COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MATTHEW PAVLOVICH, Petitioner. vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA, Respondent. DVD COPY CONTROL ASSOCIATION, INC., Real Party in Interest.	)	Sixth Appellate District Action No. _____ Related Appeal Pending: No. H021153 Trial Judge: Hon. William J. Elfving Santa Clara County Superior Court Trial Court Case No. CV 786804

PETITION FOR WRIT OF MANDATE TO COMPEL TRIAL COURT TO QUASH SERVICE OF PROCESS, MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF (APPENDIX OF EXHIBITS UNDER SEPARATE COVER)

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I

INTRODUCTION

This petition arises from an order of Respondent Santa Clara County Superior Court denying Petitioner's Motion to Quash Service of Process. Petitioner, Matthew Pavlovich, was a student at Purdue University in the State of Indiana at the time he was sued, has had no contacts with the State of California sufficient to warrant the exercise of personal jurisdiction by the State, and is currently being denied his constitutionally protected right of due process. If this court does not intervene, the lower court's order will have created, de facto, nearly limitless California jurisdiction over individuals involved in the rapidly expanding world of the Internet.

II

PETITION FOR WRIT OF MANDATE

By this verified petition, Petitioner alleges:

1. Related Appeal: Defendant and Appellant Andrew

Bunner has filed an appeal in this Court. The appeal seeks review of the lower Court's decision to grant a preliminary injunction against Mr. Bunner and others in this action (*DVD Copy Control Association, Inc*. v. *Andrew Bunner*, Superior Court Case No. CV-786804, Appellate Court Case no. H021153).

2. Petitioner, MATTHEW PAVLOVICH (hereafter "PAVLOVICH") is a defendant in the action hereinafter described and is a party beneficially interested herein.

3. Respondent is the Superior Court of Santa Clara County (hereafter "Respondent"); (Superior Court Case No. CV786804).

4. Real party in interest, DVD Copy Control Association Inc. (Hereafter "Real Party" or "DVD CCA") is the plaintiff in the action hereinafter described and is a party beneficially interested in this proceeding.

5. On December 27, 1999, Real Party in Interest, DVD CCA, filed in Respondent Court against this Petitioner, as defendant, a complaint numbered CV786804 alleging a single cause of action - misappropriation of trade secrets (Civ.Code §3426 *et seq.*). The trade secret misappropriation cause of action is based on the allegation that Petitioner republished

information that is alleged to have been misappropriated by a third party and repeatedly republished throughout the Internet. Petitioner is one of some 521 named and Doe defendants who have been sued for allegedly republishing this information on the Internet. Numerous other publishers of the same information have not been sued. Plaintiff and real party in interest is a not-for-profit trade association whose sole purpose is to license the information known as the Content Scrambling System or "CSS". Real party in interest alleges that portions of its CSS Technology were misappropriated by a third party and partially incorporated into a new technology called DeCSS. Real party in interest alleges that after the third party creator of DeCSS posted DeCSS on the Internet, Petitioner and other defendants discovered the information posted on the Internet, and themselves further republished the information on various Internet web sites. A true and correct copy of DVD CCA's complaint is included as "Exhibit A" of the separately bound appendix of exhibits[1] filed concurrently herewith, and explicitly made a part hereof.

6. Petitioner made no general appearance in Respondent Court.

[1]References to the separately bound Appendix of Exhibits, filed concurrently herewith, will be denoted as "APP."

Rather, on June 6, 2000, Petitioner appeared specially in Respondent Court (pursuant to the provisions of §418.10 of the Code of Civil Procedure) by filing a motion to quash service of summons on the grounds that the Respondent Court lacked jurisdiction of the person of the defendant. A true and correct copy of Petitioner's Proof of Service, Notice of Motion, Points and Authorities in Support of Motion, Declaration of Allonn E. Levy in support of Motion, and Declaration of Matthew Pavlovich in Support of Motion to Quash Service of Process is included as "Exhibit B"of the separately bound appendix of exhibits filed concurrently herewith, and explicitly made a part hereof by reference.

7. Following a stipulated jurisdictional deposition and document production, on August 18, 2000, Real Party in Interest filed its opposition papers to Petitioner's motion. A true and correct copy of Real Party in Interest's opposing papers, which include Points and Authorities in Opposition to Motion to Quash Service and the Declaration of Jonathan S. Shapiro in Opposition to Motion to Quash Service, is included as "Exhibit C" of the separately bound appendix of exhibits filed concurrently herewith, and explicitly made a part hereof by reference.

8. On August 22, 2000, Petitioner herein filed his reply papers

in response to DVD CCA's opposition. A true and correct copy of Petitioner's Reply Brief in Support of Motion, Reply declaration of Allonn E. Levy in Support of Motion, and Objections to Evidence Submitted by Plaintiff is included as "Exhibit D"of the separately bound appendix of exhibits filed concurrently herewith, and explicitly made a part hereof by reference.

9. A hearing was held by Respondent Court on August 29, 2000 at approximately 9:00 a.m. in Department 2 of the Santa Clara County Superior Court. An order denying Petitioner's motion to quash service of summons for lack of jurisdiction was served by mail on all parties on August 30, 2000. A true and correct copy of the court's order is included as "Exhibit E" of the separately bound appendix of exhibits filed concurrently herewith, and explicitly made a part hereof by reference.

10. A transcript of the proceedings at the hearing of the motion was ordered and a true and correct copy of said transcript is attached hereto as "Exhibit F" of the separately bound appendix of exhibits filed concurrently herewith, and explicitly made a part hereof by reference.

