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. H021961 Related Appeal Pending: No. H021153 Trial Judge: Hon. William J. Elfving Santa Clara County Superior Court Trial Court Case No. CV 786804

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE

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I.

INTRODUCTION

Petitioner MATTHEW PAVLOVICH submits this reply memorandum, responding to Real Party in Interest's Return, in accordance with this Court's Order of January 16, 2001.

1. PROCEDURAL POSTURE

This petition for writ of mandate arises from an order of Respondent Santa Clara County Superior Court denying Petitioner's Motion to Quash Service of Process filed on August 30, 2000 (APP[1]. p.224). After the filing of a Petition for Writ of Mandate, and an Informal Opposition by Real Party in Interest, this Court denied the Petition for Writ of Mandate on October 11, 2000. Following a Petition for Review, on December 13, 2000, The California Supreme Court unanimously granted review based on the following issues:

[1]All references to the separate Appendix of Exhibits filed with this court on September 11, 2000 will be denoted "APP." followed by the appropriate page number or description.

1) Whether jurisdiction is available in California under the *Calder* effects test, based exclusively on Internet effects, where there is no evidence of "express aiming" directed at a particular, known, California party.
2) Whether California may exercise jurisdiction over a defendant on the basis that: The defendant knew or should have known that his acts would have an effect on industries generally reputed to exist in California ("general industry effects"), where no other California contacts exist.

Concurrently with its grant of review, The Supreme Court directed this Court "to vacate its order denying mandate and to issue an order directing respondent Superior Court to show cause why the relief sought in the petition should not be granted" (see Supreme Court order filed December 13, 2000 attached hereto as Exhibit "A," hereinafter "Exhibit A"). On January 16, 2001, this Court filed an Order to Show Cause why the relief sought should not be granted, and, on a finding of good cause, stayed proceedings in the lower court. On February 15, 2001, Real Party in Interest served its Return[2] to the Petition by U.S. mail. Both parties requested oral argument, and this Reply is filed in response to DVD CCA's Return, pursuant to this Court's January 16th order.

[2]References to DVD CCA's Return filed February 15, 2001, are referred to at "RET" followed by the relevant citation.

2. STATEMENT OF THE CASE

This is an Internet information re-publication case wherein Petitioner, is alleged to have been involved in the web site re-publication of information in the form of computer instructions known as DeCSS. Months after the original publications of the DeCSS information, Real Party in Interest alleged that the original and subsequent publications of DeCSS included trade secrets. It is undisputed that Petitioner has had no actual contacts with California and did not expressly aim his activities at, or target, any particular California party or entity (OPP[3] at pp.11-12).

II.

FACTS

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 (APP.p.66-68; Declaration of PAVLOVICH 2:1-5; 2:8-27; APP.p.15; Complaint at p.14:4-6). Plaintiff has alleged that

[3]References to Real Party in Interest's Opposition to PAVLOVICH's Petition for Writ of Mandate dated September 18, 2000 are referred to as "OPP" throughout this reply.

Petitioner PAVLOVICH is responsible for the posting[4] of DeCSS on a web site(APP.p.6; Complaint at p.5:13-16).

[4]In its Return, DVD CCA concedes that it has mis-identified the subject web-site (Real Party in Interest's Return, hereinafter referred to as "RET" at p.4, fn.2). For purposes of this motion, PAVLOVICH voluntarily admitted that he had See APP.p.67; Declaration of PAVLOVICH at 2:17-27.

The evidence shows that PAVLOVICH did not own or operate any site that published DeCSS. However, for purposes of the motion to quash, Petitioner concurs that he, along with others[5] had input on such a web site (APP.p.67; Declaration of PAVLOVICH at 2:17-27) operated by others. The record is devoid of any evidence showing PAVLOVICH had any connection with the creation of DeCSS (APP.p.181; Pavlovich Depo. 56:21-24). Thus, liability on the part of PAVLOVICH stems 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.

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[5]The project members who allegedly posted DeCSS are not known to PAVLOVICH (APP.p.170-171;exhibit A at pp.17-18), nor does he know where those individuals are domiciled (APP.p.172;exhibit A at pp.19:19-21). Petitioner also does not know who hosts the LiVid list (APP.pp.173-174;exhibit A at 21-22) where information is exchanged electronically between members.

1. PETITIONER'S INVOLVEMENT WITH OPEN-SOURCE SYSTEMS

"Open source" refers to programs or systems that enable individuals access to the underlying source code of those programs or systems. This enables users to customize their computer program or system as they see fit or to pick and choose which portions of a packaged program or system they wish to implement. Numerous forms of open source code have been around for decades, including the popular Linux and FreeBSD operating systems, the Apache server and others. Many open source systems are protected by strict and rigorous licenses such as the GPL, Mozilla License (From Sun/Netscape), Apple Source License (Apple), and IBM's Public License. Many publically held companies devote some or all of their resources to open source projects, including VA Linux, RedHat, IBM, Corel, Sun Microsystems, Compaq and Dell. IBM alone has committed 5 Billion dollars in research and development into the

open source Linux operating system[6].

