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The Ninth Circuit's Approach to Personal Jurisdiction in Intellectual Property Cases: How Long Is the Arm of California Courts in Reaching Foreign Defendants

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THE NINTH CIRCUIT'S APPROACH TO PERSONAL JURISDICTION IN INTELLECTUAL PROPERTY CASES: HOW LONG IS THE ARM OF CALIFORNIA COURTS IN REACHING FOREIGN DEFENDANTS?

I. INTRODUCTION

In Roth v. Garcia Marquez, the Ninth Circuit Court of Appeals held that a federal district court in the Central District of California properly asserted personal jurisdiction in an action brought by a California filmmaker against an alien author, a resident of Mexico, as well as the author's agent, a citizen and resident of Spain. In the process, the Ninth Circuit announced a “dangerously low” threshold for establishing personal jurisdiction against foreign defendants dealing with American citizens in the motion picture industry. Then, only two years later in Rano v. Sipa Press, Inc., the Ninth Circuit held that the co-owner of a photographic distribution syndicate, a citizen of Turkey and long-time resident of France, was not properly subject to personal jurisdiction in federal court in California. By doing so, the court turned a blind eye towards its previous efforts in Roth, and re-established what appears to be a more rational and common-sense approach to personal jurisdiction in actions involving intellectual property and foreign defendants. Since Rano made no mention of the Roth decision, however, Roth's strength as precedent in this area is potentially uncertain.

This Comment will explore the inter-relationship between the Roth and Rano decisions and, further, will explore the effects of those two decisions on personal jurisdiction in the Ninth Circuit. Part II of this

1. 942 F.2d 617 (9th Cir. 1991).
2. Id. at 618-19.
4. 987 F.2d 580 (9th Cir. 1993).
5. Id. at 583, 589.
Comment will begin by articulating the law of personal jurisdiction in the Ninth Circuit, specifically in California. Part III will detail the facts of Roth v. Garcia Marquez and Rano v. Sipa Press, Inc. Part IV of this Comment will then apply the law of personal jurisdiction to both cases, and will reconcile their disparate results. Finally, with an eye towards other circuits, this Comment will predict the future of personal jurisdiction jurisprudence in the Ninth Circuit, with California as the focus of the analysis.

II. THE LAW OF PERSONAL JURISDICTION

Personal jurisdiction is a puzzling and problematic doctrine which continues to confuse first year law students, not to mention numerous litigants, judges, and legal scholars. The "obvious lack of clarity in the area" of personal jurisdiction has even led to criticism of the United States Supreme Court's reasoning in terms such as "'imponderable,' 'arbitrary,' 'muddled' or 'grounded in faulty logic.'"6 Personal jurisdiction has also led to abundant litigation. "[A]s of April 14, 1993, at least 19,043 cases heard [in] federal district courts . . . involved . . . personal jurisdiction."7 Therefore, it is useful to review the general principles of the law of personal jurisdiction in the Ninth Circuit.

A. Definitions and Standards

"Personal jurisdiction, sometimes referred to as in personam jurisdiction, is simply the power of the court over the defendant's person. Absent personal jurisdiction, a court lacks the power to issue an in personam judgment."8 Personal jurisdiction is, in essence, a "necessary predicate" before a court can hear the merits of a claim.9 Moreover, even if a plaintiff makes a prima facie case of jurisdiction prior to trial, the plaintiff is still required to "prove personal jurisdiction at trial by a preponderance of the evidence."10

7. Id. at 945 n.2.
8. Daniels, supra note 3, at 359 (citations omitted).
9. Lee, supra note 6, at 945.
The Ninth Circuit's standard of review for personal jurisdiction, where the underlying facts are undisputed, is *de novo.* However, a district court's finding of personal jurisdiction is reversible only upon a showing that the finding is clearly erroneous. The appellant must bear the burden of establishing a prima facie case for reversing the determination below.

B. General Versus Specific or Limited Jurisdiction

The Ninth Circuit has interpreted *International Shoe v. Washington,* the seminal Supreme Court decision on personal jurisdiction, and its progeny to mean that jurisdiction by California courts over a nonresident defendant is allowed if the defendant has enough continuous contacts with California to subject that defendant to *general jurisdiction* in the state. General jurisdiction flows from a non-resident defendant's continuous, systematic business contacts with [a particular forum-state]. In such circumstances, the nonresident defendant may be required to submit to the jurisdiction of a court sitting in this forum even though the pending cause of action does not arise out of the defendant's forum-related activities.

Thus, general jurisdiction is a powerful and wide-reaching jurisdictional tool for bringing defendants within the jurisdiction of a particular forum state's courts, assuming the defendants have sufficiently broad-based contacts in that state.

On the other hand, if the specific cause of action in question arises out of a defendant's more limited contacts with California, the state may exer-

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exercise of personal jurisdiction over the defendants.


15. "General jurisdiction" is jurisdiction "[s]uch as extends to all controversies that may be brought before a court within the legal bounds of rights and remedies . . . ." BLACK'S LAW DICTIONARY 684 (6th ed. 1990).

cise limited or specific jurisdiction\textsuperscript{17} over the defendant.\textsuperscript{18} Succinctly stated, “[s]pecific jurisdiction exists, ... when a court agrees to entertain a cause of action which does arise from forum-related activities.”\textsuperscript{19} Specific jurisdiction, however, “may be asserted only when the non-resident defendant has had ‘fair warning’ that its activities in [a particular forum state] may subject it to the jurisdiction of courts in [that] forum.”\textsuperscript{20} Specific jurisdiction is therefore narrower and more circumscribed in applicability than general jurisdiction in that the underlying cause of action by the plaintiff must be related to the defendant’s contacts in the forum state.