11. Respondent Court has no jurisdiction over the Petitioner in the above described action within the meaning of §418.10 of the Code of

Civil Procedure because Petitioner has had almost no contact with the State of California, did not purposefully avail himself of the privileges or protections of California, did not expressly aim any action toward California, did not foresee any effect of an action in California, continues to reside outside the State of California and has not otherwise submitted to the jurisdiction of this court.

12. At the time this action was filed, Petitioner was a full time student at Purdue University in Indiana. Petitioner does not own the web site alleged to have republished DeCSS, did not create the DeCSS code, and did not purposefully or expressly direct activity related to the republication towards California. Petitioner is a former student, Eagle Scout, and IEEE member. Petitioner owns no property in California, does no business in California, does not reside in California, and has no traditional contacts with California. Petitioner has limited financial capabilities and would be severely prejudiced if forced to defend himself in California.

13. This petition for writ of mandate is explicitly authorized by statute as outlined in C.C.P.§418.10(c).

14. Petitioner will suffer irreparable injury and severe prejudice if

Respondent Court is not compelled to vacate its order denying Petitioner's motion to quash, and further compelled to enter a new and different order quashing service of process for lack of jurisdiction. Specifically, Petitioner will be forced to defend himself in an action far from his home, to produce witnesses located in distant lands outside of California, to produce documents from outside of California, to find resources to support a foreign defense, all without being afforded the protections of due process, fair play, and substantial justice.

15. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law to compel Respondent Court to quash the service of summons in that this is the only proceeding authorized by statute to obtain the relief sought.

16. Petitioner's papers and actions, are intended to serve only as a special appearance pursuant to section 418.10 of the California Code of Civil Procedure. Petitioner neither consents nor submits to the jurisdiction of this Court, instead, contesting jurisdiction by way of this petition.

WHEREFORE, Petitioner prays:

1. That this court issue an alternative writ of mandate directing Respondent Court to make and enter its order quashing the service of summons on this Petitioner or to show cause before this court in a specified time and place why it has not done so;

2. That, on the hearing of this petition and the return to it, if any, this court issue a preemptory writ of mandate directing Respondent Court to so order;

3. For costs of suit herein incurred: and

4. For such other and further relief as the court may deem proper.

DATED: September 11, 2000

HUBER & SAMUELSON APC

By:_____
ALLONN E. LEVY
Attorneys for Petitioner
MATTHEW PAVLOVICH

III.

VERIFICATION

I, Allonn E. Levy, am the attorney for Petitioner in the above-entitled proceeding. I have read the foregoing petition for writ of mandate and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:_____, 2000

_____

Allonn E. Levy

IV.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

A. Introduction

Petitioner MATTHEW PAVLOVICH submits this memorandum in support of his pending petition for writ of mandamus compelling the lower court to quash service of process. If Real Party in Interest's theory of jurisdiction is permitted to stand, the lower Court's order will mark an end to 150 years of traditional jurisdictional analysis and will create California jurisdiction over virtually every Internet user in the world.

1. Question Presented:

Whether Real Party in Interest, DVD CCA satisfied its burden of providing competent evidence to prove sufficient minimum contacts between Petitioner and the state of California to justify the lower Court's exercise of personal jurisdiction over Petitioner, within the confines of Due Process and traditional notions of fair play and substantial justice. And, assuming such contacts exists, whether the exercise of jurisdiction is reasonable.

2. Short Answer:

No. DVD CCA provided insufficient competent evidence to support the lower Court's finding of jurisdiction under California's "effects" test or any other jurisdictional analysis, and any exercise of jurisdiction is unreasonable.

B. Nature Of Action

This is a First Amendment case wherein the plaintiff, DVD CCA, seeks to enjoin Petitioner PAVLOVICH and some 500 other defendants from republishing a piece of computer code identified as DeCSS. When implemented by a user, DeCSS enables consumers to play lawfully purchased DVDs without the use of a software DVD player licensed by real party DVD CCA. DVD CCA operates solely as the licensor of the Content Scrambling System or "CSS" technology.

Plaintiff claims that it is entitled to restrain the defendants right to republish this speech[2] by alleging the code itself includes misappropriated trade secrets. DVD CCA speculates that a Norwegian individual named

[2]The parties have not disputed the fact that the computer code DeCSS is speech for purposes of First Amendment analysis.

Jon Johansen authored DeCSS by reverse engineering CSS after clicking a software agreement[3] prohibiting such reverse-engineering. DVD CCA further alleges that Mr. Johansen then posted the DeCSS code on the Internet, world wide. DVD CCA further alleges that Petitioner herein, and others, subsequently found DeCSS on the Internet and republished it (see Plaintiff's complaint attached as exhibit "A" filed concurrently herewith and hereinafter referred to as "Exhibit A," at APP[4]. pp.2-21; Complaint at p.13:17-27; p.17:24-28). DVD CCA brought this action to enjoin Petitioner and the remaining 500 defendants from continuing[5] to republish the information (Exhibit A at APP.p.20; Complaint at p.19).

1. Situs and Identification of Parties

Real Party in Interest, Plaintiff DVD CCA is a Delaware corporation with offices located in Morgan Hill, California, and is the licensing entity

[3]DVD CCA has provided no evidence that Mr. Johansen entered this agreement, or that he violated such an agreement. Instead, DVD CCA simply avers that such agreements are usually agreed to.

