting," like the present case, a post-judgment "asset restraint is nonetheless appropriate to ensure that defendants do not hide assets." *Off-White LLC v. Baoding Springru Trade Co.*, No. 19-cv-674-RA-JLC, 2020 WL 1646602, at *8 (S.D.N.Y. Apr. 3, 2020). Absent such post-judgment restraints, counterfeiters would be free to hide their assets during the 30-day automatic stay provided by Rule 62(a), and "[t]he risk that they might do so, which in part justified the preliminary injunction, is not lessened by entry of judgment." *Tiffany*, 2015 WL 5638060, at *4. Indeed, the District Court in this case specifically acknowledged that the entry of post-judgment asset restraints in *Tiffany* to prevent counterfeiters from "'evad[ing] enforcement'" was "consistent with

Grupo Mexicano." *Nike, Inc. v. Wu*, No. 13-cv-8012-CM, 2020 WL 257475, at *24 (S.D.N.Y. Jan. 17, 2020). Relatedly, such post-judgment asset freezes also serve to prevent further counterfeiting, which is critical in cases involving defendant counterfeiters who are otherwise likely to simply shift their operations and continue their illegal activities.

For the same reasons, a post-judgment asset freeze was valid and warranted in this case, and the District Court erred in finding such a restraint unenforceable.

C. The New York Separate Entity Rule Does Not Apply.

The District Court also erroneously held that the New York separate entity rule precluded post-judgment enforcement of the asset restraints on foreign branches of the Banks. *See* Appellant's Br. at 54-59. The separate entity rule is derived from New York common law and provides that "a restraining notice or turnover order served on a New York branch will be effective for assets held in accounts at that branch but will have no impact on assets in other branches." *Motorola Credit Corp. v. Standard Chartered Bank*, 21 N.E.3d 233, 227 (N.Y. 2014). This state law rule does not apply to this case or other comparable federal infringement cases.

First, the asset freezes at issue derive from federal law, pursuant to the Lanham Act, the Copyright Act (in copyright cases), and the federal court's inherent equitable authority. *See Gucci*, 768 F.3d at 130. Further, federal law, under Rule

65(d)(2), binds financial institutions to the asset freezes. The state separate entity rule, therefore, is inapposite.

Second, even aside from the above, the separate entity rule is inapplicable because it bars restraining notices or turnover orders against foreign branches of banks "based solely on the service of a . . . New York branch." *Motorola*, 21 N.E.3d at 229. Under Rule 65(d)(2), however, "service" is not required; rather, the standard is "actual notice." Moreover, in the case at bar, Appellant independently established personal jurisdiction over the foreign branches of the Banks because they used correspondent New York-based accounts to conduct transactions in U.S. dollars for the defendants. *See* Appellant's Br. at 57-58.

Finally, to apply the separate entity rule as the Banks urge here is not only a mistaken application of the law, but would encourage those involved in illegal businesses, including infringers, to use New York branches of foreign banks to funnel their profits to foreign bank accounts. It also would encourage foreign banks with New York branches, who knowingly assist in enabling infringers' illegal businesses, to disregard federal court orders, which, as described above, is already a significant problem that copyright holders and trademark owners face in attempting to enforce their intellectual property rights.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's order denying Appellant's contempt motion and remand for entry of contempt.

DATED: June 5, 2020

Respectfully submitted,

/s/ Matthew J. Oppenheim

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. Pro. 29(a)(5) and Local Rule 29.1(c) because it contains 7,000 words, excluding parts of the brief exempted by Fed. R. App. Pro. 32(a)(7)(B)(iii).
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Dated: June 5, 2020

/s/ Matthew J. Oppenheim
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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2020, a true and correct copy of the foregoing Brief of *Amicus Curiae* Association of American Publishers was timely filed in accordance with Fed. R. App. Pro. 25(a)(2)(D) and served on all counsel of record via CM/ECF pursuant to Local Rule 25.1(h).

Dated: June 8, 2020

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