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Appellate Court No. H021961

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

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.	)	Supreme Court No. S100809 Trial Judge: Hon. William J. Elfving Santa Clara County Superior Court Trial Court Case No. CV 786804

PETITIONER'S OPENING BRIEF ON THE MERITS

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STATEMENT OF THE ISSUES

On December 12, 2001, this Supreme Court granted review of the decision of the Court of Appeal. The issues on review are as follows:

1. Whether, consistent with Due Process, California may exercise jurisdiction on the basis that: a 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.

2. Whether "express aiming" may be satisfied by general, untargeted acts.

3. Whether jurisdiction is proper in instances where the defendant is responsible for a passive, non-commercial Internet site that enables an unknown third party to post information subsequently claimed to have caused harm in California, without "something more."

STATEMENT OF THE CASE

In this action, DVD CCA seeks to require non-resident Petitioner Matthew Pavlovich to defend a claim of trade secret misappropriation in California. The assertion of jurisdiction does not rest on any personal contacts that Mr. Pavlovich had in California, is not based on any violation of agreement between the defendant and plaintiff, nor on any allegation of a specific, targeted act aimed at the plaintiff. Instead, the assertion of jurisdiction over Pavlovich rests on the sole allegation that a web site Mr. Pavlovich had input on was involved in the republication of already

publicly-available information on the Internet and that Pavlovich knew or should have known that his acts would have an impact on "industries" located in California.

A.RELEVANT TERMINOLOGY

A DVD (Digital Versatile Disk) is a thin disk five inches in diameter, which can store a large amount of digital data. The digital data may take any number of forms. One common type of digital data stored on DVDs is data comprising a full length motion picture (See also generally *DVD CCA. v. Bunner* (2001) 93 Cal.App.4th 648, petition for review pending).

The Content Scrambling System (CSS) is a system of specifications and ideas setting out standards for scrambling or encrypting movies that are distributed on DVDs. Many movies distributed on DVDs are scrambled or encrypted using CSS. In order to play a CSS encrypted movie, the consumer must first de-scramble or decrypt the movie. Conversely, without the ability to de-scramble or decrypt a CSS encrypted movie, the consumer cannot use his or her lawfully purchased DVD movie. As of the time this lawsuit was filed, the entities who license CSS had not permitted CSS-equipped DVD players to be built for the Linux operating system or for other open-source[1] operating systems. As such, users of those systems could not watch their lawfully purchased DVDs on their own computers (see also *DVD CCA v. Bunner, supra*).

CSS was created by a consortium of Japanese companies who are not represented in this lawsuit. CSS was licensed for many years by the

[1] / See "Open Source" below.

Japanese companies prior to 1999. In "mid-December" of 1999, Real Party in Interest, California-based DVD CCA, took over the licensing responsibilities of CSS and promptly filed this action on December 27, 1999 (APP[2].pp.2-21; Complaint at p.1-20). DVD CCA is maintaining this action not as the party that was allegedly injured when DeCSS was published in October of 1999, but as a later assignee[3]. Thus, any effects felt by the only plaintiff in this case were necessarily "assigned into" California by the Japanese predecessor in interest.

The DeCSS Codes are a different set of ideas that also instruct a DVD player how to de-scramble data and are a necessary step in the multi-step process needed to play legally purchased movies. DeCSS never belonged to the DVD CCA. The DVD CCA does not contend that it created, owns, licenses or controls the ability to license DeCSS. DeCSS was published for free over the Internet by one or more unknown authors.

There are many competing theories as to how DeCSS was authored. The DVD CCA believes DeCSS was formulated by reverse engineering the CSS ideas. It suspects that Jon Johansen, a 15-year-old boy in Norway, authored DeCSS by reverse engineering CSS. It further believes that there was something illegal about this alleged act of reverse engineering[4].

DVD CCA has never asserted that DeCSS violates any copyright, or that the petitioner pirated or distributed movies. DVD CCA simply alleges that numerous individuals re-published information known as DeCSS and

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2 /. "APP" stands for the Appendix to Exhibits filed in the Appellate Court. 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.

3 /. This means that California's claim to jurisdiction must truly rest upon the 'general industry effects', or not exist at all, since the assignor of the CSS technology existed in Japan at the time DeCSS was allegedly posted on the website in question.

4 /. Reverse engineering or independent derivation alone shall not be considered improper means Cal.Civ.Code §3426.1(a).

that this information includes CSS trade secrets which DVD CCA began to license in December of 1999.

Interoperability Frequently a particular program or set of ideas is incompatible across different platforms or operating systems. When such incompatibility is discovered with a particular operating system, it is not uncommon for individuals or entities to attempt to create patches or other programs in an effort to make the program, or set of ideas, work across those different platforms – the goal of this process is called "interoperability." In order to achieve interoperability, it is usually necessary to examine the original program or system to uncover how it works. This process is often called "reverse engineering."

Reverse engineering is a process by which a programmer controls the input and observes the output of a particular program or algorithm, and attempts to create a program that results in a similar output, without it being necessary to know the true content of the original code or algorithm. It allows a company or developer to legally create a similar output or result without copying the original proprietary code. This process is frequently employed by individuals and corporations to solve interoperability issues and to develop scientific and technological advancements. Reverse engineering is presumptively legal (see eg. Cal.Civ.Code §3426.1(a)).

"Open source" refers to programs or systems that allow 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 (Gnu Public License), Mozilla License (from Sun/Netscape), Apple Source License (Apple), BSD Public License (from the State of California) and IBM's Public License. Many publicly held companies devote some or all of their resources to open source projects, including VA Linux, RedHat, IBM, Corel, Sun Microsystems, Compaq and Dell[5]. IBM alone has committed 5 billion dollars in research and development into the open source Linux operating system[6].

