

Appellate Court No. H021961

**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

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

**PETITION FOR REVIEW AFTER DECISION BY COURT OF APPEAL,
SIXTH APPELLATE DISTRICT**

ALLONN E. LEVY (Bar No. 187251)
H.S. LAW GROUP APC
210 North Fourth Street, Suite 201
San Jose, CA 95112
Telephone: (408) 295-7034
Facsimile: (408) 295-5799

Attorneys for Petitioner
Matthew Pavlovich

TABLE OF CONTENTS

	<i>Page</i>
I. <u>PETITION FOR REVIEW</u>	2
II. <u>ISSUES FOR REVIEW</u>	2
III. <u>REASONS FOR REVIEW</u>	3
IV. <u>PROCEDURAL POSTURE</u>	7
V. <u>FACTS</u>	10
A. Statement of the Case.....	10
B. Jurisdictional Facts.....	13
VI <u>ARGUMENT</u>	14
A. Compelling Reasons Exist for this Court to Grant Review.....	14
1. THE EXPRESS-AIMING REQUIREMENT OF THE CALDER JURISDICTION TEST CANNOT BE SATISFIED SOLELY BY GENERAL INDUSTRY EFFECTS.....	17
a. The Calder Jurisdiction Test.....	17
b. Without a Meaningful “Express Aiming” Requirement, the Calder Test Cannot Satisfy Due Process Requirements.....	21

2. THE STATE MAY NOT EXERCISE SPECIFIC
JURISDICTION BASED SOLELY ON FORESEEABLE
EFFECTS IN THE FORUM ABSENT “SOMETHING
MORE”.23

VII. CONCLUSION.....27

TABLE OF AUTHORITIES*Page***FEDERAL CASES**

<u>Bancroft & Masters Inc. v. Augusta National Inc.</u> (9th Cir.2000), 223 F.3d 1082,	5, 18, 19, 21, 23, 24, 25
<u>Burger King v. Rudzewicz</u> , (1985), 471 U.S. 462	21, 24
<u>Calaway Golf Corp. v. Royal Canadian Golf Ass'n.</u> (C.D. Cal.2000) 2000 U.s. Dist. LEXIS 19032	20, 21, 23
<u>CoStar Group v. LoopNet</u> (D.Md.2000) 106 F.Supp.2d 780	21
<u>Calder v. Jones</u> , (1984) 465 U.S. 783	3,4, 5, 14, 16, 17, 19, 20, 22, 23, 24, 25
<u>Cybersell, Inc. v. Cybersell, Inc.</u> (9th Cir. 1997), 130 F.3d 414	5, 16, 19, 24, 25
<u>Gordy v. Daily News, L.P.</u> (9th Cir. 1996), 95 F.3d 829	6, 25
<u>Hanson v. Denkla</u> (1958) 357 U.S. 235	22
<u>Kulko v. Superior Court</u> (1978), 436 U.S. 84	19
<u>Meyers v. Bennett Law Offices</u> (9 th Cir. 2001) 2001 U.S.App.LEXIS 1539	23
<u>Panavision International L.P. v. Toepen</u> (9th Cir 1998), 141 F.3d 1316	5, 14, 15, 17, 19, 20, 23, 24
<u>World-Wide Volkswagen Corp. v. Woodson</u> (1980), 444 U.S. 286	24

STATE CASES

<u>Edmunds v. Superior Court</u> (1994), 24 Cal. App. 4th 221	19
<u>Goehring v. Superior Court</u> (1998), 62 Cal. App. 4th 894	19
<u>Jewish Defense Organization Inc. v. Superior Court</u> (1999), 72 Cal. App. 3d 1427	5, 14, 15, 16, 20, 23
<u>Vons Companies v. Seabest Foods Inc.</u> (1996) 14 Cal.4th 434	3, 15
<u>Wolf v. City of Alexandria</u> (1990), 217 Cal. App. 3d 541	19

STATUTES

Cal. Civil Code §3426.....	7, 12
Cal. Code of Civil Procedure §418.10.....	8
Cal. Rule of Court 28 2,9,10	

I.