[4]"APP" stands for the Appendix to Exhibits filed concurrently herewith. For the Court's convenience, all references to exhibits will include both the APP page number, followed by the original document reference. For example APP pp.2-21; Complaint pp.1-20.

[5]As indicated below, Petitioner did not own or operate the LiVid web site that allegedly republished the DeCSS code. The LiVid web site that allegedly contained DeCSS was voluntarily taken down (see Exhibit B, APP.p.67; Declaration of PAVLOVICH at 2:13-27).

for the technology known as CSS (Exhibit A, at APP.p.4; Complaint at p.3:12-17).

Petitioner, Defendant PAVLOVICH is an out-of-state resident served by U.S. mail while a student in Indiana and currently residing in Texas (See Petitioner's moving papers attached as "exhibit B" to the Appendix of exhibits, hereinafter "exhibit B" at App.pp.66-68; Declaration of PAVLOVICH at pp.1-3).

2. Summary Of Facts Re Jurisdiction

Petitioner's involvement in this case is limited to his role as an alleged republisher of the DeCSS code while enrolled as a full-time student at the University in Indiana (see Exhibit B, at APP.p.66-68; Declaration of PAVLOVICH 2:1-5; 2:8-27). Plaintiff has alleged that Petitioner PAVLOVICH is responsible for the posting of DeCSS on the "www.livid.on.openprojects.net" web site (see Exhibit A at APP.p.6; Complaint at p.5:13-16), but offered no proof to rebut Petitioner's evidence that he does not own or operate any such site[6].

[6] See Exhibit B, at APP.p.67; Declaration of PAVLOVICH at 2:17-27.

In reality, PAVLOVICH did not own or operate any site that published DeCSS, however he did concede for purposes of the motion to quash that he had input[7] on such a web site (See Exhibit B, at APP.p.67; Declaration of PAVLOVICH at 2:17-27). Since Petitioner had nothing to do with the creation of DeCSS, any liability on the part of PAVLOVICH would stem solely from his discovery of a piece of code (DeCSS) on the Internet, and having input on a web site that allegedly republished that code. Again, Real Party in Interest has offered no proof to refute these facts.

[7]The open project which allegedly posted DeCSS was a loose association of people, whom PAVLOVICH does not personally know (exhibit A at pp.17-18), nor does he know where those individuals are domiciled (exhibit A at pp.19:19-21), nor who hosts the LiVid list (exhibit A at 21-22. The goal of the LiVid group was to create better support for video playback (exhibit A at 23:10-15), not to harm any party in California.

The LiVid group which allegedly published the DeCSS code was a loose association of volunteers who were involved in Linux open-source projects involving various forms of video playback[8]. PAVLOVICH testified that the LiVid project was run by volunteers, with no formal organization, and that PAVLOVICH did nothing on the project for long periods of time (Exhibit D at APP.p.180; Deposition of PAVLOVICH at 52:2-11). DeCSS was not utilized in the LiVid project (Exhibit D at APP.p.182; Deposition of PAVLOVICH at 57:9-13), and PAVLOVICH played no part in the development of DeCSS (Exhibit D at APP.p.181; Deposition of PAVLOVICH at 56:23-25). DVD CCA has provided no evidence to show that either LiVid or PAVLOVICH intentionally directed activities towards the forum state[9].

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[8](See Petitioner's Reply Papers attached as Exhibit "D" to the separately bound Appendix of Exhibits, hereinafter "Exhibit D" at APP.pp174-175; Deposition of PAVLOVICH at pp.22-23)

[9]Real Party did provide two unauthenticated documents that it alleges are attributable to Petitioner (see DVD CCA's opposition papers attached as Exhibit "C" to the separately bound Appendix of Exhibits, hereinafter "Exhibit C," at APP.p.111-114; Declaration of Shapiro at exhibit C). Petitioner filed objections to this evidence pursuant to Evidence code §§350, 412, 702, 800 and 1520-1523, which are incorporated herein by reference (See Exhibit D at App.pp.157-158; Objections to Evidence at pp.1-2). Without waiving said objections, Petitioner contends that far from showing any intentional act, the e-mails show Petitioner's disagreement with DVD CCA's contentions (Exhibit C at APP.p.114; Declaration of Shapiro at exhibit C). The documents also show that at some point prior to the surfacing of DeCSS on the web (on October 25, 1999 according to DVD CCA; see Exhibit A at App.p.14; Complaint at 13:17-22),

Petitioner quoted someone else's incorrect hearsay statement that "Reverse engineering is illegal" in most places (Exhibit C, at App.p.112; Declaration of Shapiro at exhibit C). Additionally, the October 1, 1999 e-mail regarding reverse-engineering clearly states it relates to software "drivers" and not to any part of CSS or DeCSS.