C. The Personal Jurisdiction Analysis

To address questions regarding personal jurisdiction over non-residents of the state in which the proceedings occur, a federal court borrows the long-arm statute of the forum state in which it sits, just as if the courts of the forum state were addressing the same question.\textsuperscript{21} As with other constitutionally protected areas, states must comply with the minimum federal due process standards announced by the United States Supreme Court. Of course, states may also insist on even greater protections for potential defendants. However, “[t]he California long-arm statute provides that jurisdiction may be exercised over non-resident defendants ‘on any basis not inconsistent with the Constitution of this state or of the United States.”\textsuperscript{22} California’s long-arm statute thus utilizes the same jurisdiction standard as federal due process demands, and its personal jurisdiction analysis is the same as the federal standard.\textsuperscript{23} To that end, “[t]he due process clause prohibits the exercise of jurisdiction over nonresident defendants unless those defendants have ‘minimum contacts’ with the forum state so that the exercise of jurisdiction ‘does not offend traditional notions of fair play and substantial justice.”\textsuperscript{24}

\textsuperscript{17} Limited” or “special” (specific) jurisdiction is “[j]urisdiction ... which is confined to particular types of cases or actions, or which can be exercised only under the limitations and circumstances prescribed by the statute.” BLACK’S LAW DICTIONARY 927 (6th ed. 1990).

\textsuperscript{18} See Roth v. Garcia Marquez, 942 F.2d 617, 620 (9th Cir. 1991) (quoting Data Disc v. Systems Technology Assocs., 557 F.2d 1280, 1287 (9th Cir. 1977)).

\textsuperscript{19} Id. (citing Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 n.8 (1984)).

\textsuperscript{20} Id. (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).


\textsuperscript{22} Roth v. Garcia Marquez, 942 F.2d 617, 620 (9th Cir. 1991) (quoting Cal. Civ. Proc. Code § 410.10 (Deerings 1991)).

\textsuperscript{23} Id. at 620 (quoting FDIC v. British-American Ins., 828 F.2d 1439, 1441 (9th Cir. (1987))).

\textsuperscript{24} Id. (emphasis added) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).
Historically, presence in a particular forum state served as the criterion for asserting personal jurisdiction over any defendant, whether or not a resident of the forum state.25 "Minimum contacts" then developed as a proper basis for asserting personal jurisdiction "as a substitute for a defendant's actual presence in a forum state," for situations in which the defendant was not physically present in the forum state.26 Although the concept is rather amorphous, minimum contacts are "those activities . . . within the state which courts will deem to be sufficient to satisfy the demands of due process."27 The "fair play and substantial justice" standard, on the other hand, refers to tradition-based concepts of fairness regarding the assertion of personal jurisdiction over a non-resident. Tied inextricably to the concept of minimum contacts,28 this second standard also "developed by analogy to 'physical presence.'"29 In other words, particularly in light of interstate and international commerce, the need developed for a means of asserting personal jurisdiction over those doing business in particular fora without necessarily requiring their physical presence.

Today, however, a personal jurisdiction analysis is much more complicated. Courts bifurcate the analysis of personal jurisdiction into both a "minimum contacts" test as well as a "fair play and substantial justice" test, treating the two tests together as one analysis with two separate, mutually exclusive inquiries.30 This bifurcation stems from dicta in the landmark case Burger King Corp. v. Rudzewicz.31

Burger King involved an alleged breach of contract by defendant Rudzewicz and his partner, two Michigan-based franchisees of the plaintiff, Burger King, a Florida-based corporation. Burger King brought suit for breach of contract seeking damages and injunctive relief from the
defendants. The federal district court in Florida held that the franchisees were subject to personal jurisdiction under Florida's long-arm statute, and after trial on the merits, entered a judgment against the defendants. The court of appeals reversed, but was then in turn reversed by the United States Supreme Court.

Writing for the Court, Justice Brennan introduced and relied heavily upon the concept of foreseeability:

[W]e have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." It is these factors — prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing — that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

The United States circuit courts of appeals ultimately adopted the Burger King dicta concerning the bifurcated analysis for personal jurisdiction as law, but the various circuits do not apply the analysis uniformly. Most circuits follow the bifurcated analysis for personal jurisdiction set out in Burger King, but a few, including the Ninth, developed complex, multi-factored tests for personal jurisdiction.

The Sixth, Eighth, and Ninth Circuits have created tests for personal jurisdiction that can be categorized under the rubric of the "multi-factor balancing test." This type of test weighs a number of factors to determine whether the plaintiff's choice of forum or the defendant's due process rights should prevail. Although the factors in these circuits' balancing tests vary to some degree, the effect of the courts' reliance on the Burger King factors is the same. That is, the Burger King factors compound the minimum contacts inquiry without making the circuit courts' personal jurisdiction analyses any more determinative or "fair."

32. Burger King Corp. v. MacShara, 724 F.2d 1505 (11th Cir. 1984).
34. Id. at 479 (citations omitted).
35. Lee, supra note 6, at 953.
36. Id. at 955.
D. Specific, Personal Jurisdiction: The Ninth Circuit’s Multi-Factored, Three-Part Test

The Ninth Circuit has formulated a three-part test for determining the courts’ powers to exercise specific, personal jurisdiction: “1) the nonresident defendant must have purposefully availed himself of the privilege of conducting activities in the forum by some affirmative act or conduct; 2) plaintiff’s claim must arise out of or result from the defendant’s forum-related activities; and 3) exercise of jurisdiction must be reasonable.”