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

MATTHEW PAVLOVICH, defendant and petitioner, hereby appears specially and respectfully petitions for review following the decision of the Court of Appeal, Sixth Appellate District, (per Hon. Eugene M. Premeo, Acting P.J.), filed on August 7, 2001. Pursuant to Cal. Rule of Court 28(e)5, Petitioner incorporates by reference his previously granted petition for review (Cal. Supreme Court Case S092566) previously filed with this court.

II.

ISSUES FOR REVIEW

A. 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.

B. Whether “express aiming” may be satisfied by general, untargeted acts.

C. 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."

III.

REASONS FOR REVIEW

MATTHEW PAVLOVICH finds himself petitioning this Court anew, requesting that the Court correct what he feels is a constitutionally infirm, precedent-setting, published opinion by the Sixth District Court of Appeals. In oral argument, Real Party in Interest conceded that there is no available precedent for the facts presented in this matter (see Exhibit C, informal transcript of argument at p28:8-24) and no precedent for the analysis urged by Real Party (*Id.*). This case puts squarely before this Court the question of defining the "express aiming" requirement under *Calder v. Jones* (1984) 465 U.S. 783.

The opinion published by the Appellate Court in this case fails to clearly articulate its analysis of the narrow issues upon which this Court granted review in December of 2000. Instead, the opinion denies the requested relief using broad language that does not track the traditional three-step analysis for specific jurisdiction (see eg. *Vons Companies, Inc. v. Seabest Foods Inc.* (1996) 14

Cal.4th 434).

The Appellate Court has held for the first time that a non-resident overseer of a non-profit organization may be haled into Court in California based on a single, non-commercial, passive, posting of unknown authorship that is subsequently claimed to violate trade secrets. The Court found that simply because that defendant knew or should have known that the posted information touches upon one or more industries reputed to exist in California, jurisdiction is proper under *Calder*. There is no question that the defendant did not target, aim, or otherwise direct activity at the plaintiff, since it is conceded that the defendant did not know of the plaintiff's existence, or location, until after he was sued².

This holding potentially affects a vast number of people world-wide, including publishers, internet-information sites, open-source projects, community activists, high technology companies, press, scholars, and other information-dependant entities. For each of these entities, this holding dramatically increases

²

Real Party in Interest has conceded that petitioner has not targeted a known California Party by conceding that Petitioner did not know the identity of the only plaintiff in this case (See Opposition to Petition for Writ of Mandate, hereinafter "OPP," generally and at pp.11-12).

their exposure to expensive extra-jurisdictional liability and is likely to curb their current use of the Internet and other information-exchange technologies.

Additionally, the Appellate Court's opinion stands to create confusion among those who follow this area of law. Those affected include the 17 other non-resident defendants in this suit, the unquantifiable number of defendants in other Internet-based cases³, and the thousands of judges and legal practitioners who practice in this field. The cause of this confusion stems from the Appellate Court's seeming divergence from the great weight of *Calder* and its progeny. The Appellate Court reached the opposite conclusion from the strikingly similar facts in *Jewish Defense Organization Inc. v. Superior Court* (1999) 72 Cal.App.3d 1427 (*J.D.O.*), and declined to employ the "something more" requirement discussed in *Cybersell, Inc. v. Cybersell, Inc.* (9th Cir. 1997) 130 F.3d 414, *Panavision Int'l L.P. v. Toepen* (9th Cir. 1998) 141 F.3d 1316 and elsewhere. It further declined to analyze or otherwise explain the reasoning for its departure

3

As indicated previously, because of the wide net cast by this corporate plaintiff ensnaring only individual web publishers with no corporate affiliation, mainstream and industry-specific press have closely followed and covered this case and the Courts' decisions. As such, the Courts' actions have a vast audience and necessarily shape the manner in which industry and individuals make future decisions regarding their interaction over the Internet. The current published opinion stands to dramatically chill on-line speech, commerce, and scholarly discourse through its threat of world-wide jurisdiction based on the content of anonymous posts.

from the trends outlined in these cases⁴. In short, the Appellate Court has created important new law, without explaining its reasoning, or illustrating how its holding fits within the trends established by *Calder* and its progeny. This lack of clarity assures that this issue will continually arise in Internet and other effects-based cases in California.