Contrary to DVD CCA's unfounded contentions, open source has nothing to do with being "dedicated to making as much material as possible available over the internet" (RET at p.3). Rather, it is about enabling individuals to innovate and collaborate to create the best program or system to fit a particular need. By contrast, closed source systems, such as the Microsoft's Windows operating system focus on selling a fixed set of features to consumers and adapting the consumers to the system. Today, the open source Linux operating system is widely viewed as the only potential competition to Microsoft's Windows.

[6]While it might be flattering to think that as a 22 year old student in Indiana Matthew Pavlovich was "a leader" in open source (RET at p.3), this unattributed allegation is inaccurate. There is certainly no evidence in the record to support such an allegation.

Noted cyberlaw expert Professor Lawrence Lessig[7] credits much of the Internet's success and universal acceptance on the fact that most of the Internet's protocols, from their inception were "open sourced." Ironically, DVD CCA's own web site employs both an open source operating system (FreeBSD) and an open source web server (Apache[8]), (see specifically, http://uptime.netcraft.com/up/graph/?host=www.universalstudios.com; and generally APP.p. 242, Rep.Transcript of Proceedings at p.15:24-28).

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[7] See Lawrence Lessig, Code and Other Laws of Cyberspace (1999)

[8] The open source Apache web server application has been the number one web serving application over the last 5 years (see http://httpd.apache.org/ABOUT_APACHE.html).

2. THE LIVID LIST AND LIVID WEB SITE

The Linux video and DVD project or "LiVid" was a loose association of software developers and computer programmers who were interested in improving the Linux system architecture to better support many types of video playback (APP.p.174; Pavlovich Depo. 22:22-25). The group congregated electronically through electronic mailing lists that permitted members to post information that might be useful to the whole group. The LiVid group was a loose association of volunteers who were involved in Linux open-source projects involving various forms of video playback[9]. The LiVid project itself was run by volunteers, with no formal organization, and PAVLOVICH did nothing on the project for long periods of time (APP.p.180; Deposition of PAVLOVICH at 52:2-11). The goal of LiVid was to improve video and DVD support for Linux and to combine the resources and efforts fo various individuals to provide a resource for end users and developers to find information (APP.p.175; Pavlovich Depo.

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

23:10-15) Among the group's projects, was a project to create a DVD player for Linux, because there was no DVD support for the popular operating system (APP.p.177; Pavlovich Depo. 28:4-9) DeCSS, which is the subject of this lawsuit is not the same code as the LiVid DVD player which the group was attempting to create (APP.p.182; Deposition of PAVLOVICH at 57:9-13), and PAVLOVICH played no part in the development of DeCSS (APP.p.181; Deposition of PAVLOVICH at 56:23-25).

3. PETITIONER HAD NO CONTACT WITH CALIFORNIA.

DVD CCA has provided no evidence to show that either LiVid or PAVLOVICH[10] intentionally directed activities towards a California party[11]

[10]As indicated in PAVLOVICH'S Petition, PAVLOVICH has no connection with California. PAVLOVICH does not reside in California and does not have any regular clients or work in California (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

or entity. 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 (APP.p.68; Declaration of PAVLOVICH at 3:7-9). Petitioner neither directed nor "expressly aimed" any activity or

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(APP.p.68; Declaration of PAVLOVICH at 3:2-7). The web site DVD CCA attributes to PAVLOVICH 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 (APP.pp.67; Declaration of PAVLOVICH at 2:18-27).

[11]DVD CCA did provide two unauthenticated documents that it alleges are attributable to Petitioner (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, (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 (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 (APP.p.14; Complaint at 13:17-22), Petitioner quoted someone else's incorrect hearsay statement that Reverse engineering is illegal in most places (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.

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 (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).

Real Party in Interest does not contest the fact that PAVLOVICH has had no contact with California or the fact that he did not know the identity of the only plaintiff in this case (OPP, generally and at pp.11-12, RET at p.10). DVD CCA argues that the lack of express aiming directed at DVD CCA is irrelevant to the jurisdictional analysis (OPP at p.12; RET at p.10) and that jurisdiction may be found solely based upon effects on the computer and movie industries which are reputed to exist in California (OPP at p.11-13; RET at p.10).

III.

STANDARD OF APPELLATE REVIEW FOLLOWING ORDER TO SHOW CAUSE

Because the California Supreme Court has granted review and transferred this matter back to the Court of Appeal, the Supreme Court's action indicates that the petition is procedurally appropriate (*Atlantic Richfield Co. v. Superior Court* (1975) 51 Cal.App.3d 168, 172). In issuing the Order to Show Cause as instructed by the Supreme Court, this Court's order "is in the nature of a citation to a party to appear at a stated time and place to show why the requested relief should not be granted (citations)" (*Hagan v. Superior Court* (1960) 53 Cal.2d 498, 511 (dis.opn.of Schauer, J), cited with approval in *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1240).