1. Purposeful Availment

A defendant satisfies the purposeful availment prong when he or she “perform[s] some type of affirmative conduct which allows or promotes the transaction of business within the forum state.” As “[t]he Supreme Court has explained: ‘This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person.’” Moreover, “[t]he smaller the element of purposeful interjection, the less is jurisdiction to be anticipated and the less reasonable is its exercise.” In other words, a defendant must somehow gain the benefits or protections of the laws of the forum state. Most commonly, the benefits and protections of state laws are extended to those seeking to enjoy the privilege of conducting business in a particular forum state. Such benefits or protections must also stem from the

37. Roth v. Garcia Marquez, 942 F.2d 617, 620-21 (9th Cir. 1991) (quoting Shute v. Carnival Cruise Lines, 897 F.2d 377, 381 (9th Cir. 1990)); see also Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784 F.2d 1392 (9th Cir. 1986). Specifically, the court in Haisten required:
   1. The nonresident defendant must do some act or consummate some transaction within the forum, . . . 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. 3. Exercise of jurisdiction must be reasonable.


39. Roth, 942 F.2d at 621 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

40. Core-Vent Corp. v. Nobel Indus., 11 F.3d 1482, 1488 (9th Cir. 1993) (quoting Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1271 (9th Cir. 1981)).

41. See Hoag v. Sweetwater Int'l, 857 F. Supp. 1420, 1426 (D. Nev. 1994) (where defendant expected to enjoy the benefits of conducting business in the forum state, and executed a lease and
minimum contacts requirements of *International Shoe.* As such, there are "omnipresent" cases in which district courts must rule on the suffi-
ciency of non-residents’ contacts with the forum.

Arguably, it might seem fair that if a non-resident of a particular forum state makes a contract with a resident of that forum, the transaction should automatically bring the non-resident under the personal jurisdiction of that state. In such a case, the non-resident would probably turn to that state’s courts for protection should the other party breach or otherwise injure him. Thus, by the transaction itself, the non-resident is attempting to gain the benefits and protections of the laws of that particular state. "[H]owever, *Burger King* specifically noted that the existence of a contract with a resident of the forum state is insufficient by itself to create personal jurisdiction over the nonresident." Instead, the Court opined that “with respect to interstate contractual obligations, we have emphasized that parties who ‘reach out beyond one state and create continuing relationships and obligations with citizens of another state’ are subject to regulation and sanctions in the other State for the consequences of their activities."

The standard used to assess purposeful availment in a contract-based action is of course far different than the standard used in a tort case. Contracts, by their very nature, may implicate the benefits and protections of the law of a particular forum. Therefore, purposeful availment in the contract setting requires the analysis of additional factors, such as “prior

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42. Johannsen v. Brown, 788 F. Supp. 465, 468 (D. Or. 1992) (where the defendant should have foreseen that any infringement of the plaintiff’s copyright would have injured him in the forum where the plaintiff brought suit, purposeful interjection is sufficient to lead to personal jurisdiction).


44. Roth, 942 F.2d at 621.


46. Newman v. Comprehensive Care Corp., 794 F. Supp. 1520, 1519 (D. Or. 1992). Contract cases are different than a typical tort case regarding purposeful availment because “in a tort case... within the rubric of ‘purposeful availment’ the Court has allowed the exercise of jurisdiction over a defendant whose only ‘contact’ with the forum state is the ‘purposeful direction’ of a foreign act having effect in the forum state.” *Id.* (emphasis added) (quoting Roth, 942 F.2d at 621).
negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing.\textsuperscript{47}

2. "Arising Out Of" or "Resulting From"

To satisfy the second prong of "arising out of" or "resulting from," a defendant, at a minimum, must perform some affirmative act which produces a result or effect in the forum state.\textsuperscript{48} This requirement does seem to guarantee that, at least in some way, a defendant has sufficient contacts with the forum state such that the forum state has a legitimate interest in seeing the matter litigated in the state's own court system. Realistically, however, "arising out of" and "resulting from" are both ambiguous, and serve as potentially manipulable standards, allowing courts to hear the merits of a particular case, if it so desires.

3. Reasonableness

Reasonableness is the third prong, and it is assessed via a multifactored test. Analyzing these factors when determining "reasonableness" is in actuality a "balancing test within another balancing test."\textsuperscript{49} Osten- sibly, the additional balancing meets \textit{International Shoe}'s proscription against jurisdiction offensive to traditional notions of fair play and substantial justice.

As developed in \textit{Sinatra}, and painstakingly analyzed in \textit{Roth}, the reasonableness inquiry is comprised of the seven following factors:

1) the extent of the defendant’s purposeful interjection into the forum state’s affairs; 2) the burden on the defendant; 3) conflicts of law between the forum and defendant’s home jurisdiction; 4) the forum’s interest in adjudicating the dispute; 5) the most efficient judicial resolution of the dispute; 6) the plaintiff’s interest in convenient and effective relief; and 7) the existence of an alternative forum.\textsuperscript{50}

None of these factors are completely dispositive and they must be balanced, that is, weighed against each other in an effort to reach a fair and equitable result.\textsuperscript{51} No factor is weighted more heavily than any other, however, and

\textsuperscript{49} Lee, \textit{supra} note 6, at 955.
\textsuperscript{50} \textit{Roth}, 942 F.2d at 623 (citations omitted).
\textsuperscript{51} FDIC v. British-American Ins. Co., 828 F.2d 1439, 1442 (9th Cir. 1987).
courts are left to wrestle with the seven factors and their own sense of fairness.