Although the Appellate Court held that "general industry effects" are sufficient for jurisdiction under *Calder*, it failed to explain why this theory was not employed to sustain jurisdiction by the U.S. Supreme Court in *Calder* itself,

44

Instead, the Court simply re-stated the correct observation that *Bancroft & Masters Inc. v. Augusta Nat. Inc.* (9th Cir. 2000) 223 F.3d 1082 did *not* state that "targeting the wrongful conduct at a plaintiff whom the defendant knows to be a resident of the forum state is the only way to satisfy *Calder's* 'express aiming' requirement" (Opinion at p.13). Indeed, *Bancroft* could not have made such an observation since those facts were not before it.

or in *Gordy v. Daily News, L.P.* (9th Cir. 1996) 95 F.3d 829 -- a question that was specifically posed to the Court in oral arguments. In both *Calder* and *Gordy*, the Courts could have relied upon the effects on the motion picture industry and the music industry (respectively) within California. Instead, both the *Calder* and *Gordy* Courts went through a complex analysis of the defendants' intentional contacts targeting the known plaintiffs in California.

The Appellate opinion fails to clearly set forth the traditional three-step test for specific jurisdiction and seems to incorrectly apply the test for the second prong ("arising out of") to support its analysis of the first prong ("purposeful availment"). As discussed more specifically below, the opinion appears to use this mis-applied test as support for the precedent - setting holding that "express aiming" under the "purposeful availment" prong, can be satisfied by general industry effects (opinion at p. 14).

It is well settled that personal jurisdiction in California is restricted only by Constitutional Due Process rights. The Court dramatically expanded California's jurisdiction to reach an Indiana student who's non-profit group used a passive, non-commercial web-site, that is alleged to have harmed a California Corporation. In so doing, the Court of Appeals has created precedent-setting constitutional error. Allowing this decision to stand necessarily adversely affects the rights of all people by extending California's long arm statute beyond its

Constitutionally permissible limits.

This case presents facts well-suited to resolve the conflict in opinions and settle the constitutional infirmity because Real Party has stipulated that this Defendant *did not know* of the plaintiff's existence prior to the filing of the suit. Therefore, the Indiana defendant *could not have* targeted the California plaintiff when his organization's site was used to re-published the information. Thus, since petitioner couldn't have targeted the sole plaintiff herein, the only remaining task is to define the minimal legal touchstones of the "express aiming" requirement and related issues of fundamental fairness.

IV.

PROCEDURAL POSTURE

On December 27, 1999, Real Party in Interest, DVD CCA, filed in Respondent Court against this Petitioner, as defendant, a complaint numbered CV786804 alleging a single cause of action - misappropriation of trade secrets (Civ.Code §3426 *et seq.*). The trade secret misappropriation cause of action is based on the allegation that Petitioner republished information that is alleged to have been misappropriated by a third party or parties and repeatedly republished throughout the Internet by numerous unrelated parties. Petitioner is one of some 521 named and Doe defendants who have been sued for allegedly republishing this

information on the Internet – many of whom are non-residents.

Petitioner made no general appearance in Respondent Court⁵. Rather, on June 6, 2000, Petitioner appeared specially in Respondent Court (pursuant to the provisions of §418.10 of the Code of Civil Procedure) by filing a motion to quash service of summons on the grounds that the Respondent Court lacked jurisdiction

5

References to the separately bound Appendix of Exhibits, filed concurrently with petitioner's petition for writ of mandate in the Appellate Court will be denoted as "APP"; See complaint included as exhibit A of the separately bound appendix of exhibits filed with the Appellate Court.

over the person of defendant⁶ and petitioner. Following a stipulated jurisdictional

⁶ A true and correct copy of Petitioner's Proof of Service, Notice of Motion, Points and Authorities in Support of Motion, Declaration of Allonn E. Levy in support of Motion, and Declaration of Matthew Pavlovich in Support of Motion to Quash Service of Process is included as Exhibit B of the separately bound appendix of exhibits filed with the Appellate Court.

deposition and document production, on August 18, 2000, Real Party in Interest filed its opposition papers to Petitioner's motion⁷. On August 22, 2000, Petitioner herein filed his reply papers in response to DVD CCA's opposition⁸.