> "When a nonresident defendant challenges personal jurisdiction the burden shifts to the plaintiff to demonstrate by a preponderance of the evidence that all necessary jurisdictional criteria are met. [citation] This burden must be met by competent evidence in affidavits and authenticated documentary evidence. An unverified complaint may not be considered as an affidavit supplying necessary facts (*Ziller*

Electronics Lab Gmbh v. Superior Court (1988) 206 Cal.App.3d 1222, 1232-1233)"

Jewish Defense Organization Inc (JDO) v. Superior Court 72 Cal.App.4th 1045, 1054-1055.

Where there is conflicting factual evidence, the standard of review at the appellate level is the substantial evidence test. In other words, whether the trial court's decision is supported by substantial evidence (*Serafini v. Superior Court* (1988) 68 Cal.App.4th 70, 77). However, if there is no conflict in the relevant facts, the question is one of law, the Appellate Court exercises its independent judgment (*Serafini* at 77) and the lower court's determination is not binding on the reviewing court (*Hall v. LaRonde* (1997) 56 Cal.App.4th 1342, 1346).

IV.

ARGUMENT

California's long-arm statute permits California Courts to exercise jurisdiction only to the extent such an exercise of power is not inconsistent with the Constitution of the United States or the Constitution of California (Code Civ. Proc. §410.10). In the absence of traditional bases for jurisdiction, such as in-state physical presence, domicile, or consent,

the Due Process clause requires that the defendant have "certain minimum contacts with the [forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial (*International Shoe Co. v. Washington* (1945) 326 U.S. 310, 320; *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434). "The defendant's conduct and connection with the forum State must be such that the defendant 'should reasonably anticipate being haled into court there'" (*Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 904; citing *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297).

The concept of minimum contacts embraces two types of jurisdiction -- general and specific (*Vons, supra*). DVD CCA's informal Opposition and its Return concede the lack of general jurisdiction, opting only to argue on the basis of specific jurisdiction. In analyzing specific jurisdiction, California courts have outlined 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 (citations).

J.D.O v. Superior Court at 1054.

As both the federal and state Supreme Courts have noted, each individual, resident and non-resident, has a significant liberty interest in not being subject to the judgments of a forum with which he or she has established no meaningful minimum "contacts, ties or relations." (*Vons, supra* at 445, citing *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 471-472).

1. PETITIONER, A STUDENT IN INDIANA, DID NOT PURPOSEFULLY AVAIL HIMSELF OF THE PRIVILEGES OF THE STATE OF CALIFORNIA BY PERMITTING INFORMATION TO BE POSTED ON A WEB SITE

A Court may exercise specific jurisdiction over a non-resident defendant only when the defendant purposely availed himself of the privileges of conducting activities in the forum (*Callaway Golf Corp. v. Royal Canadian Golf Ass'n* (C.D.Cal.2000) 2000 U.S. Dist. LEXIS 19032[12], citing *Bancroft & Masters v. Augusta National* (9th Cir. 2000) 223 F.3d

[12]This recent case denying jurisdiction based on a *Bancroft* analysis is attached hereto as exhibit B.

1082, 1086). Purposeful availment is satisfied if the defendant has taken deliberate action within the forum state or created continuing obligations to forum residents (*Id* and also *Ballard v. Savage,* (9th Cir. 1995) 65 F.3d 1495, 1498).

In its Return, DVD CCA argues exclusively under the *Calder* "effects test" doctrine[13]. In the landmark case of *Calder v. Jones,* 465 U.S. 783 (1984), the Supreme Court held that jurisdiction may be found, within the confines of due process, where certain intentional acts are "expressly aimed", and cause foreseeable harm in the forum state. Subsequent Courts have noted that due process provisions and *Calder* require "something more" than simply foreseeable effects in the forum state (*Panavision Int'l, L.P. v. Toeppen*, (9th Cir. 1998) 141 F.3d 1316, 1322, without clearly defining "something more" or the boundaries of "express aiming." One recent decision published by the Ninth Circuit provides

[13]There are numerous bases for determining specific jurisdiction. In Internet publication cases, Courts frequently analyze the "effects test" and the "sliding scale" approach (*Cybersell Inc. v. Cybersell, Inc.* (9th Cir. 1997) 130 F.3d 414, 419). DVD CCA has opted to argue exclusively under the "effects" doctrine, conceding the level of interactivity of the LiVid web site does not provide a basis for jurisdiction (RET at p.8, fn.5).

some guidance on the limitations of the effects test while candidly acknowledging the confusion among courts:

> Subsequent cases have struggled somewhat with *Calder's* import, recognizing that the case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction. We have said that there must be something more, but have not spelled out what that something more must be. See *Panavision,* 141 F.3d at 1322.
>
> We now conclude that something more is what the Supreme Court described as express aiming at the forum state. See *Calder,* 465 U.S. at 789. Express aiming is a concept that in the jurisdictional context hardly defines itself. From the available cases, we deduce that the requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.