Open source has nothing to do with making "as much material as possible available over the Internet"[7] (*Pavlovich v. Superior Court* (2001) 91 Cal.App.4th 409 at 413). Rather, it is about enabling individuals to innovate and collaborate to create the best program or system to fit a particular need[8].

B.JURISDICTIONAL FACTS

Petitioner's involvement in this case is limited to his role as an alleged republisher of DeCSS information while enrolled as a full-time student at Purdue University in Indiana (see Exhibit B, at APP.p.66-68; Declaration of Pavlovich 2:1-5; 2:8-27). The Court of Appeals has

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5 /. Notably, the majority of these computer-industry leaders are not headquartered in California. Red Hat is in North Carolina, IBM in New York, Corel in Canada, Compaq in Texas and Dell in Texas.

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 (*Pavlovich v. Superior Court* (2001) 91 Cal.App.4th 409 at 413), this unattributed allegation is both inaccurate and unsupported by any evidence in the record. Mr. Pavlovich can hardly compete with the likes of Linus Torvalds, VA Linux and Red Hat.

7 /. Noted cyberlaw expert Professor Lawrence Lessig credits much of the Internet's success and universal acceptance to the fact that most of the Internet's protocols, from their inception, were "open sourced." (See Lawrence Lessig, Code and Other Laws of Cyberspace (1999)). DVD CCA's own web site employs both an open source operating system (FreeBSD) and an open source web server (Apache), see specifically the following website link: http://uptime.netcraft.com/up/graph/?host=www.dvdcca.org; and generally APP. p. 242, Rep.Transcript of Proceedings at p.15:24-28).

8 /. By contrast, closed source systems, such as Microsoft's Windows operating system, focus on providing a fixed set of features requiring that consumers adapt to that fixed system. Today, the open source Linux operating system is widely viewed as the only potential competition to Microsoft's Windows.

asserted, without evidentiary support, that Petitioner Pavlovich is responsible for the posting of DeCSS on the livid.on.openprojects.net web site, and that he "owned and operated" the website (*Pavlovich v. Superior Court, supra* 91 Cal.App.4th 409, 412-413). While Pavlovich did contribute to the LiVid[9]. site, the evidence is uncontradicted that Pavlovich did not own or operate the site[10]. The trial court record is similarly devoid of any evidence that Pavlovich himself posted DeCSS.

Petitioner Pavlovich resided in Indiana when the acts complained of occurred and now resides in Texas. He has no connection with California.

The uncontroverted evidence shows Pavlovich has never:

- Resided in California;
- Had any regular clients or work in California;
- 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.pp66-68; 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)[11].

The LiVid web site that DVD CCA incorrectly attributes to Pavlovich in their complaint, which was neither owned nor hosted by Pavlovich, was a "passive" web-site. The site 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).

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9 /. LiVid, the Linux Video and DVD project is discussed in section "1" below.

10 /. See Exhibit B, at APP.p.67; Declaration of Pavlovich at 2:17-27.

11 /. Again, Real Party in Interest provided no competent evidence to challenge any of these facts.

Real Party in Interest has conceded that Pavlovich has had no contact with California, did not know the identity of the only plaintiff in this case, 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 The web site DVD CCA incorrectly attributes 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 218-27). 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 37-9). 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, 444-12, 4822-25, 522-11, 9122-25)[/]. Again, Real Party in Interest provided no competent evidence to challenge any of these facts.. (See Opposition to Petition for Writ of Mandate filed September 18, 1999, hereinafter "OPP," generally and at pp.12-13 and Exhibit B, at APP.p.68; Declaration of Pavlovich at 3:7-9).

1. The LiVid List, LiVid Web Site, and Publication of DeCSS

The Linux Video and DVD project or "LiVid" was a loose association of software developers and computer programmers, with no formal organizational structure, who volunteered their time to work on Linux open-source projects involving various forms of Linux tools, frameworks, and video

playback[12] that were heretofore only available to users of mainstream operating systems. The non-profit[13] group congregated electronically through public electronic mailing lists that permitted members to post information that might be useful to the whole group. The goal of LiVid was to create useful Linux applications, learn and collaborate, and improve various types of video and DVD playback support for Linux. The group sought to combining the efforts of various individuals to provide a resource for end users and developers seeking information (APP.p.175; Pavlovich Depo. 23:10-15). They held no meetings in person and maintained no assets collectively.

Pavlovich did not own or host any site that published DeCSS. These facts are not contradicted by any evidence in the record. The DeCSS information in question is alleged to have been posted by someone, somewhere on the LiVid website, which was accessible by hundreds if not thousands of people across the Internet.

Although the record is devoid of any evidence as to the ownership or operation of the LiVid web site, on information and belief, the site appears to have been operated and perhaps owned by an unknown third party somewhere in Europe. Pavlovich did have input into the creation of the LiVid site and described the site at the time as follows:

> The LiVid web page consisted of one page with a blue background and text. The text included links to other web sites and included an old LiVid logo. The function of the web site was to provide information to [any] individual who sought it out by entering the URL into their web browser. Neither the site, nor the information on the site, was specifically directed at citizens of California or any other forum. The web site did not solicit or transact business, contained no "input

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[12] /. (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.22-25).

[13] /.Petitioner uses the term non-profit to mean the group didn't generate or attempt to generate any revenue. It is not intended to suggest that LiVid was a legally formed non-profit entity, indeed, the group had very little structure at all.

> fields" (blank spaces where users can insert information requested by the web site operator), and offered nothing for sale.

(APP. p.67, Pavlovich Declaration at p.2:17-27).

The web site was taken down some time before the original hearing on this case in the Trial Court (*Id*).

Although DVD CCA has adduced no evidence in support of either theory, it is assumed that Pavlovich was sued either because someone else posted DeCSS on the LiVid web site, someone else posted DeCSS on a site that had a link on the LiVid web page, or someone else posted DeCSS on one of the LiVid discussion lists. Matt Pavlovich himself did not post the code on the LiVid site or anywhere else.