⁷ A true and correct copy of Real Party in Interest's opposing papers, which include Points and Authorities in Opposition to Motion to Quash Service and the Declaration of Jonathan S. Shapiro in Opposition to Motion to Quash Service, is included as Exhibit C of the separately bound appendix of exhibits filed with the Appellate Court.

⁸ A true and correct copy of Petitioner's Reply Brief in Support of Motion, Reply declaration of Allonn E. Levy in Support of Motion, and Objections to Evidence Submitted by Plaintiff is included as Exhibit D of the separately bound appendix of exhibits filed with the Appellate Court.

Petitioner is a party beneficially interested herein. Respondent is the Superior Court of Santa Clara County⁹ (hereinafter "RESPONDENT"). Real Party in Interest, DVD Copy Control Association Inc., (hereinafter "REAL PARTY" or "DVD CCA") is the plaintiff in the action described herein and is a party beneficially interested in this proceeding.

A hearing was held by Respondent Court on August 29, 2000 at approximately 9:00 a.m. in Department two of the Santa Clara County Superior Court. An order denying Petitioner's motion to quash service of process for lack of jurisdiction was served by mail on all parties on August 30, 2000¹⁰ (pursuant to Cal.Rule of Court 28(e)6, a true and correct copy of the Trial Court's decision is appended as Exhibit "A" to this petition, hereinafter "Exhibit A"). A petition for Writ of Mandate and appendix of exhibits were timely filed with the Sixth District Court of Appeal on September 11, 2000. The Court of Appeal issued its decision summarily denying the petition for writ of mandate on October 11, 2000. On October 23, 2000, petitioner filed a petition for review with this Court. On December 19, 2000, this Court made the following order:

Petition for review GRANTED.

The matter is transferred to the Court of Appeal, Sixth Appellate District, with directions to vacate its order denying mandate and to

⁹Santa Clara County Superior Court Case No. CV786804.

¹⁰ A true and correct copy of the court's order is included as Exhibit E of the separately bound appendix of exhibits filed with the Appellate Court.

issue an order directing respondent superior court to show cause why the relief sought in the petition should not be granted.

On January 16, 2001, the Court of Appeals complied with this Court's order and, on its own motion issued a stay of all proceedings in the lower Court. On February 15, 2001, DVD CCA filed points and authorities in support of its return – no verified answer was filed by Real Party in Interest.

On July 12, 2001, the Court of Appeals heard oral argument in this matter (pursuant to Cal.Rule of Court 28(e)6, a true and correct copy of an unofficial transcription of the audio recording of arguments is appended as Exhibit "B" to this petition, hereinafter "Exhibit B").

On August 7, 2001, the Court of Appeals issued a published opinion denying the Petition for Writ of Mandate. On August 31, 2001, on its own motion, the Court of Appeals modified its opinion in order to lift the temporary stay it had previously issued (pursuant to Cal.Rule of Court 28(e)6, a true and correct copy of the written opinion and the order modifying the opinion are appended as Exhibit "C" to this petition, hereinafter "Exhibit C").

V.

FACTS

A. Statement of the Case

This is an Internet re-publication¹¹ case with a set of relatively simple jurisdictional facts. However, for context, a brief overview of the underlying case may prove useful.

11

In the underlying case, the parties have not disputed the fact that the computer code DeCSS is speech for purposes of First Amendment analysis.

The Content Scrambling System (CSS) was created by a consortium of Japanese companies who are not represented in this lawsuit. 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 in December of 1999¹².

CSS is a system of ideas about how to scramble or encrypt movies that are distributed on Digital Versatile Disks (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 operating systems¹³. As such, users of those systems could not

12

“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 pp1-20.