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 at *10-14 (a courtesy copy of the decision has previously been provided to opposing counsel and is attached hereto as exhibit B).

1. REAL PARTY IN INTEREST'S EVIDENCE DOES NOT PROVIDE THIS COURT WITH "CAUSE" TO DENY THE REQUESTED RELIEF

In its Return, DVD CCA provides a myriad of evidentiary citations, without directing the Court to any particular point or reason for denying Petitioner's request. Reviewing the evidence identified in the Return does

not provide "cause" to deny the petition.

Although DVD CCA repeatedly states that PAVLOVICH posted information on the Internet, and misappropriated trade secrets, they provide no competent evidence to support the allegations. The LiVid web site which allegedly had the DeCSS code posted on it, was apparently operated by an individual not known to Petitioner (APP. P.97; Deposition at pp.20-21) and there is no evidence that Petitioner was responsible for the posting of DeCSS, or believed DeCSS contained misappropriated trade secrets.

While Real Party in Interest continually insinuates that petitioner was somehow involved in piracy, they provide no evidence to support their claim. There is, however, evidence that the LiVid group's goal was to create better support for all types of video[14] playback for Linux machines (APP. at pp.175-176; Pavlovich Depo, at pp.22-23). DVD CCA has never

[14]In the context of computer programming, "video" includes any graphical representations on a computer screen. Thus, video output usually includes presentation of text and graphics on a video screen connected to a computer and video playback includes the storage and retrieval of such data.

provided a shred of evidence suggesting Petitioner or the LiVid project was involved in piracy[15] of DVDs or piracy of any other media.

[15]Contrary to the conclusion in DVD CCA's Return, Petitioner did not state that DeCSS facilitates piracy. Rather, when counsel for DVD CCA asked

"once a motion picture is on a hard drive" can it be pirated? (APP at p.104; Deposition at 60:19-25). Petitioner answered: "It can. I mean, it's not like you can go from using DeCSS as part of your hard drive to pirating. There is a lot more that one would have to do to do that" (APP. at p.183; Deposition at 61:1-3). PAVLOVICH went on to explain that there are many other ways to pirate motion pictures (APP. at p.183; Deposition 61:5-25). Furthermore, PAVLOVICH testified that according to his knowledge, copying a purchased DVD onto a hard drive either as a back-up or to "space-shift" viewing to a different machine constituted legal "fair use" (APP. at p. 184; Deposition at p.70:17-25) and not piracy (see also 17 U.S.C 107 and annotations). As indicated previously, the goal of LiVid was to improve Linux support for video playback, as well as to produce the first Linux compatible DVD player – There is no evidence suggesting they were involved in illegal copying of any sort.

DVD CCA's Return indicates that petitioner was fully aware that DVD's were "key instruments of the motion picture industry in that they serve to deliver motion picture content," (RET at p.4) citing to Petitioner's deposition at page 28. The transcript citation shows that Petitioner informed his examiner that DVDs were used for "large back-ups and stuff" (APP. at p.98; Pavlovich Depo. p. 28:17-19 but accepted DVD CCA's attorney's request that they only address DVDs used to deliver motion picture content (APP. at p.98; Deposition 28:13-16). In fact, Petitioner corrected his examiner that motion pictures were probably not the primary use of DVDs, just the most well known use (APP. at p.98; Deposition 28:20-25).

DVD CCA specifically asked PAVLOVICH if the motion picture industry was "centered" in Hollywood, California, to which Petitioner responded "I wouldn't know" (APP. At p.99; Deposition at 30:2-7). Petitioner only stated that movies and movie stars are known to exist in Hollywood. Similarly, PAVLOVICH stated that he was aware many technology companies were in California, with many others in Texas and around the world (APP. at p.102; Deposition at pp.41-44). Petitioner also

identified New York, Dallas, Atlanta, and Ottawa Canada as cities with "a lot of technology" (APP. at p.179, Pavlovich Depo p.48:3-19). Nowhere in his lengthy deposition did PAVLOVICH indicate he targeted harmful conduct at anyone in California.

Nowhere in the record is there any evidence that DVD CCA produces movies or computers or any technology. DVD CCA isn't a part of Hollywood and doesn't involve Hollywood actors. Instead, it is comprised of attorneys and administrative personnel. The record indicates that DVD CCA is simply an administrative entity created to manage licenses (APP.p.14; Complaint p.13:4-15), not a technology or movie company.

DVD CCA also indicates that Petitioner "knew" there was an organization that licensed technology having to do with DVD playback. Petitioner actually stated that while he believed a license was available, he "didn't know the full details . .." and "never knew for certain" (APP. at p.98; Deposition 25:1-20). Irrespective of any such knowledge, except in a patent action, neither reverse engineering, nor independent innovation of

unlicenced products are considered illegal or intentionally harmful[16].