Petitioner PAVLOVICH has no connection with California. PAVLOVICH does not reside in California and does not have any regular clients or work in California (Exhibit B, at APP.pp67-68; Declaration of PAVLOVICH at pp.2-3). Furthermore, PAVLOVICH has never: solicited business in California; designated a registered agent for service of process in California; maintained a place of business in California; maintained a telephone listing in California; maintained a bank account in California; or even visited California for any business purpose (Exhibit B, at APP.p.68; Declaration of PAVLOVICH at 3:2-7). The web site DVD CCA is assumed to attribute to PAVLOVICH in their complaint was a "passive" web-site that did not involve the interactive exchange of information with users, did not solicit or engage in business activities, and did not solicit contact with California residents (Exhibit B, at APP.pp.67; Declaration of PAVLOVICH at 2:18-27). Further, Petitioner did not know of DVD CCA's existence, much less its situs in California, prior to the filing of this lawsuit and has never done business with DVD CCA (Exhibit B, at APP.p.68; Declaration of PAVLOVICH at 3:7-9). Petitioner neither directed nor expressly aimed any activity or contact towards California, much less any activity or contact specifically related to the trade secret cause of

action that is the subject of this suit (Exhibit B, at APP.pp.66-68; Declaration of PAVLOVICH at pp.1-3; Exhibit D, at App.pp.168-169,178, 179, 180, 185; Deposition of PAVLOVICH at pp.11-12, 44:4-12, 48:22-25, 52:2-11, 91:22-25)[10].

C. Summary Of Argument

[10] Again, Real Party in Interest provided no competent evidence to challenge any of these facts.

Petitioner PAVLOVICH asks this Court to intervene on his behalf, to quash service of process on the grounds that a California Court lacks power to exercise personal jurisdiction over him. Petitioner is not a California resident and is not domiciled in California, has no contacts, no ties, no relationship with California, was not served within California, and has not consented to or appeared in the California action (*Pennoyer v. Neff* (1877) 95 U.S. 714, 733). Additionally, Petitioner engaged in no "express aiming" of acts towards a California resident involving this lawsuit by DVD CCA (*Calder v. Jones* (1984) 465 U.S. 783). Therefore, there is no constitutionally sufficient basis for any California Court to assert personal jurisdiction over Petitioner. Accordingly, this Court issue the appropriate writ, quash service of process, and set aside any existing default or default judgment as void[11] (C.C.P. §473(d); C.C.P. §418.10(d)).

D. BECAUSE CALIFORNIA LACKS PERSONAL JURISDICTION OVER PETITIONER PAVLOVICH, THIS COURT SHOULD INTERVENE AND ISSUE THE REQUESTED RELIEF

[11]On or about March 14, 2000, Plaintiff filed a request for entry of Default. As of this writing, the Court's file indicates that despite the fact that plaintiff has served a notice of request of entry of default, no such default was entered by the lower Court. In the event that default or default judgment is entered prior to the hearing on this motion, defendant requests that the default or default judgment be set aside as void for lack of personal jurisdiction.

1. Standard of Review

In assessing Petitioners request for relief, This Court must carefully scrutinize the extensive record in the lower Court, to ensure there is no due process violation. Review of the lower Court's order is governed by the following principles:

> (1) where a defendant properly moves to quash out of state service of process for lack of jurisdiction, the burden of proof is upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence; (2) evidence of those facts or their absence may be in the form of declarations . . . ; (3) where there is a conflict in the declarations, resolution of the conflict by the trial court will not be disturbed on appeal if the determination of that court is supported by substantial evidence. Substantial evidence is not deemed synonymous with any evidence but rather of ponderable legal significance, . . . reasonable in nature, credible, and of solid value (citations).

Sammons Enterprises Inc. v. Superior Court (1988) 205 Cal.App.3d 1427, 1430.

> Where there is no conflict in the evidence, the question of personal jurisdiction is one of law; in such a case, the lower court's determination is not binding on the reviewing court.

Jewish Defense Organization, Inc. v. *Superior Court* (1999) 72 Cal.App.4th 1045, 1055.

Here, the lower Court made no findings of fact[12]. Therefore, this Court is entitled to review the matter *de novo*.

[12]See Court's order of August 29, 2000, attached as exhibit "E" to the separately bound Appendix of Exhibit, hereinafter referred to as "Exhibit E" at App.p.225; Order at 1:22-23

California courts are empowered to exercise personal jurisdiction only to the extent that such an exercise is consistent with the State or Federal Constitution (CCP §410.10). A court may exercise personal jurisdiction over a non-resident defendant only when the defendant has such minimum contacts with the forum state that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice" (*Felix v. Bomoro Kommanditgesellschaft* (1987) 196 Cal.App.3d 106, 111 [citing *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316]; *Helicopteros Nacionales de Columbia v. Hall* (1984) 466 U.S. 408, 414). Such, minimum contacts are measured on a case-by-case basis and the ultimate test is whether "California has a sufficient relationship with the [particular] defendant and litigation [as] to make it reasonable ("fair play")..." to require the defendant to defend the litigation in California (Weil & Brown, *Cal.Prac.Guide: Civ.Pro.Before Trial*, (The Rutter Group 1999) §3:202 at 3-41.2)[13]. Additionally, any default or default judgment entered without jurisdiction over the defendant is necessarily void[14].

[13]The Due Process clause requires "that the defendant's conduct and connection with the forum State are such that he [or she] should reasonably anticipate being hauled into court there" (*World-Wide Volkswagen Corp. v. Woodson,* (1980) 444 U.S. 286, 297).

[14]Where a defendant attacks jurisdiction post default, the proper mechanism is to file a

2. The court lacks personal jurisdiction over defendant PAVLOVICH

The personal jurisdiction analysis is broken down into two questions: [1] does "general" jurisdiction exist; and [2] absent "general" jurisdiction, does "specific" jurisdiction exist (see *Brown v. Watson* (1989) 207 Cal.App.3d 1306, 1312). In other words:

> If a defendant has sufficient extensive 'contacts' with the forum state, it may be subject to suit there on all claims wherever they arise [i.e., general jurisdiction].... [In] other cases, the jurisdictional sufficiency of the defendant's contacts depends on an assessment of the 'relationship among the defendants, the forum, and the litigation [i.e., specific jurisdiction]'.