13

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),

watch lawfully purchased DVDs on their computers.

It is not uncommon for a particular program, or set of ideas, to be incompatible across different platforms or operating systems. When such incompatibility is uncovered 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 – this process is frequently 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.” Such reverse engineering is usually legal (see eg. Cal.Civ.Code §3426.1(a)) and is frequently employed by individuals and companies to solve

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 which is seen as the only true competitor to Microsoft's Windows operating system.

problems involving interoperability.

DeCSS is a different system of ideas that also tells a DVD player how to unscramble and play legally purchased movies. DeCSS never belonged to the DVD CCA. The DVD CCA does not contend that it created, owns, 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.

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

B. Jurisdictional Facts

Matthew Pavlovich was a full time Student at Purdue University when this action was filed in December of 1999. In addition to his studies, PAVLOVICH volunteered his time on a group of open-source projects for the Linux operating system. Among the open-source projects upon which

PAVLOVICH worked was the LiVID project¹⁴. The LiVID project was intended to solve interoperability problems for numerous types of computer video, including video cards, display issues, and DVD support¹⁵. As part of his volunteer work, he had input into a communal web-site that permitted individuals to post information. An unknown person placed information known as DeCSS onto that web site. Subsequently, in December of 1999, DVD CCA became the licensing entity for CSS and sued the Indiana student in a California Court claiming

14

The LiVID project was a loose association of people, whom PAVLOVICH does not personally know (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), nor who hosts the LiVid list (APP.pp.173-174;exhibit A at 21-22). The goal of the LiVid group was to create better support for video playback (APP.p.175;exhibit A at 23:10-15), not to harm any party in California. LiVID came into existence long before DeCSS began appearing on the Internet.

15

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

the DeCSS information posted on the communal web site included CSS trade secrets that DVD CCA licensed. Prior to that point, Defendant had never heard of DVD CCA.

In or about March of 2000, four months after DVD CCA filed this case, PAVLOVICH left Purdue University to work at a small start-up company in Texas, where he now lives with his parents. Pavlovich's income during the year 2000 was 10,400.00.

VI.

ARGUMENT

A. Compelling Reasons Exist for this Court to Grant Review

The significant reasons that compelled this Court to grant review in December of 2000, have only been magnified by the Appellate Court's, published opinion. Instead of creating uniformity among internet effects-based jurisdiction cases, and settling the questions identified by this Court in its previous grant of review, the opinion published by the Appellate Court serves only to create additional ambiguity and increase the need for this Court's intervention.

As the number of Internet related disputes grows world-wide, the question of "express aiming" under *Calder* will continually resurface. The Appellate

opinion will serve only to confuse and confound as Courts and practitioners compare this opinion with that of *J.D.O. v. Superior Court, supra, Panavision, supra, and Calder* itself.

In its analysis, the Appellate Court relies upon PAVLOVICH's alleged knowledge that California "is commonly known as the center of the motion picture industry, and that the computer industry holds a commanding presence in the state." Yet, the Court fails to explain how or why this evidence satisfies the "express-aiming" requirement when REAL PARTY is not a member of either industry and where PAVLOVICH never knew of DVD CCA's existence until after the filing of the lawsuit.

The Appellate Court's opinion also seems to mis-apply the test for purposeful availment. The tests for analyzing minimum contacts in specific jurisdiction cases are well settled:

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

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

Rather than providing clear analysis of each of the tests, the opinion, simply

highlights verbiage from each of the different tests without providing a clear framework. In doing so, the Court mis-applies the “nexus test” which states that a Court properly focuses “on the relationship among the defendant, the forum, and the litigation” (exhibit C at p.14). The Court incorrectly applies this language which is properly used to explain traditional minimum contacts analysis and generally relates to the second prong of the specific jurisdiction test (see *Vons v. Seabest* at pp.460-465). Although no Court has clearly defined a test for *express aiming* there is no support in any of the effects cases suggesting that *express aiming* may be satisfied through this “nexus test” analysis. Traditionally, Courts have applied the “nexus test” only after actual contacts are found or purposeful availment has been established.