Simply working to create a new product that happens to disrupt another

[16]Petitioner did believe that DeCSS was reverse engineered (APP. at p.99-100; Deposition at pp.32-33), however, he did not know that the reverse engineering of DeCSS was illegal. The citation offered by Real Party to show such "knowledge" predates the existence of DeCSS by a substantial amount of time (see PET p.16, fn.9) such that it cannot possibly relate to DeCSS. The evidence itself (see APP. at p.112; Declaration of Shapiro at Exhibit C) quotes previous messages by others and relates to "media drivers" (programs that interact between hardware and operating systems) not the CSS technology. Additionally, Petitioner re-asserts his evidentiary objections outlined in opening papers PET at p.16, fn.9.

In a trade secret action, the only way in which reverse engineering can be "illegal" is if it is done in violation of a contract (See Cal.Civ.Code §3426.1(a)) – DVD CCA provides no evidence to support such a conclusion.

Additionally, Petitioner contends the evidence itself is incompetent and inadmissible as discussed in opening papers (PET at p.16, fn.9).

unknown entity's monopoly[17] can't be considered an intentional, harmful act targeted at a particular state.

In contrast, to the discordant evidence in this case, in *JDO v. Superior Court, supra*, 72 Cal.App4th, 1045, the plaintiffs did provide some evidence of forum contact and some evidence of aiming at a forum resident. Nevertheless, that Court reversed a trial Court's order finding jurisdiction despite the fact that the Defendant owned or operated the site which contained the offending information, had authored defamatory statements on the web site, contacted a California resident, knew the plaintiff lived in California, had previously lived in California, and contracted with a California Internet Service Provider. After analyzing the facts under the "effects test" The *JDO* Court differentiated *Panavision*

[17]Naturally, the case would be different if the matter involved a legal monopoly such as a patent or in some cases a copyright. There are no such allegations in this instance.

Inter'l, L.P. v. Toeppen (9th Cir. 1998) 141 F.3d 1316), by noting that in *Panavision* "defendant's conduct, as he knew it likely would, had the effect of injuring Panavision in California" (*Id* at 1059). The distinction between *J.D.O.* and *Panavision* is that in *Panavision*, the plaintiff provided competent evidence clearly demonstrating that defendant had targeted an extortion scheme aimed directly at the plaintiff who was known to be situated in California (*Id* at 1059, *Panavision* at 1319), while in *J.D.O.*, as in the case at bar, there was no such express aiming or targeting. The same distinction may be found upon a close comparison between the holdings of *Panavision* and *Cybersell.* In *Cybersell, supra,* 130 F.3d 414, the defendant's conduct was not specifically and purposefully targeted at the plaintiff with knowledge that said plaintiff would be affected within the forum state.

2. CALIFORNIA OUGHT NOT EXERCISE JURISDICTION BASED SOLELY UPON THE EXISTENCE OF ALLEGED GENERAL EFFECTS FELT BY INDUSTRIES REPUTED TO EXIST IN CALIFORNIA

DVD CCA argues that although DVD CCA did not exist until late

1999 and only became the licensing entity for CSS after the alleged posting of DeCSS (APP.p.14; Complaint at p.13:11-15), the fact that Petitioner couldn't have targeted or expressly aimed activity at DVD CCA is irrelevant. Instead, Real Party argues that petitioner aimed conduct at three industries (RET at p.12).

Both the seminal "effects" case of *Calder* and the *Panavision* case that applied the effects test to Internet contacts, discuss the existence of an Industry within the forum as additional evidence that a defendant expressly aimed or targeted a California resident[18]. However, neither case, nor any other case known to Petitioner, suggests that such "general industry contacts" can be a basis for jurisdiction exclusive of directed, express aiming.

In support of its argument, DVD CCA cites to a number of District Court Orders. In *Nissan Motor Co. Ltd. v. Nissan Computer Corp* (C.D. Cal.2000) 89 F.Supp.2d 1154 (cited by DVD CCA), the Court first found jurisdiction independent of the "effects test" because of the countless

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forum contacts and only then, noted in passing that the effects test was satisfied. It found the effects test satisfied based upon express aiming because the defendants had purposefully changed the content of its website in August 1999 to exploit the known California plaintiffs' goodwill by profiting from consumer confusion (*Nissan* at 1160). The opinion was eventually affirmed in an unpublished Ninth Circuit opinion that specifically followed the *Bancroft* holding *Nissan Motor Co. v. Nissan Computer Corp*.(9th Cir. 2000) 2000 U.S. App. LEXIS 33937.

Real Party also cites the District Court's "Order re Plaintiff's Motion for Temporary Restraining Order and Expedited Discovery" in *3DO Co. v. Poptop Software, Inc*.(N.D.Cal.1998) 49 U.S.P.Q.2d 1469. In its order, the District Court noted that Poptop Software had posted an interactive website and encouraged users in California to download copies of the infringing game (*Id,* at page 8). Additionally, counsel for Poptop appears to have made a general appearance and participated in general discovery prior to the T.R.O. hearing (*Id* at pp1-3). In contrast,[19]

[19]It is unclear from the brief discussion in this opinion whether or not Poptop was aware that 3DO had its principal place of business in

reviewing court cases analyzing the effects test on the Internet have all involved the targeting of an individual or entity within the forum state.