Sammons Enterprises, Inc. v. Superior Court (1988) 205 Cal.App.3d 1427, 1432.

In this case, there is insufficient evidence to support a finding of either "general" or "specific" jurisdiction.

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motion to concurrently vacate default or default judgment and quashing service of process (*Floveyor Int. Ltd v. Superior Court* (1997) 59 Cal.App.4th 789, 792). It is then the plaintiff's burden both to prove proper service of process and to prove the existence of personal jurisdiction over the defendant (*Id* at 792-793).

a. General Jurisdiction Is Absent In This Case

General jurisdiction depends upon substantial, continuous, and systematic contacts between the defendant and the forum state (*Perkins v. Benguet Mining Consolidated Mining Co.*, (1952) 342 U.S. 437, 447-448[15]). In this case, Petitioner's contact with California is anything but substantial, continuous, or systematic – it is essentially non-existent[16].

Petitioner is a Texas resident, formerly a resident of Indiana. PAVLOVICH does not have any regular business, clients or employees in California, has never solicited business in California, has never designated a registered agent for service of process in California and has never

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[15] In accord, *KLM v. Superior Court*, (1951) 107 Cal.App.2d 495, 500; *Sammons Enterprises, Inc. v. Superior Court, supra*, 1434; *Secrest Machine Corp. v. Superior Court* (1983) 33 Cal.3d 664, 669).

[16] Real Party, DVD CCA properly conceded the lack of general jurisdiction by not arguing the issue in its opposition papers (exhibit C at APP.pp.71-87; Opposition at pp1-13) or in oral argument below (See transcript of August 29, 2000 proceedings attached as Exhibit "F" to the separately bound Appendix of Exhibits, hereinafter referred to as "Exhibit F," at APP.pp.228-247; Transcript at pp.1-20).

maintained a place of business in California or even a telephone listing in California. He has never owned property or maintained a bank account in California and has never even been to California for business purposes. (See generally Exhibit B at APP.pp. 66-68; Declaration of PAVLOVICH at pp.1-3).

In short, Petitioner has not engaged in any activities in California, much less any activities that may be described as substantial, continuous, or systematic. Hence, there is no basis for California to exercise general jurisdiction over Defendant PAVLOVICH. Since California has no real relationship with this Defendant, it is not reasonable to require PAVLOVICH to defend any pending litigation in California.

b. Specific Jurisdiction Is Similarly Absent In This Case

Specific jurisdiction depends upon a showing that the non-resident defendant purposefully established contacts with the forum state, that the plaintiff's cause of action arises out of the defendant's forum-related contacts, and the forum's exercise of personal jurisdiction comports with "fair play and substantial justice" (*Burger King v. Rudzewicz* (1985) 471 U.S. 462, 472, 476-78; *Cornelison v. Chaney*, (1976) 16 Cal.3d 143, 148). In

other words:

> Where a non-resident defendant's activities in the forum are not so pervasive as to justify the exercise of general jurisdiction over him, then jurisdiction depends upon the quality and nature of his activity in the forum in relation to the particular cause of action.... Thus, as the relationship of the defendant with the state seeking to exercise jurisdiction over him grows more tenuous, the scope of jurisdiction also retracts and fairness is assured by limiting the circumstances under which the plaintiff can compel him to appear and defend.

Brown v. Watson (1989) 207 Cal.App.3d 1306, 1312-1313, emphasis added.

> Thus, specific jurisdiction is determined under a three-part test: '(1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable.

(*Jewish Defense Organization Inc. v. Superior Court* (1999) 72 Cal.App.4th 1045, 1054, citing *Panavision Intern., L.P. v. Toeppen* 141 F.3d 1316, 1320 (9th Cir. 1998)).

Here, petitioner has not directed any activity at California from which the cause of action can be said to have arisen. Further, any relationship between Petitioner and the forum state (California) is so tenuous that, in fairness, jurisdiction cannot exist.

(1 PAVLOVICH has had no purposeful contact with California and has not purposefully availed himself of the benefits of the forum state

This case does not involve purposeful contact between Defendant and California, as the term is used in jurisdictional analysis. A "purposeful" contact is one in which a particular defendant has deliberately directed his/her activities at the residents of the forum state or has deliberately availed himself/herself of the benefits and protections of the laws of the forum state (*Hanson v. Denckla*, (1958) 357 U.S. 235, 253-254; See Also *Sibley v. Superior Court*, (1976) 16 Cal.3d 442, 447-448). Stated in the converse, personal jurisdiction does not extend to a non-resident defendant by virtue of "random, fortuitous or attendant..." contacts over which the defendant had no control (*Burger King v. Rudzewicz*, (1985) 471 U.S. 462, 475-76, 485). Furthermore, unilateral activity on the part of the plaintiff or others[17] over whom the non-resident defendant has no control does not translate into a purposeful contact on

[17]Thus, any activities on the part of the third parties who created DeCSS, the movie industry, the computer industry, DVD CCA (or anyone other than PAVLOVICH himself), cannot be used to support a finding of jurisdiction over Petitioner (*Helicopteros Nac., supra*).

the part of the defendant (*Helicopteros Nacionales v. Hall*, (1984) 466 U.S. 408, 416-417).