Under *Calder*, to establish purposeful availment, a Court must find 1) intentional activity by the defendant 2) that has been expressly aimed or targeted 3) along with a foreseeable expectation of harm in the forum state (see *J.D.O.* and *Calder* generally). Thus if there is no intentional act, or there is no “express aiming” or targeting, then the Court never reaches the “nexus test.” There is no known support for the proposition that the “nexus test” can also satisfy the *express aiming* requirement of prong one (purposeful availment) in a *Calder*-jurisdiction case.

In lieu of analysis, the Court provides unprecedented, sweeping language

about Internet-based jurisdiction:

Instant access provided by the Internet is the functional equivalent of personal presence . . . In a sense, therefore, the reach of the Internet is also the reach of the extension of the poster's presence.

(Exhibit C, opinion at p.10).

The Court of Appeals makes it clear that it feels that information posted on the Internet instantly subjects individuals to personal jurisdiction world-wide.

However, this position stands in stark contrast to accepted jurisdictional jurisprudence (see eg. *J.D.O. and Cybersell*).

1. THE EXPRESS-AIMING REQUIREMENT OF THE CALDER JURISDICTION TEST CANNOT BE SATISFIED SOLELY BY GENERAL INDUSTRY EFFECTS

1. The Calder Jurisdiction Test

In 1984, the U.S. Supreme Court approved the use of a new basis for jurisdiction *Calder v. Jones*, 465 U.S. 783 (1984). In its landmark decision, the Court found that in cases where there was insufficient contact for a finding of Purposeful avialment under traditional analysis, Courts could turn to a different analysis. The new analysis focused on far more limited contacts with the forum state, but included the added requirements of intentional activity that is expressly aimed or targeted.

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. Toebben*, (9th Cir. 1998) 141 F.3d 1316, 1322, but have not defined what the “something more” is and have not defined the boundaries of “express aiming” (see also section VI, A, 2 *infra*).

Although itself not an Internet case, the *Calder* case was an information re-publication case. As such, the *Calder* test has, in varying degrees, become the primary basis for jurisdictional analysis in Internet cases. The importance of the *Calder* test in Internet cases arises out of the high-speed, transient, nature of information on the Internet and the effects brought about by that information. In applying the *Calder* holding to the Internet arena, the boundaries of the *Calder* effects test itself, as well as the specific “express aiming” requirement cry out for definition and clarification. Definition and clarification not yet provided by the published opinion here. Without such definition, California Courts and litigants will continue to struggle with jurisdictional questions resulting in a lack of uniformity among similar Court cases and in confusion by industry participants.

. . .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) 223 f.3d 1082 at 1087

While the case at bar presents unique facts, in as much as it is clear that the petitioner couldn't have targeted the plaintiff¹⁶, this Appellate Court is not the first¹⁷ to have wrestled with the boundaries of the “effects test” in California¹⁸.

16

Real Party in Interest has conceded that petitioner has not targeted a known California Party by conceding that Petitioner did not know the identity of the only plaintiff in this case (See Opposition to Petition for Writ of Mandate, hereinafter “OPP,” generally and at pp.11-12). DVD CCA argues that the lack of express aiming directed at DVD CCA is irrelevant to the jurisdictional analysis (OPP at p.12) 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).

17

The *Bancroft* Court supplied some clarification on the issue of “express aiming” but could not provide actual boundaries demonstrating facts that do not satisfy the “express aiming” requirement since those facts were not properly before the *Bancroft* Court. We know from *Bancroft* that the express aiming requirement is satisfied when the defendant is alleged to have engaged

In *Edmunds v. Superior Court* (1994) 24 Cal.App.4th 221, 236, the Court struggled with the confines of *Calder*, eventually noting “[i]t 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

in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.

¹⁸ In *Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 909 the Court noted the confusion involved in the “express aiming” requirement and the *Calder* test generally. That Court handled the ambiguities by analyzing the level of intent on the part of the non-resident defendant in “expressly aiming” contact with the resident plaintiff, but did not clarify the boundaries of *Calder*.

jurisdiction over that defendant on the California courts.¹⁹”

¹⁹ Also citing *Wolf v. City of Alexandria* (1990) 217 Cal.App.3d 541; *Kulko v. Superior Court* (1978) 436 U.S. 84, 94-95.