In interpreting and applying the *Calder* Effects Test, this state's Court of Appeal recently noted:

> It does not follow, however, that the fact that a defendant's actions in some way set into motion events which ultimately injured a California resident, will be enough to confer jurisdiction over that defendant on the California courts.

Edmunds v. Superior Court (1994) 24 Cal.App.4th 221, 236, citing *Wolf v. City of Alexandria* (1990) 217 Cal.App.3d 541, and relying on *Kulko v. Superior Court* (1978) 436 U.S. 84, 94-95.

Contrary to the implication of the name "effects test," the *Calder* analysis turns less on the location of the harm or "effect", and more on the purposeful targeting on the part of a defendant. It is that purposeful targeting that enables Courts to exercise jurisdiction fairly within the confines of due process. As the U.S. Supreme Court noted in *Hanson v. Denkla* (1958) 357 U.S. 235, 253:

California at the time it actively distributed its code.

> [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

(see also *Cybersell v. Cybersell* (1997) 130 F.3d 414 at 416-417).

It is the purposeful, knowing, targeting of forum residents by the non-forum defendant, <u>together</u> with the knowledge that the act is likely to result in harm within that forum, that provides the "act" of purposeful availment envisioned in *Hanson* and other jurisdiction cases. The mere knowledge that one is involved in providing information that relates to the computer industry, motion picture industry or any other industry, can not rise to the level of purposeful availment identified in *Hanson* or *Calder*.

In *Bancroft & Masters, Inc. v. Augusta National* (9th Cir. 2000) 223 F.3d 1082, 1087, the Ninth Circuit (applying California law) candidly tackled the effects test issues. That Court noted that after *Calder* and *Panavision* "Subsequent cases . . . bear out the conclusion that 'express aiming' encompasses wrongful conduct <u>individually targeting a known forum resident</u>" (*Id* at 1087). The *Bancroft* court reviewed a slew of cases noting that in each instance, the finding of jurisdiction using the "effects

test" was based on a specific act or acts targeting a known party within the forum state such that the "forum effect of a foreign act 'was not only foreseeable, it was contemplated and bargained for'" (*Id* at 1087-1088, citations omitted). In finding jurisdiction over the defendant, the *Bancroft* Court found:

> (Defendant) acted intentionally when it sent its letter to NSI. the letter was expressly aimed at California <u>because it individually targeted (plaintiff)</u>, a California corporation doing business almost exclusively in California . . . the effects of the letter were primarily felt as (defendant) knew they would be, in California.

Bancroft at 1088, emphasis added.

Since the *Bancroft* decision, numerous courts have cited and followed the *Bancroft* decision. In dismissing the action for lack of jurisdiction, the Court in *Callaway Golf corp. v. Royal Canadian Golf Ass'n*, (C.D. Cal.2000) 2000 U.S. Dist. LEXIS 19032 followed *Bancroft* holding:

> plaintiff does not adduce facts sufficient to establish that defendant knew or should have known plaintiff was a resident of California, had its principal place of business in California, or otherwise would feel the brunt of the effects of defendant's actions in California."
> . . . Merely knowing a corporate defendant might be located

in California does not fulfill the effects test (citing *Bancroft*).

Id at p.12

Yet another reviewing Court, following *Bancroft* described the analysis as follows:

> We focus our analysis on whether Plaintiffs have made a prima facie showing that (defendant) knew that its allegedly wrongful acts were aimed at (forum) residents

Meyers v. Bennett Law Offices (9th Cir. 2001) 2001 U.S. App.LEXIS 1539; 2001 DAR 1348 at p.7; emphasis added (attached as exhibit "B" for the Court's convenience).

Here, Real Party in Interest concedes that petitioner did not expressly aim his activities at DVD CCA. By Real Party's own admission, less than 20% of the CSS licensees are located in California (RET at p.5), Petitioner did not know of DVD CCA's existence or location at the time the posting of DeCSS occurred (APP at p.68; Pavlovich Dec. p.3:7-9; OPP at p.12) and DVD CCA was not the licensor at the time the postings occurred (APP.p.14; Complaint p.13: 6-10). Because of the lack of evidence that PAVLOVICH targeted them, Real Party attempts to argue that petitioner somehow aimed his activities at a number of general industries. However,

no known opinion has ever permitted such a vague "targeting" to satisfy the express aiming requirement of the effects test.