C.DVD CCA's COMPLAINT

In its complaint filed with the trial court, real party in interest DVD CCA, seeks to enjoin Petitioner Pavlovich and some 521 other defendants from republishing the collection of ideas embodied in computer codes referred to as DeCSS. The vast majority of the Defendants appear to have found the information in the public domain and simply republished it on the Internet.

DVD CCA speculates that a Norwegian boy named Jon Johansen authored DeCSS by reverse engineering CSS after clicking a software agreement[14] prohibiting such reverse-engineering[15]. The complaint further alleges that Mr. Johansen first posted the DeCSS code on the Internet, world wide. DVD CCA alleges "on information and belief, the DeCSS program first appeared in the

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

[15] /. DVD CCA provided the trial court with no direct evidence that Mr. Johansen reverse engineered CSS.

United States, as early as October 25, 1999, on a website operated by Defendant Pavlovich, addressed as www.livid.on.openprojects.net." (see APP. p.15; Complaint at p.14:4-6). DVD CCA brought this action to enjoin Petitioner and the remaining defendants from continuing[16] to republish the DeCSS information (Exhibit A at APP.p.20; Complaint at p.19).

Irrespective of how DeCSS was originally created, DVD CCA has never claimed that Mr. Pavlovich authored it. Nor has DVD CCA ever alleged that DeCSS violates any copyright, or that Mr. Pavlovich pirated or distributed pirated movies.

D. PROCEDURAL STATUS AND THE DECISION OF THE COURT OF APPEAL

On August 30, 2000, the Superior Court of Santa Clara County (respondent) denied Petitioner's motion to quash service of summons. On October 11, 2000, the Sixth District Court of Appeals summarily denied Petitioner's writ petition. Following this Court's grant of review and directions to the Court of Appeal to issue an Order to Show Cause why petitioner's requested relief should not be granted[17], the Sixth District Court of Appeal issued a written opinion again denying relief[18].

In its decision, the Court of Appeals held that the pleading of an intentional tort, coupled with the transfer of information from a completely non-pecuniary, passive web site, touching upon any industry reputed to exist in California, was sufficient to satisfy purposeful availment (*Pavlovich v. Superior*

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16 /. As indicated above, the evidence demonstrates that Petitioner did not actually 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 APP.p.67; Declaration of Pavlovich at 2:13-27).

17 /. On December 19, 2000.

18 /. On August 7, 2001

Court, supra, at pp.417-418). In doing so, the Court modified the traditional "intent" requirement under the *Calder* jurisdiction test to a lesser "knew or should have known" standard (*Id* at p.418, 419). The Court also found that any Internet transmission is the equivalent of personal presence within all possible jurisdictions:

> Instant access provided by the Internet is the functional equivalent of personal presence of the person posting the material on the Web at the place from which the posted material is accessed and appropriated. It is as if the poster is instantaneously present in different places at the same time, and therefore, the reach of the Internet is also the reach of the extension of the poster's presence.

Pavlovich v. Superior Court, supra, at p.419.

Since the appellate record is devoid of any suggestion that Pavlovich himself posted DeCSS, it is presumed that the Court of Appeal used the term "posted" to include the instant scenario where an unknown person puts DeCSS onto a web site to which the named defendant has input. The Court deemed jurisdiction over Pavlovich proper because he knew or should have known that the motion picture industry and computer industries both had a substantial presence in California.

Petitioner argues that the lower Court's decision was wrongly decided, and violative of federal Due Process in that it incorrectly applies existing law and sets precedent in a manner that conflicts with existing jurisdictional jurisprudence.

SUMMARY OF ARGUMENT

Petitioner's acts, such as they are, are far too removed from California to sustain jurisdiction. He had no contact with California and never undertook the type of activities that traditionally support jurisdiction under the *Calder* test. In

asserting jurisdiction over Pavlovich, the Appellate Court improperly adopted a "knew or should have known" standard for the "Express Aiming" requirement in *Calder*, improperly expanded "Express Aiming" to include generalized aiming at industries reputed to exist in the forum; improperly applied the narrow *Calder* test to an ill-fitting factual situation; *and* improperly analyzed the "fairness" requirement of specific jurisdiction.

ARGUMENT

In *Vons Companies, Inc. v. Seabest Foods Inc.* (1996) 14 Cal.4th, 434, this Court noted the well-settled, structured, analysis that must be followed where state power over a non-resident defendant is asserted[19]:

> A state court's assertion of personal jurisdiction over a nonresident defendant who has not been served with process within the state comports with the requirements of the due process clause of the federal Constitution if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate " 'traditional notions of fair play and substantial justice.' " (*International Shoe Co.* v. *Washington* (1945) 326 U.S. 310, 316). . .
>
> Recent decisions of the United States Supreme Court describe two bases for limiting a state's exercise of personal jurisdiction over nonresidents. The first recognizes limits on a state's assertion of jurisdiction designed to ensure fairness to nonresident defendants. The second recognizes the mutual limits on the states' sovereign power to exercise jurisdiction in a federal system.
>
> As the high court has explained, each individual has a 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." (*Burger King Corp.* v. *Rudzewicz* (1985) 471 U.S. 462, 471-472) . . .
>
> The concept of minimum contacts also requires states to observe certain territorial limits on their sovereignty. It "ensure[s] that the States, through their courts, do not reach out beyond the limits imposed

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19 /. It is well settled that California's long-arm statute authorizes California courts to exercise jurisdiction on any basis not inconsistent with the Constitution of the United States or the Constitution of California. (Code Civ. Proc., § 410.10.) (*Vons* at 444).

> on them by their status as coequal sovereigns in a federal system." (*World-Wide Volkswagen Corp.* v. *Woodson* (1980) 444 U.S. 286, 292. . . "[T]he Framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States . . . . " (*Id.* at p. 293.)