In the Internet jurisdiction cases of *Panavision International L.P. v. Toepen* (9th Cir 1998) 141 F.3d 1316, the Court found jurisdiction based upon the defendant's intentional targeting of the known plaintiff²⁰. By contrast, in *Cybersell, Inc. v. Cybersell, Inc.* (9th Cir. 1997) 130 F.3d 414, no such targeting of the plaintiff occurred and the Court found that the *Calder* jurisdictional test could not be satisfied. Similarly, in *Jewish Defense Organization Inc. v. Superior Court* (1999) 72 Cal.App.3d 1427 (*J.D.O.*) the Court found the *Calder* jurisdictional test could not be satisfied in an information re-publication case with facts similar to those at bar. Although no known Supreme Court decision has so held, the distinctions between these cases would appear to turn on the ill-defined "express aiming" requirement²¹. A careful review of the factual backdrop of these cases suggests that in cases where the express aiming requirement is satisfied, the defendant has taken some intentional action and has targeted that action at a known party within the forum state (see review of effects cases in *Bancroft, supra*).

20

The defendant in *Panavision* sent the plaintiff a letter attempting to extort money.

21

J.D.O. found no effects based jurisdiction by differentiating its facts from *Panavision*. The *J.D.O.* court noted that in *Panavision* defendant's conduct "as he knew it likely would" had the effect of injuring the defendant in California" (*Id* at 1059). By Contrast, *J.D.O.* did not find the same intentional, express targeting of the plaintiff by the defendant and therefore found no jurisdiction under *Calder*.

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 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

Following the *Bancroft* decision, some trial Courts have held that because a defendant did not know he was targetting a particular California Plaintiff, the Court in turn could not excercise jurisdiction over that defendant. Examples include *Callaway, supra* and *CoStar Group v. LoopNet* 106 F.Supp.2d 780 (D.Md. 2000). *Callaway* explicitly found no jurisdiction despite the fact that the defendant had targeted activity at California generally²².

22

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. However, neither case, nor any other reviewing case known to Petitioner, suggests that such "general industry contacts" can be a basis for jurisdiction exclusive of directed, express aiming.

2. WITHOUT A MEANINGFUL “EXPRESS AIMING” REQUIREMENT, THE CALDER TEST CANNOT SATISFY DUE PROCESS REQUIREMENTS.

The Appellate decision suggests, mere knowledge that information relates to an industry that exists in a forum together with an alleged harm to an unrelated plaintiff within that forum is sufficient to yield jurisdiction (Exhibit C, opinion at p.8). Petitioner contends that such attendant or random contact cannot satisfy Due Process. It is well settled that contacts which are considered “random, fortuitous or attendant” will not support personal jurisdiction consistent with the Due Process clause (*Burger King v. Rudzewicz*, (1985) 471 U.S. 462, 475-476, 485).

If all that were necessary to satisfy the *Calder* test was “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).

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 v. Denkla* (1958) 357 U.S. 235, 253 and other jurisdiction cases.

By definition, one can't "expressly" target or aim activity at an industry since an industry is an amorphous non-entity. 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 multiple industries), the Appellate opinion has concurrently reduced the required level of intent, purpose, and foreseeability envisioned in *Calder*. It is a heightened level of intent, purpose, and foreseeability that forms the 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 itself 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 *Calloway*²³.

2. THE STATE MAY NOT EXERCISE SPECIFIC JURISDICTION BASED SOLELY ON FORSEEABLE EFFECTS IN THE FORUM ABSENT “SOMETHING MORE”.