4. The Analysis Analyzed

The Ninth Circuit's test is "substantially more complicated" than that required under Burger King. This three-prong test is conducted on two levels, and as stated earlier, it is actually a "balancing test within another balancing test." The "inner" balancing test weighs the seven "reasonableness factors." However, as with the Sixth Circuit's similar test, the reasonableness prong is not allowed to have an overly influential role in the overall "reasonableness" determination of personal jurisdiction inquiries. 54

Once a court establishes that a defendant purposefully availed himself of the benefits of the forum state and that the defendant's forum-related activities gave rise to the cause of action, the forum's exercise of jurisdiction is presumptively reasonable. Therefore, the burden shifts to the defendant to demonstrate why an exercise of jurisdiction would be unreasonable. 55

III. THE FACTUAL BACKGROUND OF ROTH AND RANO

As evidenced by the nature of the Ninth Circuit's three-part test, personal jurisdiction inquiries are highly fact-specific determinations. As such, a careful review of the facts in both Roth and Rano is required so the results of both cases can be understood, compared, and reconciled.

A. Roth v. Garcia Marquez

1. Procedural Posture

The controversy in Roth centered on Richard Roth's and Richard Roth Production's ("Roth's") attempt to secure the movie rights to Gabriel Garcia Marquez's novel Love in the Time of Cholera ("Cholera"). In 1989, Roth filed a complaint in the Central District of California seeking declaratory relief to determine his rights to produce Cholera. Garcia

52. Lee, supra note 6, at 955.
53. Id. at 955.
54. Id. at 956.
55. Id. at 957 (emphasis added) (citations omitted); see Roth, 942 F.2d at 625.
56. Roth, 942 F.2d at 618.
57. Id. at 620.
Marquez and his agent Carmen Balcells filed a motion to dismiss, alleging, *inter alia*, that the court did not have personal jurisdiction over them. The district court denied the defendants' motion to dismiss for lack of personal jurisdiction, but it granted their motion to dismiss for failure to state a claim, and also denied Roth's motion for leave to amend his complaint. Roth appealed the district court's dismissal of his complaint for failure to state a claim, while Garcia Marquez and Balcells appealed the district court's denial of their motion to dismiss for want of personal jurisdiction.

The United States Court of Appeals, Ninth Circuit, affirmed the district court's finding that personal jurisdiction existed as to Garcia Marquez and Balcells. The court also affirmed the district court's dismissal of the plaintiff's complaint, as well as the denial of leave to amend the complaint.

2. Factual Summary

Richard Roth is a movie producer who lives and works in California. His company, Richard Roth Productions, is a California corporation, doing business in the state of California. Gabriel Garcia Marquez is an internationally renowned author who won the Nobel Prize for Literature in 1982. He has written many best-selling novels, and the film rights to his book *Love in the Time of Cholera* were at issue in this case. Garcia Marquez was a sixteen-year resident of Mexico City, and his agent, Balcells, the president of a literary agency in Barcelona, Spain, who also resided in Spain.

In the latter half of 1986, Roth contacted Garcia Marquez in Mexico City. Roth wanted to make *Cholera* into a movie. After meeting Roth in Havana, Cuba, Garcia Marquez said he would consider selling the film rights under three conditions: Roth would agree (1) to pay him five million dollars; (2) to use a Latin American director; and (3) to shoot (produce and direct) the film in Colombia. To finalize and secure the deal, Garcia Marquez authorized Balcells to pursue further negotiations with Roth.
Negotiations dragged on because of various disputes, ranging from the price Roth could pay for an option on the film rights, to the identity of a possible director. Roth travelled repeatedly to Barcelona and Mexico City to meet with both agent and author, while calls, letters and faxes passed among all three parties. The only meetings in the United States occurred when Balcells visited the country for an annual convention and took some time out to meet with Roth, and when Garcia Marquez was visiting a friend in Los Angeles for four days and met with Roth. Eventually, Garcia Marquez dropped his insistence on shooting the film in Colombia and agreed that Roth could shoot the film in Brazil instead; however, he remained firm on the two other terms.

On November 17, 1988, Roth, through his agent, purchased the grant of an option to the right to produce Cholera, as well as the right to extend the option. Along with the option purchase, Roth included a letter which was signed by him as well as his agent, and later by Balcells which confirmed all the details of the proposed deal. The letter also confirmed that a "final agreement" had been reached and that there was a great deal of excitement that all those involved could "finally ... get this project moving." In late February, 1989, when Roth's agent finally transmitted the formal agreement to Balcells, Balcells objected to a number of items in the agreement, including the omission of clauses about a Latin American director and the site of the shooting. Balcells communicated these objections to Roth, and after weeks of renewed negotiations, the parties could not reach an accord. Garcia Marquez never signed a formal agreement and Roth never paid him any money.

For its personal jurisdiction analysis, the Roth court provided this summary:

Garcia Marquez lives in Mexico City and has never resided in California. He has visited the state four times for a total of twenty days. He met with Roth once in California, but entered the state for a social purpose. He has never owned property in the state, nor has he ever conducted business on a regular basis or authorized any resident of the state to do so on his behalf. He has maintained a checking account, not his principal one, in

67. Id.
68. Id.
69. Id.
70. Id.
71. Roth, 942 F.2d at 619-20.
72. Id. at 620.
Los Angeles since 1988 for the purposes [sic] of having an account in dollars for certain transactions occurring outside of California.