Instead, Petitioner simply republished information that happened to allegedly harm a California resident. That the subject of the publication touches on various industries that exist in California and throughout the world is not, in itself, a basis for jurisdiction. When the analysis is correctly focused on whether Petitioner knew that his allegedly wrongful acts were aimed at forum residents it becomes clear that due process will not permit jurisdiction in this case (*Meyers* at p.7). To hold otherwise would mean that any publisher of information must screen the content of his writing to determine what possible industries might be involved and must expect to be sued in any jurisdiction where such industries exist – this type of world-wide extension of jurisdiction would run afoul of the age-old due process considerations discussed herein.

1. THE EXPRESS AIMING REQUIREMENT IN CALDER OUGHT TO PROPERLY BE READ AS REQUIRING AN INTENTIONAL DIRECTION OF CONSEQUENCES AIMED AT A KNOWN PARTY IN THE FORUM STATE

As the cases indicate, jurisdiction under the effects test is predicated upon 1) intentional acts 2) targeting or express aiming and 3) harm the defendant knows will be suffered in the forum state (*Core-Vent Corp. v. Nobel Indus.* (9th Cir. 1993) 11 F.3d 1482). Permitting the effects test to be satisfied by alleged targeting of a vague concept such as three "industries" impermissibly weakens all three elements of the *Calder* test as well as the overarching concept of true "purposeful availment" (see also *Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 909[20]). By enlarging the target at which the cross-hairs of a non-resident's "express aiming" must be centered to encompass an entire industry (or three industries), the Court concurrently reduces the intent, purpose, and forseeability of the non-party. It is that express purpose that forms the

[20]In *Goehring*, the Petitioner knew the identity of the California business and directed some correspondence and agreements to the California entity. However, the *Goehring* Court still found that the Petitioner had not purposefully directed their acts with an intention or expectation that the documents would have an effect in California. Similarly, assuming arguendo, PAVLOVICH did publish DeCSS information, there is no evidence that his general knowledge about the movie and computer industry translates into an intention or expectation that publication of DeCSS would cause an effect in California.

underpinnings of the *Calder* test for purposeful availment. Enlarging the target to include an entire industry is the practical equivalent of the "mere untargeted negligence" that the *Calder* Court identified would not provide a basis for jurisdiction under its test (*Calder* at 789-790).

When an individual performs an intentional act that is truly targeted, it must, by definition be targeted at something. It may be targeted at a person, or an entity, but not at an idea. An "industry" isn't a tangible thing that a person can target in the manner envisioned by Courts in *Calder, Panavision, J.D.O., Bancroft,* and *Myers*. An individual can't be said to have purposefully availed him/herself of the privilege of conducting activities within the forum state and invoked the benefits and protections of that state's laws *(Hanson v. Denkla, supra* at 253) simply by posting information that is related to one or more industries that reputedly exist in the forum state. Such purposeful acts only occur when the defendant intentionally undertakes activities expressly aimed at a particular, known, forum party.

The concept behind the effects test is also ill-suited to apply to the targeting of an industry. In rejecting the plaintiff's arguments under the

effects test, the Court in *Cybersell v. Cybersell, supra,* 130 F.3d 414, 420, noted the well established rule that "because a corporation "does not suffer harm in a particular geographic location in the same sense that an individual does" (citing *Core-Vent, supra, at 1486*), the effects test does not apply with the same force to a corporation as it does to an individual[21]. By logical extension, an "industry" does not suffer harm in a geographic location at all since it is neither an individual nor a created entity, and because it is not truly bounded by any particular geographical location.

Concluding that "general industry effects" are sufficient to support jurisdiction would completely eviscerate the three *Calder* requirements and reduce the forum contacts to "random, fortuitous or attendant contacts" that traditionally would not support a finding of jurisdiction (*Burger King v. Rudzewicz* (1985) 471 U.S. 462, 475-476, 485). The case at bar is precisely the fact pattern that *Calder* and its progeny seek to avoid when they require "something more" than mere forseeability.

[21]Naturally, this rule also applies in it pure form to the instant case, since DVD CCA is a corporate plaintiff.

2. REAL PARTY IN INTEREST'S CLAIMS DO NOT ARISE FROM ANY FORUM-RELATED ACTIVITIES ON THE PART OF PAVLOVICH

In *Panavision*, the defendant directed correspondence to the plaintiff resulting in the suit and in *Calder* the defendant made various phone inquiries and had other contacts with California which resulted in the suit. By contrast, here, there are no true contacts with California that caused this trade secret case.

The original development and publication of the DeCSS information is alleged to have originated from one or more residents of foreign countries who posted the information on the Internet. The posting complained of was performed by an unidentified person on a web site owned and operated by an unknown person. The information itself was not authored by the Petitioner and was not directed towards the plaintiff in this action.

When evaluating specific jurisdiction, the court may only consider forum-related activities that relate to the specific cause of action at hand (*J.D.O., supra*, at 1058). This requirement is unique to specific jurisdiction,

differentiating it from the broader general jurisdiction (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147).