The Court Below goes to great lengths to demonstrate that petitioner “knew that California is commonly known as the center of the movie industry, and knew that Silicon Valley in California is one of the top three technology ‘hot spots’ in the Country” (Exhibit C, opinion at 8-10). However, even assuming arguendo that the Court’s conclusions as to petitioner’s knowledge are correct, this analysis incorrectly focuses only on foreseeability. The Appellate opinion notes “California’s long-arm statute looks at the effects, not at the system that

²³

See also *Meyers v. Bennett Law Offices* (9th Cir. 2001) 2001 U.S. App.LEXIS 1539, also following *Bancroft*’s analysis.

delivered and produced those effects.” (Exhibit C, opinion at p.11).

However, under *Calder* and its progeny, Courts are compelled to look at the delivery of the effects. While there is no question that foreseeability²⁴ is an important prong of the *Calder* test, it cannot sustain jurisdiction without more. Numerous Courts have held that mere foreseeability, without “something more” is insufficient (See *Bancroft, supra* 1087).

24

“[T]he foreseeability that is critical to due process analysis . . . is that the defendant’s conduct and connection with the forum . . . are such that he should reasonably anticipate being haled into court there.” (*Burger King* at 474; *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 295).

In *Cybersell v. Cybersell* (9th Cir. 1997) 130 F.3d 414, the Court noted that providing information across the Internet, like placing a product into the stream of commerce, may cause foreseeable effects world-wide. However, without “more” it will not satisfy purposeful availment (*Id* at 418; see also *Panavision v. Toeppen* (9th Cir. 1998) 141 F.3d 1316 at 1322). Other courts agree noting that foreseeable effects in the forum will not support jurisdiction under *Calder* without “something more²⁵” (*Bancroft* at 1087). It is unclear from the opinion whether the Court of Appeals disapproved of the federal line of cases requiring “something more,” found “something more” to be something other than “express aiming” (in contrast to *Bancroft*), or satisfied “express aiming” using a new test (see opinion generally at pp13-14).

By using the plaintiff’s intellectual property, the defendant in *Cybersell v. Cybersell*, was surely aware that its Internet conduct could have had an effect on any number of industries within the forum state. But there, the *Cybersell* court denied jurisdiction. To permit the test to hinge upon foreseeability of harm to an industry would mean that any publisher of information must screen the content of

25

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’” (*Bancroft & Masters Inc. v. Augusta National Inc.* (9th Cir.2000) 223 f.3d 1082 at 1087-1088, citations omitted; emphasis added).

his publication to determine what possible industries might be involved and must expect to be sued in any jurisdiction where such industries exist – such a rule would simply be unworkable and would be violative of due process.

In another information publication case, *Gordy v. Daily News* (9th Cir. 1996) 95 F.3d 829, 833, the Court again found jurisdiction under the *Calder* test based upon the express targeting of the plaintiff who was a forum resident (see also *Bancroft* at 1088 citing *Gordy*). There, the plaintiff was the founder of Motown Records. In finding jurisdiction, the Court properly focused on the defendant's targeting of that known California Plaintiff, and did not even address the fact that the plaintiff was also a member of an industry reputed to exist in California. If mere knowledge that the music industry was “centered” in California were sufficient under *Calder*, it is unlikely that the *Gordy* Court would have performed an analysis based upon the defendant's knowledge that the plaintiff lived in California and was targeted there (*Id.*).

By emasculating the express aiming requirement, and focusing primarily, if not exclusively on foreseeability, the Appellate Court's opinion impermissibly deprives petitioner of his Due Process rights, and simultaneously creates new precedent that stands to affect all potential litigants. Additionally by standing in contrast to traditional authority on Internet Jurisdiction, the opinion stands to create confusion, thereby depriving litigants of the predictability that is so

vital in jurisdictional issues.

VII.

CONCLUSION

The import of the Appellate opinion is to dramatically alter the terrain of jurisdictional jurisprudence. Followed to its logical conclusion, the opinion creates nearly limitless California jurisdiction over cases with subject matters involving movies, computers, telecommunications, music, biotechnology and nearly every other California industry from oranges to surfing. Such a severe alteration to the jurisdictional landscape compels review by this High Court.

For the reasons stated herein, petitioner respectfully requests this court grant review to determine the issues presented above.

DATED: September 14, 2001

H.S. LAW GROUP APC

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