In this case, Petitioner was a full-time student in Indiana during the time period outlined in the complaint, and never transacted business with anyone in California[18]. Furthermore, PAVLOVICH did not exercise any control over anyone in California and never solicited contacts with California residents through the web site identified in the complaint (Exhibit B, at APP.p.67-68; Declaration of Pavlovich at pp.2-3). Assuming, arguendo, that any California resident contacted the subject web site, such contact would have been simply fortuitous. The web site merely contained information available to any Internet user and did not target or in anyway solicit California residents (Exhibit B, at APP.pp67; Declaration of Pavlovich at 2:17-27). Additionally, PAVLOVICH cannot have targeted his action at either DVD CCA or California since he was not aware of the existence of DVD CCA (much less their place of business) prior to the filing of this lawsuit[19]. Accordingly, to the extent that Defendant

[18] See generally, Exhibit B, at APP.pp66-68; Declaration of Pavlovich at pp.1-3).

[19] As stated previously; see also Exhibit B, at APP.p.68; Declaration of Pavlovich at 3:7-9

PAVLOVICH may be involved in the events which are the subject of this lawsuit, his involvement cannot be described as a purposeful contact with California.

(a) **The Web site in question was merely passive and cannot satisfy the effects tests**

Court's have established guidelines in cyberspace cases where the plaintiff attempts to utilize the "effects test" (*Calder v. Jones* 465 U.S. 783 (1984)) to satisfy the "purposeful availment" requirement of specific jurisdiction:

> [T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. [Citation.] At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. a passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. [Citation]

(*Jewish Defense Organization v. Superior Court, supra*, at 1060[20])

[20]Additionally, if a Web site is interactive (rather than passive), the exercise of

jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site [Citation] (*Jewish Defense Organization, supra*, at 1060).

Here, any "effects" in California would necessarily have come from the republication of the DeCSS information through the Internet web site. a review of the evidence shows that PAVLOVICH has at most[21] offered information on a passive web site. Assuming, arguendo, that the information reached California residents such contacts would be simply fortuitus and insufficient to establish specific jurisdiction (*Id;* and see also *Cybersell, Inc. v. Cybersell, Inc* (9th Cir. 1997) 130 F.3d 414).

In *Jewish Defense Organization Inc. v. Superior Court, supra,* California's Second District Court of Appeals reversed the trial court's denial of a defendant's motion to vacate default judgment and quash service where publication of information through a web site allegedly caused harmful effects in California. In the *J.D.O* case, the Defendant actually owned or operated the subject site, had made allegedly defamatory statements (the subject of the lawsuit) on his Web site, used the U.S. mail to contact a California resident, previously resided in California, was aware of the plaintiff's situs in California, and contracted

[21]For purposes of this motion and Petition only, PAVLOVICH concedes that he had influence over the information contained in a LiVid web site. However, PAVLOVICH is not the "owner" or "operator" of such a site.

with a California Internet service provider (ISP) to host the Web site in question. Yet, the Appellate Court properly concluded that these contacts were insufficient to support an exercise of jurisdiction.

In the instant case, the forum contacts are even less substantial than those in *Jewish Defense Organization.* PAVLOVICH has had no contacts with California and is only alleged to have offered information on a passive web site. Thus, this Court should follow the holding in *Jewish Defense Organization,* and quash service of process based on a lack of purposeful availment.

(2 The Claim does not arise from PAVLOVICH's forum-related activities

DVD CCA has also failed to provide competent evidence to satisfy the second prong of the specific jurisdiction test. Here, DVD CCA's cause of action does not relate to any local activities on the part of Petitioner PAVLOVICH. Personal jurisdiction is restricted to situations where a particular cause of action relates to or "arises out of" the defendant's forum-related activities (*Jewish Defense Organization, supra*, at 1054 and *Perkins v. Benguet Consolidated Mining Co.,* (1952) 342 U.S. 437, 444-445).

In this case, plaintiff has alleged that defendant PAVLOVICH misappropriated DVD CCA's trade secrets by discovering the DeCSS information on-line (following its world-wide publication by others on the Internet) and then republishing the same previously published trade secrets anew[22]. There is no allegation that it was a specific publication to a California resident that caused DVD CCA's alleged harm, or that PAVLOVICH intended to harm DVD CCA in California[23]. Indeed, whether PAVLOVICH's alleged republication happened to reach this particular forum is irrelevant to DVD CCA's claim. Thus, it cannot be said that the plaintiff's claim arises from or relates to PAVLOVICH's contact with this forum.

Because the cause of action does not arise out of Petitioner's forum-related activities, DVD CCA has been unable to point to any such relevant forum contacts. Instead, Real Party in Interest has provided speculative evidence that PAVLOVICH believed the motion picture

[22]Exhibit A, at APP.p.15; Complaint at p.14:13-17.

[23]As indicated previously, Petitioner was not even aware of DVD CCA's existence or of its presence in California at the time of the alleged republication.

industry and the computer industry in general do business in California[24]. This despite the fact that DVD CCA itself is neither a computer producer nor a movie producer.

(a) DVD CCA's reading of the "effects" test is contrary to established law and violative of Due Process

[24]Notably, the record is devoid of any expert opinion, judicially noticed fact or other admissible piece of evidence demonstrating that these industries are actually based in California, or do a majority of business that is somehow tied to California or attributed to California. These same industries certainly also have a massive presence in New York, Oregon, Washington, Texas, India, and Thailand.