As indicated previously, DVD CCA has not provided any evidence of actual misappropriation by Pavlovich. Second, by its own pleadings, it is evident that DVD CCA was not the licensor of CSS at the time it was posted. Thus any misappropriation that may have occurred was not directed at DVD CCA at the time it occurred. Finally, there is no evidence connecting the republication of DeCSS information with California.

Courts have noted that:

> 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).

Here, the connection between this former 22 year old Indiana student and the State of California is so tenuous that California should not exercise jurisdiction over him.

A. EXERCISE OF JURISDICTION WOULD NOT BE REASONABLE

IN THIS CASE

Petitioner contends that California's exercise of jurisdiction is unreasonable, and thus constitutionally impermissible. In its Return, DVD CCA urges that this Court apply the seven factor test enumerated in *Core-Vent v. Nobel, supra,* 11 F.3d 1482. In weighing these factors, one reaches the same conclusion as the *Core-Vent* Court – that jurisdiction is unreasonable.

1. Purposeful Interjection

Even where there is sufficient "interjection" into the state to satisfy the purposeful availment prong, the degree of that interjection is a factor to be weighed in assessing reasonableness (*Id* at 1488). In *Core-Vent*, the authors of defamatory material, who knew the target of the defamatory material was in California, and knew the material would reach California through a particular publication were found to have attenuated California contacts. Here, since Petitioner did not target the plaintiff, did not know the information would reach California, and did not interject himself into California, this factor weighs heavily in Petitioner's favor.

2. The Burden on Defendant in defending the suit in California

As was the case in *Core-Vent*, here, Petitioner's action did not

involve profit and Petitioner is an individual[22] while DVD CCA is a large corporation with tremendous resources. Additionally, 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. This factor also weighs heavily in favor of Petitioner.

3. The extent of conflict with the sovereignty of the defendant's state

This factor tends to weigh heavily in favor of international defendants. Here, Petitioner is in a foreign state within the nation. So, the conflict of sovereignty exists, but only weighs slightly in Petitioner's

[22]DVD CCA notes that Petitioner traveled to New York for a related case (RET at p.16, fn.9). In that instance, PAVLOVICH had his air-fare paid by a non-profit group and unceremoniously slept on a couch in an apartment upon his arrival in New York.

favor.

4. The forum state's interest in adjudicating the dispute

As with any case where the plaintiff resides in the forum state, the state has some interest in adjudicating the suit. However, where, as here, the controversy arises elsewhere and involves the simple publication of information, that interest is tempered.

5. The Efficiency of the Forum

Although relying on *Core-Vent*, Real Party misreads the test for this factor. DVD CCA opts to evaluate its efficiency in litigating all matters in its home town – naturally it concludes the factor weighs in its favor. However, *Core-Vent* states that in evaluating this factor, Courts are to look primarily at where the witnesses and the evidence are located (*Id* at 1489). As indicated above, there are only one or two known California witnesses, while there are hundreds of other witnesses nation-wide and world-wide. According to DVD CCA the original creation of DeCSS and the original posting of the code occurred in Norway. while the evidence and witnesses relating to the creation of CSS exist almost exclusively in

Japan. The existence of two similar cases in Connecticut[23] and New York[24] further suggests that this case 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. Thus, not only does this factor not weigh heavily in favor of DVD CCA, it likely weighs in favor of Petitioner.

6. Existence of an alternate forum and (7) the convenience and effectiveness of the relief for the plaintiff

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

[24]*Universal City Studios et al. v. Reimerdes et al.*, case no. 00Civ.0277 (LAK), (S.D.N.Y.).

The *Core-Vent* Court analyzes factors six and seven jointly (*Id* at 1490). In its Return, DVD CCA states that because it exists in California, that is where it was harmed, that expense, burden and conflict could result, and that California "has the greatest interest[25] in the outcome of [this] litigation" (RET at pp.16-17). *Core-Vent* notes that "trying a case where one lives is almost always a plaintiff's preference" and "a mere preference on the part of the plaintiff for its home forum does not affect the balancing" (*Id* at 1490). Just as was the case in *Core-Vent*, Real Party "has not met its burden of proving that it would be precluded from suing" in an alternate forum (*Id* at 1490).

While the cost of a suit in another forum may be costly and inconvenient, there is no evidence that a trade secret claim can not be tried in Texas or any other alternative forum (*Id* at 1490). Therefore, the final factors are either insignificant or weigh slightly in Petitioner's favor.

V.

[25]It is unclear why California would have the greatest interest in the outcome of this case when DVD CCA's own Return demonstrates that over 80% of the CSS licensees are located outside of California (RET at p.5).

CONCLUSION

Real Party in Interest has failed to show cause why Petitioner's requested relief should be denied. This Court should resist Real Party in Interest's invitation to dramatically expand traditional jurisdictional bases to include the tenuous connection between a non-resident's particular publication on the Internet and the general reputation of a particular forum state[26].

[26]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.

As such, it is respectfully requested that this Court grant the petition based upon each of the reasons enumerated above, in the Petition, and the previously filed Reply.

Respectfully submitted,

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