(*Vons,* at 444-445).

Personal jurisdiction may be either general or specific (*Perkins v. Benguet Mining Co* (1952) 342 U.S. 437).

A. GENERAL JURISDICTION IS ABSENT IN THIS CASE

"The standard for establishing general jurisdiction is 'fairly high,' and requires that the defendant's contacts be of the sort that approximate physical presence" (*Bancroft and Masters, Inc. v. Augusta Nat'l, Inc.* (9th Cir. 2000) 223 f.3d 1082, 1086). Occasional contacts with California simply are not enough (*Brand v. Menlove Dodge* (9th cir. 1986) 796 F.2d 1070, 1073). It is uncontested that Pavlovich has no California contacts. DVD CCA does not argue, and the lower Court did not find, a basis for general jurisdiction.

B. SPECIFIC JURISDICTION IS ALSO ABSENT IN THIS CASE

SPECIFIC JURISDICTION IS ABSENT IN THIS CASE BECAUSE THE PETITIONER HAS NOT PURPOSEFULLY ESTABLISHED CONTACTS, TIES, OR RELATIONSHIPS WITH CALIFORNIA

Specific jurisdiction, such as that relied upon by the Appellate Court, depends upon a three-pronged showing: That the non-resident defendant (1) purposefully established contacts with the forum state[20], (2) that the plaintiff's

[20] /. As this Court has noted, the United States Supreme Court has described the forum contacts necessary to fulfill the "purposeful availment" element as "a non-resident who has 'purposefully directed' his or her activities at forum residents" (*Vons* at 446), "has 'purposefully derived benefit' from forum activities"

cause of action arises out of the defendant's forum-related contacts, and (3) 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). The Court of Appeals below erred in its application of the first, second and third prongs of the *Burger King* test.

1. PRONG ONE: Pavlovich has not purposefully availed himself of the benefits of the forum state.

PRONG ONE PAVLOVICH has not purposefully established contacts with California, has not purposefully directed activities at forum residents, has not purposefully availed himself of the benefits of the forum state, nor deliberately established obligations or activities with California residents. A "purposeful" contact is one in which a particular defendant has deliberately directed his or her activities at the residents of the forum state or has deliberately availed himself or 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 over whom the non-resident defendant has no control does not translate into a purposeful contact on the part of the defendant (*Helicopteros Nacionales v. Hall,* (1984) 466 U.S. 408, 416-417). Thus, any activities on the part of the third party Japanese corporations who created CSS, the movie industry, the

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(*Id*), has "purposefully availed himself or herself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'" (*Id*, citations omitted) or has "'deliberately' . . . engaged in significant activities with a State . . .or has created 'continuing obligations' between himself and residents of the forum" (*Id*, citations omitted).

computer industry, the other LiVid participants, the other named defendants in this case, or anyone other than Pavlovich himself, cannot be used to support a finding of jurisdiction over Petitioner (see *Helicopteros Nac., supra*).

In the seminal case of *Calder v. Jones,* 465 U.S. 783 (1984), the Supreme Court held that purposeful availment may be satisfied, within the confines of due process, where certain intentional acts are "expressly aimed" and cause foreseeable harm in the forum state. Courts have consistently 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).

Bancroft, *Cybersell v. Cybersell* (1997) 130 F.3d 414, and *J.D.O. v. Superior Court* (1999) 72 Cal.App.4th 1045 (review denied) are particularly instructive with respect to the "effects" test which so many Plaintiffs attempt to stretch well beyond what the *Calder* Court envisioned.

The *Bancroft* Court noted: "the [express aiming] 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, supra,* at 1087).

Numerous courts have cited and followed the *Bancroft* rationale holding that the *Calder* test will satisfy purposeful avialment only in instances where the defendant has knowingly targeted a forum party. For example, in dismissing an Internet trade libel action for lack of jurisdiction, the Court in *Callaway Golf Corp. v. Royal Canadian Golf Ass'n*, (C.D.Cal. 2000) 125 F. Supp. 2d 1194 followed the *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

To the extent that Pavlovich is involved in the events which are the subject of this lawsuit, his involvement cannot be described as a purposeful contact with California. It is well settled that to support jurisdiction, "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). Here, nothing about Pavlovich's limited conduct in relation to this case should have caused him to anticipate being haled into court in California.

a. The Court of Appeals lowered the "intent" element of the express aiming requirement and impermissibly considered unintentional acts not intentionally targeted at forum residents.

California may not exercise jurisdiction, consistent with Due Process, on the basis thata defendant knew or should have known that his acts would have an effect on industries generally reputed to exist in California (generalindustryeffects), where no other California contacts exist. The very essence of the *Calder* test precludes the negligence ("*knew or should have known*") standard employed by the Court of Appeal to satisfy the express aiming requirement. The *Calder* Court made it quite clear that its test was only to be used where intentional acts are purposefully directed by the defendants. That Court explained the factual scenario carefully:

> petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortuous, actions were expressly aimed at California. Petitioner South wrote and Petitioner Calder

> edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that 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 v. Jones, supra, at 789-790.

The *Calder* Court made it quite clear that the defendant had "knowingly" caused the injury and that the "wrong doing [was] *intentionally* directed at a California resident" (*Id* at 790, emphasis added).

The Calder Court's requirement that the defendant have knowingly caused the injury and intentionally directed wrongful conduct at a resident is not a fortuity. It is well settled that a Court may only exercise specific jurisdiction over a non-resident defendant when the defendant purposely avails himself of the privileges of conducting activities in the forum state (*Callaway, supra*, citing *Bancroft v. Augusta, supra* at 1086 analyzing the "Calder Effects" test). Such 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). Thus, negligent conduct will not suffice.