In the seminal case of of *Calder v. Jones* 465 U.S. 783 (1984), and its well known "*Calder* effects test" the Supreme Court found that when an individual engages in "express aiming" and satisfies the "effects test," jurisdiction is available – the High Court did not hold that where any effect, of any sort, is felt within a state jurisdiction will follow[25].

In *Calder*, the defendant sold 600,000 magazines (more than in any other state) in California, frequently traveled to California, made phone calls to California to obtain the information that went into the article which was the subject of the lawsuit, called the California plaintiffs in California to solicit a comment about the subject article, knew the plaintiffs resided in California, and declined to print a retraction request sent by the California plaintiffs (*Id*, at 783-786). Thus, the *Calder* Court had no difficulty in finding that the defendant had purposefully and expressly aimed contacts at California and that the cause of action arose out of those California contacts.

The Supreme Court in *Calder* noted:

petitioners are not charged with mere untargeted negligence.

[25] See *Edmunds v. Superior Court* (1994) 24 Cal.App.4th 221, 230, holding that the mere causing of an effect "is not necessarily sufficient to afford a constitutional basis for jurisdiction."

> Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. . . Petitioner[s] . . . knew [their actions] would have a potentially devastating impact upon respondent [the plaintiff]. And they knew the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation.

Calder at 789-790.

Similarly in *Panavision Inter'l, L.P. v. Toeppen*,(9th Cir. 1998) 141 F.3d 1316, the Court found jurisdiction on the basis of the defendant's targeted extortion scheme aimed directly at plaintiff[26] *Panavision* (Id at 1319). The scheme included direct contact with the California business, relating to the subject of the case, and an attempt at obtaining $13,000 in exchange for Panavision's trademarked domain names (Id at 1319).

[26]DVD CCA's assertion that the effects test in *Panavision* was satisfied simply because the heart of the motion picture industry was in California is plainly wrong.

By stark contrast, here, PAVLOVICH was a student in Indiana when this suit was instituted, his newly formed business has nothing to do with this case (see Exhibit D, at APP.pp.168-169; Deposition of PAVLOVICH at pp.11-12) and has no connection with anyone from California (see Exhibit D, at APP.pp.178,179; Deposition of PAVLOVICH at 44:4-12; 48:22-25). Additionally, PAVLOVICH had no knowledge of plaintiff DVD CCA's existence, much less its location, prior to the filing of the instant lawsuit (see Exhibit D, at APP.p.185; Deposition of PAVLOVICH at 91:22-25). Also, plaintiff has not contested the fact that PAVLOVICH has neither operated, nor had sole control over any "LiVid" web site[27] that may have contained DeCSS (see Exhibit B at APP.pp.66-67; Declaration of PAVLOVICH at 2:15-27). Also not in dispute is the fact that PAVLOVICH did not develop any part of DeCSS (see Exhibit D at APP.p.181; Testimony of PAVLOVICH at 56:23-24) and that DeCSS was not utilized in the LiVid project (Exhibit D at APP.p.182; Deposition of PAVLOVICH at 57:9-13). It is similarly uncontroverted that "Neither the site, nor the information on the site, was specifically directed at citizens of

[27] In fact, PAVLOVICH testified that the LIVID project was run by volunteers, with no formal organization, and that PAVLOVICH was not able to do anything on the project for long periods of time (exhibit a p.52:2-11).

California" (Exhibit B at APP.p.67; Declaration of PAVLOVICH at 2:23-26) and that no part of the posting came from any known California contact.

In ascertaining the existence of specific jurisdiction, a Court may only properly consider forum-related activities that relate to the specific cause of action at hand *(J.D.O., supra,* at 1058, citing *Gordy v. Daily News* (9th Cir. 1996) 95 F.3d 829, 835, it may not consider contacts that relate to alleged harm by third parties not a party to the particular action.

In the case at bar, Plaintiff is a technology licencing entity (Exhibit C, at APP.p.77; Opposition brief 3:16-18). It is a small and fairly obscure[28] organization charged with licensing CSS technology. It is not a movie producer, or a studio, and it is located in Morgan Hill California – not Hollywood. Thus any general knowledge PAVLOVICH had about a movie industry's presence in California, or a Computer industry presence in California is of no consequence – to hold otherwise would create California as a permanent legal forum for every single dispute tangentially related to either industry.

For the "effects test" to be constitutional, both the purposeful

[28] As indicated previously, PAVLOVICH had never heard of DVD CCA prior to the filing of the subject complaint.

directing of activity and the substantial connection to the lawsuit must exist (see *Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 908-911; *Bancroft & Masters Inc. v. Augusta National Inc.* (9th Cir.2000) __ f.3d __, 2000 U.S. App. LEXIS 20917, 2000 C.D.O.S 6941, 2000 D.A.R. 9197). In *Goehring*, the Court denied jurisdiction because the individual's forum contacts were not "substantially" connected to the cause of action. In *Bancroft*, the Court found jurisdiction because the Defendant knew the identity and location of the Plaintiff when it undertook the intentional acts, aimed at that plaintiff, which gave rise to the lawsuit (see *Bancroft* generally), thus satisfying the "express aiming" requirement of *Calder*.

If the Court were to follow the logic put forth by plaintiffs, instead of the law as outlined in *Calder, Panavision, Bancroft,* and *Goehring,* the results would be absurd. Holding that mere knowledge of an industry presence in a particular forum provides jurisdiction for any dispute remotely touching on that industry's subject matter would offend Due Process and lead to an obliteration of traditional jurisdictional requirements.