Balcells lives in Barcelona. She has never lived in California, though she has visited twice. On one of those occasions, she met with Roth, though she was in the state for a convention. She has never owned property in California, has no office or telephone number there, and has never conducted business on a regular basis or authorized any resident of the state to do so for her.73

Despite the negative factual findings inherent in the record, findings that ordinarily would militate against holding a defendant properly subject to personal jurisdiction, the Ninth Circuit Court of Appeals upheld the district court's finding of personal jurisdiction over both defendants.74

B. Rano v. Sipa Press, Inc.

1. Procedural Posture

Unlike Roth, Rano involved the issue of copyright infringement. Plaintiff Kip Rano, a photographer, sued Sipa Press, Sipa Press, Inc., Sipa, Inc. (a photograph distribution syndicate, all hereinafter "Sipa"), and Goskin Sipahioglu, President and one of three owners of Sipa Press. Rano filed suit in federal district court for copyright infringement and improper copyright notice, as well as pendent state claims for breach of contract, intentional interference with economic relationships, and malicious conversion.75

The "district court dismissed Rano's pendent claims for malicious conversion and intentional interference with economic relationship and granted defendant Sipahioglu's motion to dismiss for lack of personal jurisdiction."76 After a hearing on the merits, the district court granted defendant Sipa's motion for summary judgment, holding that all but one of Rano's infringement claims did not constitute copyright claims under the Copyright Act and that the one remaining claim was meritless.77 The

73. Id. at 620.
74. Id. at 629. For a complete discussion of the circuit's holding and accompanying rationale, see Part III.C., infra.
76. Id. at 583.
77. Id. at 583-84.
district court then dismissed the remaining pendent state claims for lack of subject matter jurisdiction.\textsuperscript{78}

The United States Court of Appeals, Ninth Circuit, affirmed the district court’s dismissal of defendant Goskin Sipahioglu for lack of personal jurisdiction.\textsuperscript{79} The court also affirmed the district court’s summary judgment in favor of Sipa on the issue of copyright infringement.\textsuperscript{80} However, the circuit court reversed the district court’s summary judgment in favor of Sipa regarding Rano’s claim for improper copyright notice, and remanded for further proceedings consistent with the court’s opinion.\textsuperscript{81}

2. Factual Summary

During or before 1978, Rano and representatives of the defendants met in France and entered into an oral agreement by which Rano granted Sipa a non-exclusive license of unspecified duration to reproduce, distribute, and sell his photographs, as well as to authorize other licensees to also reproduce, distribute and sell Rano’s photographs.\textsuperscript{82} Sipa, in return, agreed to store and develop Rano’s negatives and pay a fifty percent royalty on the revenue generated from the sales and distribution of Rano’s photographs.\textsuperscript{83}

The relationship between the parties proceeded smoothly and without interruption for approximately eight years, and Rano eventually gave Sipa several thousand photographs for distribution.\textsuperscript{84} However, in March, 1986, Rano notified Sipa that he would no longer be sending negatives to Sipa because he was changing agencies. Rano cited “Sipa’s failure to timely pay royalties, low sales, poor photography assignments, and [Sipa’s] unwillingness to reimburse” some expenses as reasons for the change.\textsuperscript{85}

\begin{itemize}
\item \textsuperscript{78} Id. at 584.
\item \textsuperscript{79} Id. at 588.
\item \textsuperscript{80} Rano, 987 F.2d at 589.
\item \textsuperscript{81} Id.
\item \textsuperscript{82} Id. at 583. When the parties entered the agreement, Sipa had offices in France, Delaware and New York. Goskin Sipahioglu, sued individually, resided in France, and was a citizen of Turkey. The Rano opinion, however, does not make clear in its factual “Overview” whether Rano, a citizen of Great Britain with his principal place of business in California, had any contacts in California at the time he signed the agreement. See id. at 583. Later in the opinion, the court tacitly found that Rano did in fact come to California after the agreement’s formation, stating: “Sipahioglu could not have foreseen Rano’s fortuitous move from Europe to California.” Id. at 588.
\item \textsuperscript{83} Rano, 987 F.2d at 583.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id.
\end{itemize}
On March 12, 1987, Rano informed Sipahioglu that he "did not authorize Sipa to sell any more of [his] photographs."  

Finally, in July of 1989, Rano sued the defendants for allegedly infringing his copyright by: (1) failing to credit him for a photograph; (2) failing to pay certain royalties; (3) continuing to distribute some of Rano's photographs after he demanded their return and terminated the licensing agreement with Sipa; (4) failing to return some of his photographs; and (5) placing defective copyright notices on slide mounts of some of Rano's photographs.  

Rano also alleged breach of contract, intentional interference with economic relations, and malicious conversion claims against the defendants.  

The plaintiff sought an injunction against Sipa's further use of his photographs as a remedy for the copyright claims.  

On appeal, the Ninth Circuit made a tri-partite holding.  

First, federal copyright law preempted California's at-will doctrine and rendered the doctrine inapplicable to a copyright licensing agreement of limitless duration.  

Second, a genuine issue of material fact existed regarding the adequacy of plaintiff's copyright notice which the licensee used on negatives, thus precluding summary judgment for the licensee.  

Finally, the circuit court affirmed the district court's holding that it lacked personal jurisdiction over defendant Sipahioglu, the president of Sipa Press, Inc.

C. Analysis of Roth and Rano Under Applicable Law

1. Threshold Issues

Convenient for comparison at the most basic level of inquiry, both Roth and Rano share the same de novo standard of review on appeal to the

86. Id.
87. Id. at 583.
88. Rano, 987 F.2d at 583.
89. Id.
90. Id. at 589.
91. Id. at 585-86.
92. Id. at 587.
93. Rano, 987 F.2d at 588. For a complete discussion of the circuit's holding and accompanying rationale, see infra part III.C.
Ninth Circuit. Further, neither of the respective plaintiffs asserted that the defendants should be subject to general jurisdiction in California. Instead, in both Roth and Rano, the question presented was whether the defendants had sufficient "minimum contacts" in California for specific, personal jurisdiction.  

2. Purposeful Availment

The Roth and Rano courts took different approaches to analyze purposeful availment. In Roth, the court conceded that its decision regarding the purposeful availment prong of the Ninth Circuit's test was a close one. The court acknowledged that even though it eventually found sufficient contacts by the defendants to support personal jurisdiction, there were two facts which marginally worked in the defendants' favor: (1) minimal physical presence in the forum by the defendants; and (2) the plaintiff himself made the efforts to solicit the defendants outside the forum, referred to in personal jurisdiction parlance as "unilateral acts" by the plaintiff. Facts such as these ordinarily militate against a finding of personal jurisdiction over a defendant.