In the Internet publication case *J.D.O. v. Superior Court*, *supra* [21]., the Court distinguished *Panavision Inter'l, L.P. v. Toeppen* (9th Cir. 1998) 141 F.3d 1316), by noting that in *Panavision*[22] the defendant knew his intentional conduct would have the effect of injuring Panavision in California (*Id* at 1059). In *Panavision*, the plaintiff provided competent evidence clearly demonstrating

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21 /In JDO, the plaintiff Rambam sued for defamation after the defendant allegedly disseminated defamatory statements on an entities passive web site. The Court of appeals reversed the trial Court's finding of jurisdiction.

22 /In *Panavision*, the defendant Toeppen allegedly operated as a "cyberpirate," stealing valuable trademarks, registering domain names using the marks and then trying to sell the domain names to the rightful trademark owners. Panavision, a California movie studio sued after Toeppen contacted Panavision in California and tried to extort $13,000.00 from them.

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* [23].. 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 as it was in *Panavision*. After surveying a slew of effects cases, one Court noted:

> individualized targeting is what separates [cases where the effects tests is satisfied] from others in which we have found the effects test unsatisfied.

Bancroft at 1088.

Each of these cases demonstrates that the requirement may only be satisfied where there is purposefully wrongful conduct which is intentionally targeted [24].

Contrary to the implication of the name "effects test," the *Calder* analysis actually depends on the purposeful targeting on the part of a defendant. It is that intentional wrongful act, purposefully targeted 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:

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[23] /In *Cybersell*, Cybersell AZ sued Cybersell FL in Arizona for allegedly infringing on its service mark on its Internet web page. Cybersell FL continued to use the service mark after Cybersell AZ contacted them and informed them of the infringement.

[24] /. In accord, *Brainerd v. Governors of the University of Alberta* (9th Cir. 1989) 873 F.2d 1257, and also *Haisten v. Grass Valley Med. Reimb. Fund Ltd.* (9th Cir. 1986) 784 F.2d 1392, forum effect "was not only foreseeable, it was contemplated and bargained for" (*Id* at 1398).

> [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."

(and in accord *Cybersell v. Cybersell, supra* at 416-417).

It is the purposeful, knowing, targeting of forum residents by the non-forum defendant, together 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.

Here, neither intentional element has been fulfilled. There is neither evidence that Pavlovich knowingly targeted residents of California, nor is there evidence that he knew his actions (or inactions) would harm California residents.

Petitioner's sole connection to this case is that he was one of many contributors to a site which is alleged to have republished information that happened to allegedly harm a California licensing corporation created two months after the harmful information was allegedly posted. 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).

The instant case is therefore analogous to the *Calder* discussion in *Edmunds v. Superior Court* (1994) 24 Cal.App.4th 221. In *Edmunds*, the non-resident defendant allegedly had input into documents and tangential dealings with a partnership that eventually caused harm to the plaintiff in California. Although in *Edmunds* the defendant knew of the plaintiff's identity and residence, the Court found that his actions were not sufficiently intentional nor sufficiently targeted to permit jurisdiction under *Calder*. That Court explained:

> 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.

Here the Court of Appeals below erred in presuming that a finding that the defendant "knew or should have known" that his conduct might result in harm within California is sufficient to satisfy the *Calder* test. Mere knowledge or presumed knowledge that information posted by someone on a web site might affect an industry reputed to exist in California is far from the factual scenario envisioned by the Supreme Court in *Calder*. Thus, the Court of Appeals below simply ignored the counsel of *J.D.O, Cybersell* and *Calder's* other progeny by stretching the "express aiming" requirement beyond recognition [25].

b. The "Express aiming" requirement may not be satisfied by general, untargeted acts or "general industry effects"on non-parties.

The Court of Appeal once again overstretched *Calder* by holding that jurisdiction need not be based on specific activity targeted at a specific forum party. Instead, it held that all that is necessary are generalized effects on industries (*Pavlovich v. Superior Court* at 418, 419) and that those industries need not be parties in the suit (*Id* at 422) [26]. By definition, "express aiming" is

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[25] /The Court's error in failing to require intentional activity purposefully targeted by the defendant was compounded by its incredible assertion that Internet contacts are the functional equivalence of personal presence wherever information is accessed. An idea resoundingly rejected by many courts (see eg. *Cybersell v. Cybersell*, supra at 414.

[26] /In support for its erroneous conclusions regarding express aiming, the Appellat Court incorrectly imported the legal standard for prong two (arising out of) and applied it to the express aiming element of prong one (see section IV, B,2, infra).

necessarily directed and purposeful. It is aiming specifically targeted at someone or something. Thus, the Court of Appeal erred in finding that Pavlovich's untargeted acts (or his failure to act by removing the DeCSS code someone else posted) satisfied purposeful availment. General acts that affect one or more industries cannot, by their nature, be considered to have been "expressly aimed".

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 (*JDO v. Superior Court, supra, at 1057*; *Panavision* at 1321).

As discussed above in Bancroft & Masters, *supra* at 1087, the Ninth Circuit (applying California law) candidly tackled the "express aiming" element of the effects test. The Court noted that after *Calder* and *Panavision* "Subsequent cases ... bear out the conclusion that 'express aiming' encompasses wrongful conduct individually targeting a known forum resident" (*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 because it individually targeted (plaintiff), 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; in accord *Meyers v. Bennett Law Offices* (9th Cir 2001) 238 F.3d 1068, 1072).

The same conclusion is reached when analyzing *Panavision*. There, the Court found that the defendant had intentionally engaged in a scheme targeting the plaintiff and had attempted to extort money from that same plaintiff (*Panavision* at 1322). While the *Panavision* Court did mention the fact that the plaintiff's industry[27] was centered in California, it only did so as additional support for the proposition that harm was forseeable in California once the defendant targeted *Panavision* with his extortion scheme (*Id* at 1321). *Panavision* in no way suggests that the industry itself could be targeted instead of the plaintiff.