Petitioner is merely a republisher of information found on the Internet. He never knew of the existence of the only adverse party in this

case, much less intended his activity to affect a California party. It is well settled that personal jurisdiction does not extend to a non-resident defendant by virtue of "random, fortuitous or attendant..." contacts over which the defendant had no control[29] (*Burger King, supra,* at 485). Similarly, just posting information on a web site without "express aiming" is "like placing a product into the stream of commerce, [its effects] may be felt nationwide or even worldwide – but, without more, it is not an act purposefully directed toward the forum state[30]"*Cybersell v. Cybersell* (9th Cir. 1997) 130 F.3d 414, 418.

In short, PAVLOVICH did not interact with the plaintiff (as is the case in *Calder, McGee, Panavision, Bancroft,* and other "effects" cases), did not direct activities at California, and did not purposefully interact with Californians in conjunction with the instant case. As such, California has no jurisdiction over him.

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[29]DVD CCA does not seek to restrain PAVLOVICH'S publication of DeCSS in California, but rather world-wide. There is no allegation that it was a specific publication to a California resident that caused DVD CCA's alleged harm. Indeed, whether PAVLOVICH's alleged republication happened to reach this particular forum is irrelevant to DVD CCA's claim – their claim is based on the fact that the information was published anywhere. Thus, it cannot be said that the plaintiff's claim arises from or relates to PAVLOVICH's contact with this particular forum.

[30]The *Cybersell* Court also rejected the plaintiff's argument that the *Calder* effects test should supply jurisdiction (*Id* at 420).

(3 Exercise of jurisdiction would not be reasonable in this case

Finally, it is unreasonable, and thus constitutionally offensive, to impose personal jurisdiction in this case. In ascertaining reasonableness in applying personal jurisdiction, Courts balance a number of factors including:

> The interest of the state in providing a forum for its residents or in regulating the business involved...; the relative availability of the evidence and the burden of defense and prosecution in one place rather than another...; the ease of access to an alternative forum...; the avoidance of multiplicity of suits and conflicting adjudications...; and the extent to which the cause of action arose out of defendant's local activities....

Fisher Governor Co. v. Superior Court, (1959) 53 Cal.2d 222, 225-26.

To date, the defense is aware of only one California witness essential to the prosecution and defense of this action, Mr. John Hoy. By contrast, an array of witnesses that could provide information in this case are available from Norway, to Japan, to England, to New York and Connecticut. The fact that two similar cases are currently being prosecuted in Connecticut[31] and New York[32] makes it clear that this case

[31] *Universal City Studios, Inc. et al. v. Hughes,* case no. 300CV721 RNC, (D.Ct).

[32] *Universal City Studios et al. v. Reimerdes et al.,* case no. 00Civ.0277 (LAK),

could be tried in any number of other available forums. Also, since California has adopted the Uniform Trade Secrets Act, the plaintiff has the ability to prosecute the same claim in any number of other jurisdictions. Additionally, there are no overriding policy considerations that compel California to assert jurisdiction over PAVLOVICH, an individual Texas resident and former Indiana student.

This case has nothing to do with any activities that Defendant performed in California. In point of fact, PAVLOVICH has performed no activities in California, did not solicit or engage in transactions with California, and certainly engaged in no activities with California that gave rise to the pending litigation.

Because PAVLOVICH is domiciled in Texas and employed in Texas at a new fledgling company (see Exhibit B at APP.p.67; Declaration of PAVLOVICH 2:10-12; 2:1-7), and has no contact with, or reason to come to, California (see Exhibit B at APP.pp.67-68; Declaration of PAVLOVICH pp.2-3), it would necessarily be a substantial burden on PAVLOVICH to defend this action in California, to transport witnesses and evidence to California, to hire California trial counsel, to pay for temporary housing in

(S.D.N.Y.).

California during the trial and to arrange for housing and transport for necessary witnesses (see Exhibit B at APP.p.68; Declaration of PAVLOVICH 3:10-17).

With the above factors in mind, it is evident that the balance weighs heavily against jurisdiction in California. Therefore, and in the interests of fair play and substantial justice, California should not impose jurisdiction on Petitioner.

V.

CONCLUSION

Individual interaction and discourse on the Internet is, by all accounts in its infancy – creating new law that transforms the Internet into a liability minefield, with world-wide California jurisdiction, would severely chill the development and growth of this medium. The high Court has noted that the Internet is one of the greatest democratic tools of the 21st century (Reno v. American Civil Liberties union, (1997) 521 U.S. 844, 851). It is a "unique and wholly new medium of worldwide human communication" which disseminates "content as diverse as human thought" (Id at 883, 884). It would be an unreasonable and fundamentally unconstitutional decision, that would tolerate the finding of jurisdiction

based on the tenuous connection of a particular publication on the Internet and the general reputation of a particular forum state[33].

[33]DVD CCA has argued, without proffering evidence, that because California has a reputation for creating movies and high technology, it has jurisdiction over Petitioner whose conduct allegedly touches on both.

For all of the above reasons, and for those outlined in Petitioner's exhibits, California cannot be permitted to exercise personal jurisdiction over Petitioner PAVLOVICH without depriving Petitioner of his constitutionally protected right to due process of law. It is therefore respectfully requested that this court intervene, grant the relief requested in the petition, and compel the lower court to quash service for lack of jurisdiction.

DATED: September 11, 2000 HUBER & SAMUELSON APC

By:_____
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TABLE OF AUTHORITIES

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