The Roth court, however, did something extraordinary in its analysis; the court looked to the future consequences of the contract between Roth and Garcia Marquez in a unique way. Drawing on Burger King's concept of the "contemplated future consequences" of a contract, as well as Burger King's reliance on the express terms of a contract and the parties' history regarding their course of dealings, the court decided to look to the realm of possibilities. "[W]hen a contract is offered as the basis of personal jurisdiction, a court must examine the 'economic reality' embodied in the agreement." 

Specifically, the Roth decision turned on the fact that this case involved a potential motion picture. At length, the court observed:

the contract concerned a film, most of the work for which would have been performed in California. Though the shooting most

94. Cf. Zenger-Miller, Inc. v. Training Team GMBH, 757 F. Supp. 1062 (N.D. Cal. 1991) (German defendants unable to contend that their lack of minimum contacts in California left the state unable to assert personal jurisdiction over them because the defendants consented to personal jurisdiction contractually via a forum selection clause).
95. Roth v. Garcia Marquez, 942 F.2d 617, 622 (9th Cir. 1991).
96. Id.
97. See id.
98. Id. (quoting Burger King v. Rudzewicz, 471 U.S. 462, 479 (1985)).
likely would have taken place in Brazil, all of the editing, production work, and advertising would have occurred in California. This is not an instance where the contract was a one-shot deal. . . . [M]ost of the future of the contract would have centered on the forum. . . . In looking at the "economic reality," it seems that the contract's subject would have continuing and extensive involvement with the forum.\(^\text{100}\)

This line of reasoning should be more than a little unsettling to potential defendants in that the \textit{Roth} court did not restrict its analysis to the defendant's contacts with the forum, but also looked to the possible future contacts of people who might help fulfill the contract, such as editors, producers and advertisers.\(^\text{101}\) This is particularly problematic because the court looked at the \textit{contract's} connection with the forum state. Instead, the court should have focused only on the \textit{defendant's} contacts with the forum in its personal jurisdiction analysis.

On the other hand, in \textit{Rano}, the plaintiff contended that Sipahioglu caused and profited from Sipahioglu's grant of licenses of Rano's photographs to publications that Sipahioglu knew would be distributed in California, among other places. Thus, Rano argued such a distribution was enough to satisfy purposeful availment.\(^\text{102}\)

The \textit{Rano} court disagreed. Instead of focusing on the "foreseeable consequences" of the "economic reality" of the parties' course of dealing, the court held there was no way that Sipahioglu could have foreseen Rano moving from Europe to California.\(^\text{103}\) Moreover, there was no evidence presented that Sipahioglu received the benefits or protections of California law.\(^\text{104}\) Interestingly, the court noted that if Rano's argument were accepted, it would render Sipahioglu — and any other foreign owners of art who sell their works to publications — open to suit in each and every

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\(^{100}\) \textit{Roth}, 942 F.2d at 622 (citation omitted).

\(^{101}\) Lee, \textit{supra} note 6, at 961.

\(^{102}\) \textit{Rano}, 987 F.2d at 588.

\(^{103}\) \textit{Id.} at 588. \textit{See also} Pacific Atl. Trading Co. v. M/V Main Express, 758 F.2d 1325, 1329 (1985) (no basis to assume the foreseeability of a suit in California based on an agreement signed by the parties in Malaysia).

\(^{104}\) Katherine C. Spelman, \textit{Current Developments in Copyright Law}, at 191 (PLI/Patents, Copyrights, Trademarks and Literary Property Course Handbook Series No.G4-3917, 1994) ("The question was whether the fact that a photographer knew or had reason to know that plaintiff's publication of his photograph would include distribution in California was sufficient to trigger 'long arm' jurisdiction in California. The Court ruled that it was not. No specific jurisdiction found because defendant had not triggered the protection of California law."). \textit{Id.} at 191. \textit{See also} David Goldberg, et al., \textit{Judicial Developments in Literary and Artistic Property}, 40 J. COPYRIGHT SOC'Y 511, 512 (1993).
state into which their art eventually is distributed or displayed. Finally, the *Rano* court noted that litigation against an alien defendant presents a higher barrier to personal jurisdiction than if the defendant were simply from another state. Ultimately, the court found that Rano did not carry his burden of establishing personal jurisdiction over Sipahioglu, and affirmed the district court's dismissal of claims against him, largely due to his lack of genuine purposeful availment.

2. "Arising Out Of" or "Resulting From"

As with the purposeful availment prong, the *Roth* and *Rano* courts took different approaches to the second prong as well, and likewise reached dissimilar conclusions. In *Roth*, the court held that there was "no dispute" on the second prong, and that the plaintiff's suit arose directly from the defendants' activities directed at the forum. The court relied on the fact that the "appellees concede that appellant's claim arises out of the January 19 letter, which was negotiated and executed by a party who was in the forum at the time, namely Roth in Los Angeles." By contrast, in *Rano*, the plaintiff relied on the same argument to prove the second prong that he used in asserting that the purposeful availment prong was satisfied; that Sipa's knowledge of the distribution of plaintiff's photographs to California publications sufficiently met both the "purposeful availment" and "arising out of requirements." Again, the court in *Rano* disagreed with the plaintiff's contentions, relying on the same rationale to dismiss this argument for the fulfillment of the "arising
out of" requirement that it had used to defeat the argument made regarding the defendant's purposeful availment: a fortuitous move by Rano to California, not foreseeable by the defendants, as well as the fact that the defendants did not receive the benefits and protections of California law, demonstrated the insufficiency of the Rano's argument.\textsuperscript{110}