In finding *Calder* inapplicable, the Court in *Cybersell v. Cybersell* also defined the requirements as "intentional torts directed to the plaintiff, causing injury where the plaintiff lives" (*Id* at 40 and see fn.6 distinguishing *Panavision* based on lack of activity targeted at the plaintiff).

Permitting the effects test to be satisfied by the alleged targeting of a vague concept such as "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[28]). 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 industries), the Court concurrently reduced the intent, the purpose, and the

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27 /. It is noteworthy, that in *Panavision*, the Court mentioned the existence of the motion picture industry and television industry because the targeted plaintiff (Panavision) was a part of that industry. Here, DVD CCA is simply an administrative body that regulates contracts and licenses. It is not part of any of the industries discussed in the Court of Appeal's decision.

28 /. 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 Petitioners had not purposefully directed their acts with an intention or expectation that the documents would have an effect in California. Similarly, assuming arguendo, Pavlovich were in some way responsible for the web site publication of 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.

forseeability requirements. It is this express purpose that forms the under-pinning 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 specifically 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 the Courts in *Calder, Panavision, J.D.O., Bancroft*, and *Myers*. An individual can't be said to have purposefully availed him or 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 permitting information to be posted that is related to one or more industries that reputedly exist in the forum state. The requisite purposeful acts needed to satisfy purposeful availment only occur when the defendant intentionally undertakes activities expressly aimed at a particular, known, forum party.

If all that were necessary to satisfy the *Calder* test were "general industry effects," then the U.S. Supreme Court in *Calder* itself would have dramatically curtailed its analysis. In *Calder*, the allegedly defamatory news story involved then well-known actress Shirley Jones. The High Court could have easily and simply concluded that National Enquirer writers knew the story involved the motion picture industry, knew that the industry existed in California, and therefore were subject to suit in California when Jones alleged harm. It did not. Instead, the *Calder* Court embarked on careful analysis noting that the defendant knew the identity of the plaintiff, knew the plaintiff lived in California and knew that the information it published would likely have an

adverse effect on that particular plaintiff (*Calder* at 789-790). *Calder* concluded that California courts had personal jurisdiction over the defendants in Florida because defendants' "intentional conduct in Florida [was] calculated to cause injury to respondent in California" (*Calder* at 791).

Mere knowledge that one is involved in providing information that relates to the computer industry, motion picture industry or any other industry, isn't an "act" that rises to the level of purposeful availment identified in *Hanson* or *Calder*. That the subject of a publication touches on various industries that exist in California and throughout the world, is not in itself a basis for jurisdiction.

Here, Real Party in Interest conceded that petitioner could not have expressly aimed his activities at DVD CCA. Petitioner did not even 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 of CSS at the time the postings occurred (APP.p.14; Complaint p.13: 6-10). Additionally, by DVD CCA's count, less than 20% of the CSS licensees are located in California (RET[29] at p.5),

The concept of harmful effects, within *Calder*, further demonstrates that the "express-aiming" requirement is 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 v. Nobel* (9th Cir. 1993) 11 F.3d *1482,1486*), the effects test does not apply with the

[29] /. DVD CCA's Return filed in the Court of Appeal on February 15, 2001, hereafter "RET"

same force to a corporation as it does to an individual[30]. 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 it is not truly bound by or to any particular geographic 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 sought to avoid when they required "something more" than mere forseeability.

If general industry effects were sufficient to satisfy *Calder*, any publisher of information would be required to screen the content of his or her writing to determine what possible industries might be involved, and expect to be sued in any jurisdiction where such industries exist. Thus for example, a food critic who happens to discuss cheese in an allegedly defamatory article, would be required to defend him or herself in California, Wisconsin, New York and probably Paris. Such a result is both absurd and violative of due process.

c. The Court of Appeals Erred in Failing to Distinguish Between the Facts at Bar and Those Presented in *Calder v. Jones*.

As the Court in *Cybersell v. Cybersell* noted, not every information republication case is analogous to *Calder* (*Cybersell* at 420[31]). Similarly, other

30 /. Naturally, this rule also applies in its pure form to the instant case, since DVD CCA is a corporate plaintiff (see section C below).

31 /. The *Cybersell* Court stated simply "we don't see this as a *Calder* case" before providing a careful factually distinction of *Calder*.

Courts have held that one must "deal with the entire picture" presented because "a categorical approach is antithetical to *Calder*'s admonishment that the personal jurisdiction inquiry cannot be answered through the application of a mechanical test" (*Gordy v. Daily News* (9th Cir. 1996) 96 Cal.Daily Op. Service 7860, 96 D.A.R. 13030 at p.13[32].). When looking at the "entire picture" in *Calder* and comparing it to the facts at bar, one finds that both cases involve the alleged republication of information across state lines. The similarities, however, largely end there.

Eight important points distinguish this case from the scenario presented to the *Calder*.

1. Pecuniary Interests. The non-commercial, non-profit nature of Petitioner's activities meant that he did not receive any benefit from California, made no money in California, and had no business ties with California. In *Calder*, the defendants certainly benefitted from the sale of 600,000 copies of their magazine in California (*Id* at 785).
2. Party Harmed. In the instant case, Pavlovich is alleged to have harmed a corporate entity (DVD CCA) which does business world-wide and is less likely to suffer harm in one particular location. By contrast, in *Calder*, the plaintiff was an individual who necessarily felt harm where she lived and worked. Numerous cases have suggested that the *Calder* test is less applicable to corporate plaintiffs since they are less likely to suffer harm in one particular location (*Core-Vent v. Nobel Industries*, (9th Cir. 1993) 11 F.3d 1482, 1486, in accord, *Gordy, supra, Cybersell, supra*).
3. Location of the Harm. In the case at bar, the harm claimed by the plaintiff would have affected entities in Japan, not California, at the time publication

[32] /. Originally sited at 95 F.3d 829, and subsequently modified but not re-paginated.

was allegedly made. As indicated previously, DVD CCA alleges that the DeCSS information was posted somewhere on the website in question on or about October 25, 1999, but admits it did not become the licensor of CSS until mid-December 1999. In *Calder*, there could be no question in the defendants' minds that the harm would be felt in California since they specifically targeted the known California resident (Shirley Jones) and made phone calls to the plaintiff's home in California.

4. Interaction with State Residents. In this case, there has been no interaction between Petitioner and the State of California and no interaction between the Petitioner and the sole plaintiff (DVD CCA). In the *Calder* scenario, the defendants had some ties to the forum through their investigative efforts in California, their phone calls into California, frequent visits to California, and due to the fact that California was their largest market (*Id* at 785-786). Additionally, the defendants intentionally and specifically targeted a known California resident and film star by impugning the professionalism and integrity of the plaintiff in their libelous article (*Id* at 788-789).

5. Control. Here, the web-site publishing the objectionable information is not under the sole control of the defendant. As mentioned previously, this passive website was maintained by and for a large, unstructured group of contributors. By contrast, in *Calder,* the author and editor of the libelous article had complete control over its content and caused it to be delivered to California where the magazine had its largest circulation (*Calder* at 785).

6. Delivery Into Forum As indicated above, the LiVid site was passive and did not solicit or otherwise intentionally direct information into California. By Contrast, in *Calder* the defendants had a circulation of 600,000 papers in California - each one carrying the libelous article (see *Casualty Assurance Risk v. Dillon* (9th Cir. 1992) 976 F.2d 596 at 599 on the importance of the

circulation of the information within the forum state as an important factor in determining jurisdiction).

7. Intent to Act/Intent to Aim. Here, the true source of the information (DeCSS) and the true intent of the original publisher are unknown and Petitioner's volitional acts are minimal. Further, the identity and existence of the sole plaintiff were unknown to the defendant when the acts occurred. Thus, Petitioner Can't be said to have intentionally acted and purposefully targeted his conduct (see section A, *supra*). In *Calder*, both the writer and editor were identifiable and could be brought before the Court. Defendants were responsible for the investigation in California, as well as the authorship, editing, and publication of the libelous work. The defendants also knew the location and identity of the plaintiff and refused to retract their libelous story upon request, knowing that it would harm the plaintiff in California (*Id* at 785-786).

8. Targeting of Forum Residents Here, Pavlovich has not targeted any activity at a particular forum resident or entity, much less at the plaintiff (see section B, *supra*). In *Calder*, the defendants knew exactly whom they were targeting since they specifically sought out Ms. Jones, contacted her husband, and refused to retract their libelous story when she demanded they do so (In accord, *Gordy, supra, Cybersell, supra, Bancroft, supra, Panavision, supra,* at 1319 (targeting extortion scheme at plaintiff).

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.

Yet, in this case, there is unquestionably even less evidence of purposeful availment than in *JDO* and other cases where Courts have not found jurisdiction. Here Petitioner was a full-time student in Indiana during the time period outlined in the complaint, and never transacted business with anyone in California[33]. Furthermore, Pavlovich did not exercise any control over anyone in California and never solicited contacts with California residents through the web site (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 world-wide and did not target or in any way solicit California residents (Exhibit B, at APP.pp67; Declaration of Pavlovich at 2:17-27). Additionally, Pavlovich cannot have targeted his actions 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[34].

The evidence is undisputed that Pavlovich's sole involvement in this case is through his limited input to a web site run by his not-for-profit volunteer group. No evidence has ever been presented suggesting he either developed or even himself posted DeCSS. The non-cyberspace analogy would be that of the president of a student group in charge of a discussion cork-board in a university dorm hall and an unknown individual then posting an objectionable flyer on that cork-board. Haling the President of the group into

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

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

court in Michigan, or for that matter, Japan, because the content posted on the cork-board criticized the automotive industry would be unthinkable.

2. PRONG TWO: Any contacts considered in the jurisdictional analysis must "arise out of" or be "related to" the cause of action.

As this Court noted in *Vons v. Seabest, supra*, this second prong requires that the contacts used to support the purposeful availment prong, must demonstrate a nexus between the forum, the litigation, and the defendant (*Id* at 457-458; in accord, *Cassiar Mining Corp. v. Superior Court* (1998) 66 Cal.App.4th 550, 557).

Thus, since the sole cause of action in this case is an allegation of trade secret misappropriation, brought by a licensing entity, it was improper for the Appellate Court to consider activity unrelated to the cause of action, the defendant and the forum. For example, the Court should not have considered "distribution of copyrighted material of California Companies" or "pirating DVD's" (*Pavlovich* at 414, 418-419) since there is no allegation that Petitioner was involved in either activity.

Additionally, in analyzing the express aiming requirement under the "purposeful availment" prong, (see section "1" above) the Appellate Court below erroneously relied upon *Cassiar*'s "nexus test" analysis (*Pavlovich v. Superior Court* at 421-422). While it would be proper for a Court to apply *Cassiar* in this prong, the *Cassiar* test has no relevance to an express aiming analysis.

3. PRONG THREE: Exercise of jurisdiction is unreasonable in this case

The Court of Appeal also incorrectly applied the final prong of the jurisdiction test. *Core-Vent v. Nobel, supra,* 11 F.3d 1482 provides a seven-factor test for analyzing prong three of specific jurisdiction:

> "In determining whether the exercise of jurisdiction over a nonresident defendant comports with "fair play and substantial justice," we must consider seven factors: (1) the extent of the defendants' purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendants' state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum." *Core-Vent* at 1487-1488, quoting *Paccar Int'l, Inc. v. Commercial Bank of Kuwait, (9th Cir. 1985) 757 F.2d 1058 at 1065.*

In weighing these factors, one reaches the same conclusion as the *Core-Vent* Court – that jurisdiction under these circumstances is unreasonable.

a. Purposeful Interjection

The Core-Vent court pointed out that

> even if there is sufficient 'interjection' into the state to satisfy the [purposeful availment prong], the degree of interjection is a factor to be weighed in assessing the overall reasonableness of jurisdiction under the [reasonableness prong].