3. Reasonableness

Unfortunately, while the Roth court reached the third prong's reasonableness analysis, the Rano court did not. The Roth court carefully weighed and balanced the seven "reasonableness" factors.\textsuperscript{111} Two factors favored Roth, three favored the defendants, and two were basically neutral.\textsuperscript{112} This created an "extremely close question," and the court indicated that the assertion of personal jurisdiction over the defendants in this case might in fact be unreasonable based on the assessment of the seven reasonableness factors.\textsuperscript{113} As the court noted, however, the difficulty for the defendants was that "'[o]nce purposeful availment has been established, the forum's exercise of jurisdiction is presumptively reasonable. To rebut that presumption, a defendant 'must present a compelling case' that the exercise of jurisdiction would, in fact, be unreasonable.'"\textsuperscript{114} This need for a "compelling" case could not be overcome by the defendants. Thus, the court concluded that while the defendants "may be able to show that the exercise of jurisdiction might be unreasonable, . . . the closeness of the question manifests that they cannot do so in a compelling fashion."\textsuperscript{115}

At least one commentator has correctly pointed out that this aspect of the Roth decision shows that using these seven balancing factors often

\textsuperscript{110} See supra notes 82, 102-103 and text accompanying notes 102-103.

\textsuperscript{111} See supra, note 50 and accompanying text.

\textsuperscript{112} The court's balancing of the reasonableness factors looked like this: Garcia Marquez and Balcells "narrowly . . . purposefully availed themselves of the privilege of conducting activities in California," and granting Roth convenient and effective redress also favored Roth, although "not as decisively as in other cases." Roth, 942 F.2d at 623-24. Meanwhile, burdens on the defendant, conflicts with the sovereignty of two foreign nations, and the availability of an alternative forum favored the defendants. Finally, the forum state's interest in adjudicating the issue and the most efficient forum for judicial resolution of the conflict favored neither party. Id.

\textsuperscript{113} "Garcia Marquez and Balcells, [the defendants] . . . can make a strong argument on the third prong, namely that the exercise of jurisdiction may be unreasonable." Roth, 942 F.2d at 625.

\textsuperscript{114} Id. (quoting Shute v. Carnival Cruise Lines, 897 F.2d 377, 386 (9th Cir. 1990)).

\textsuperscript{115} Id.
provides no clear result. Moreover, the factors do not make a personal jurisdiction analysis any more fair to individual defendants. The standard used in Roth merely obscures the search for what should be the true issue in every personal jurisdiction case: whether the defendant’s due process rights are violated by a particular court asserting personal jurisdiction over his or her person. In Roth, the defendant made a strong argument against the state’s exercise of personal jurisdiction, but this argument could not overcome the burden imposed by the “presumption of reasonableness” doctrine applied by the court. Obviously, this “balancing within a balancing” test can be awkward and unpredictable. The difficulties associated with the Ninth Circuit's test are especially problematic because, as in Roth, a court might conclude that a particular defendant made a strong showing of unreasonableness which should, in and of itself, be enough for a defendant to defeat personal jurisdiction. After all, it is a defendant’s due process rights which are implicated in personal jurisdiction analysis. However, in Roth, the defendants were held to a higher standard of “unreasonableness,” a standard which could not be overcome, thus abridging Roth’s and Balcell’s due process rights. For this reason, Roth itself has been a lightning rod of criticism, illustrating the deleterious effect of the Ninth Circuit’s test for personal jurisdiction on both fairness and predictability.

Unlike Roth, the court in Rano never reached the third prong of reasonableness. Without a showing on either of the first two prongs, it proved unnecessary. Therefore, reasonableness is technically an impossible point of comparison between the two cases. Had reasonableness been considered, however, it probably would have ultimately cut in favor of Sipa and the other defendants. For example, an inquiry into the first factor of the reasonableness analysis, purposeful interjection, parallels the question of minimum contacts. The Rano court clearly decided that Sipa’s contacts were insufficient to grant personal jurisdiction to the satisfaction of the purposeful availment requirement of the circuit’s test. Secondly, had the Rano court considered the second reasonableness factor, the burden of defending a suit in a foreign land, “[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant

116. Lee, supra note 6, at 960-61.
117. Id.
118. Id.
119. Id. at 957.
120. Id.
weight in assessing . . . reasonableness.” The record failed to disclose that Sipa had even a single office in California, nor in the rest of the United States for that matter. In addition, all potential witnesses and evidence remained outside of California. All such considerations pointed to the “considerable burden” on the defendant.

The remaining reasonableness factors almost all seemed to militate against the assertion of personal jurisdiction over Sipahioglu. Undoubtedly, there would be conflicts of law between the United States and both of Sipahioglu’s “home countries,” Turkey and France. Next, California would not benefit by trying the case, and neither the state, nor its citizens, would probably have much of an interest in adjudicating the dispute. Further, California would not afford the most efficient forum for judicial resolution in that no witnesses or evidence would be present in the state, and holding the trial there would prove a hardship on the defendant, a resident of France. The plaintiff’s interest in convenient and effective relief is perhaps the worst argument for unreasonableness as it seems to cut in favor of Rano’s having the case heard in California. However, in light of the fact that alternative fora exist, and that the other five factors favor Sipahioglu, it seems that California’s assertion of personal jurisdiction over Sipahioglu would be unreasonable.

IV. RECONCILING ROTH WITH RANO

Once the applicable law and facts are set out, the puzzle over the Ninth Circuit’s conflicting holdings grows more readily apparent. Reconciling the disparate results should either harmonize the law regarding personal jurisdiction, or, should point to the fact that Roth and Rano are hopelessly at odds with each other.