Core-Vent at 1488 quoting *Insurance Company of North America v. Marina Salina Cruz, (9th Cir. 1981) 649 F.2d 1266, at 1271.*

In *Core-Vent*, the defendants and authors (Swedish doctors who authored several articles which arguably libeled the products of a competing U.S. Corporation) of the defamatory material knew the target of the defamatory material was in California and knew the material would reach California through a particular publication. By contrast, Mr. Pavlovich did not author or himself post DeCSS, did not know where DVD CCA was located and, had no

specific knowledge that the website would be viewed by Californians. He had no other purposeful contacts with the State of California or its residents. Thus, because there is no purposeful interjection, this factor weighs heavily in Petitioner's favor.

b. The Burden on Defendant in Defending the Suit in California

In *Core-Vent*, the court suggested that the burden on the defendant of defending the suit in the forum should be examined in light of the plaintiff's corresponding burden (*Core-Vent* at 1489). The court then pointed out that the Swedish doctors were:

> individuals with little or no physical contacts with California. Core-Vent, on the other hand, is a large international corporation with worldwide distribution of its products. Regardless whether the burden on the plaintiff is considered, this factor weighs heavily in favor of the doctors

Core-Vent at 1489.

Here, Mr. Pavlovich's limited involvement in this case did not involve any pecuniary profit. Additionally Mr. Pavlovich is a young man, just out of college, with a year 2000 taxable income of $10,455.14. DVD CCA, on the other hand, is a corporation with tremendous resources. Because of the heavy burden of defending this suit in California, this factor also weighs heavily in favor of Petitioner.

c. The Extent of Conflict With the Sovereignty of the Defendant's State

This factor tends to weigh heavily in favor of international defendants and marginally in favor of domestic non-resident defendants. Whenever a foreign jurisdiction seeks to judge a non-resident, there is an inherent conflict with the sovereignty of the non-resident's state. In *Core-Vent,* the court examined the Swedish Doctors' ties with the U.S. in general, and stated, "[i]n

determining how much weight to give this factor, we have focused on the presence or absence of connections to the United States in general, not just to the forum state" *Core-Vent* at 1489. Since Petitioner is a U.S. citizen, this factor must necessarily be less weighted. However, one similarity with the Core-Vent Doctors persists - that Mr. Pavlovich had no representative, or personal contact within the forum state. *FDIC v. British-American Ins. Co.*(*9th Cir. 1987) 828 F.2d 1439, 1444* (absence of officer, affiliate or subsidiary in United States significant in evaluating sovereignty concerns). Here, since Petitioner resides in a foreign state within the same nation, the conflict of sovereignty exists, weighing slightly in Petitioner's favor.

d. 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, in order to provide an effective means of redress for its residents who are tortiously injured (*Core-Vent* at 1489). However, where, as here, the controversy arises elsewhere and involves the simple publication of information, that interest is tempered.

e. The Efficiency of the Forum

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). The defense is aware of only two California witness essential to the prosecution and defense of this action, Mr. John Hoy and Andrew Bunner. By contrast, an array of witnesses that could provide information in this case are available in Norway, Japan, England, New York and Connecticut in addition to hundreds of other potential witnesses 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. 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 in favor of DVD CCA as the Appellate Court concluded, it weighs in favor of Petitioner.

f. Existence of an Alternate Forum and (g) the Convenience and Effectiveness of the Relief for the Plaintiff

The *Core-Vent* Court analyzes factors six and seven jointly (*Id* at 1490). In its Return filed in the Appellate Court, 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[35] 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).

The *Core-Vent* court iterated that mere inconvenience is not enough to tip the scales in favor of the plaintiff under this analysis. It pointed out that, "[t]he maintenance of a suit in Sweden may be costly and inconvenient for Core-Vent, but Core-Vent has not shown that its libel claims cannot be effectively remedied there" *Id* at 1490. The analysis is similar here: while the expense of litigation in another forum may be costly and inconvenient, there is no evidence that a trade secret claim cannot be effectively tried in Texas or any

35 /. 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).

other alternative forum (*Id* at 1490). Therefore, the final factors are either insignificant or weigh slightly in Petitioner's favor.

CONCLUSION

Due Process requires that personal jurisdiction be based first and foremost on fairness. If defendants do not have "fair warning" that their Internet activities will render them subject to jurisdiction in this forum, personal jurisdiction may not be had, regardless of other considerations (*Millennium Enters., Inc. v. Millennium Music, L.P.* (D.Or. 1999) 33 F.Supp.2d 907, 923-924, citing *World-Wide Volkswagen Corp.*, *supra* 444 U.S. at 294). To permit the broad assumption that any publication on the internet must necessarily result in an assumption of the risks and liabilities of facing suit in all of the states in the Union, is to necessarily eviscerate the guaranteed protections of the Due Process Clause. The notion of "Fair Play" requires that defendants be held accountable for their actions in any forum in which they conduct business, or otherwise avail themselves of the benefits and protections of the forum state, but that they remain free from the worry of being sued in a foreign state with which they have had no meaningful contacts. Certainly, the mere implication of a connection between an entire industry and an inferred activity, cannot rise to the level of fairness contemplated by our forefathers.

Petitioner respectfully requests that this Court reverse the decision of the Court of Appeals and provide such other relief as the Court may deem appropriate.

Respectfully Submitted,	H.S. LAW GROUP APC

DATED: January 14, 2002	By:_____ ALLONN E. LEVY Attorneys for Defendant MATTHEW PAVLOVICH