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123. Amoco Egypt Oil Co. v. Leonis Navigation Co., 1 F.3d 848, 851 (9th Cir. 1993) (quoting Roth, 942 F.2d at 623). Incredibly, Amoco Egypt Oil quotes Roth as precedent. Although Roth noted the difficulty on the defendant in that case, it did not prove dispositive regarding the determination of undue burdens. Yet the decision in Amoco Egypt Oil found the burdens of defending in a foreign legal system undue, and thus held personal jurisdiction unreasonable.
124. It should go without saying that Rano’s desire to sue in California, his new home, would be a convenient forum. This is evidenced by the fact that Rano chose to file suit in California.
A. The Plaintiffs' Arguments

1. Foreseeability

The court in *Roth* appears to have primarily relied on the concept of foreseeability in a manner inconsistent with *International Shoe* and its progeny in order to craft a decision based on a distorted view of the reality of the motion picture industry.\(^{125}\)

Indeed, the court's assumptions about where the film industry is based and how the industry operates lay at the heart of its finding that it could assert personal jurisdiction over Garcia Marquez and Balcells. . . . The true message of *Roth* is that the Ninth Circuit still views Hollywood as a geographic place, even though modern day film-makers recognize that Hollywood is really more a term describing a global state of mind.\(^{126}\)

The *Roth* court overly minimized the significant fact that *Cholera* was to be filmed in Brazil, not Hollywood. Furthermore, that the court seemed so certain about the future work to be done on *Cholera*, relying on both assumptions and facts not before the court or in the parties' briefs, the court belied a "certain naivete about how the modern motion picture business works."\(^{127}\)

By contrast, the court in *Rano* refused to acknowledge Rano's argument that suit in California was a foreseeable by-product of his and the defendants' business dealings. As the court succinctly stated: "Sipahioglu could not have foreseen Rano's fortuitous move from Europe to California."\(^{128}\) For support, the *Rano* court cited *Pacific Atlantic Trading Co. v. M/V Main Express*,\(^ {129}\) where there was no basis to assume foreseeability in California based on an agreement signed in Malaysia. As stated earlier, such an argument, if accepted, would subject any foreign art owners

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125. Daniels, supra note 3, at 367. "The personal jurisdiction holding of *Roth* is based on erroneous assumptions of how the motion picture business works." *Id.* at 354. "The future consequences analysis and the 'to be made in Hollywood' assumption are what led the *Roth* court astray." *Id.* at 379.

126. *Id.* at 367 (citation omitted).

127. *Id.* at 371.


129. 758 F.2d 1325 (9th Cir. 1985).
who sell their products to publications in the United States to personal jurisdiction in each and every state in which their art is eventually displayed or sold.\textsuperscript{130}

The \textit{Rano} decision appeared to be colored by the logic of \textit{World-Wide Volkswagen Corp. v. Woodson.}\textsuperscript{131} In \textit{World-Wide Volkswagen}, the Supreme Court refused to hold that a Volkswagen dealership had sufficient contacts for personal jurisdiction purposes with states outside of the tri-state area of Connecticut, New York, and New Jersey, except for the possible “contact” created when the plaintiff drove the car he purchased from that dealership to Oklahoma. The Court held that this was not enough to create the requisite minimum contacts for personal jurisdiction because the logic of such an argument, if extended, would render the Volkswagen dealership amenable to personal jurisdiction in California, Alaska, or even Hawaii, although the dealership had nothing to do with their product’s interjection into those fora. Such a rule would lead to the situation where “[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.”\textsuperscript{132} The Court explained:

This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.\textsuperscript{133}

The finding in \textit{Rano} should have been different if the chattels in question, namely photographs, were viewed strictly as chattels distributed with the intention of finding their way to particular states, such as California. Such a reading of the facts would be supported by \textit{Asahi Metal Industry Co. v. Superior Court.}\textsuperscript{134} However, it would have been shortsighted in that such a holding could not ignore the fact that \textit{Rano} hinged upon not only the distribution of photographs, but also turned upon the contract forged between plaintiff and defendant. Coincidentally, the same analytical duality is manifest in \textit{Roth} as well.

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\textsuperscript{130} \textit{Rano}, 987 F.2d at 588.
\textsuperscript{131} 444 U.S. 286 (1980).
\textsuperscript{132} Id. at 296.
\textsuperscript{133} Id. at 297.
\textsuperscript{134} 480 U.S. 102 (1987). The awareness on the part of a foreign defendant-manufacturer of stems for tire valves that its product would reach the forum state via the stream of commerce constituted the minimal contacts required between the defendant and the forum state for the fair and just exercise of personal jurisdiction by the forum.
To that end, both Rano and Roth must really be assessed in light of Burger King v. Rudzewicz.135 In Burger King, the wisdom of the Court's logic was apparent. By signing a contractual franchise agreement, the defendants established a continuous and systematic business relationship which was pre-set for twenty years.136 As franchisees, the defendants knew that they were establishing a symbiotic business relationship with very close ties to their corporate giant parent in Florida. Under the relationship between defendants and Burger King, whereby the defendants regularly received training and support in exchange for franchise fees and monthly percentages of the restaurant's profits. This was evidence of the strength of the parties' established, long-term, interactive relationship. Moreover, the contract's express terms dictated that all of Burger King's operations were conducted and supervised from the Florida headquarters. Specific provisions deemed the agreement to be "made and entered into in the State of Florida and . . . governed and construed under and in accordance with the laws of the State of Florida."137 In sum, the defendants knew they were dependant franchisees, that their franchisor lived in a different state than where they operated their franchise, and that they would enjoy regular and continuous business contacts with the franchisor in Florida, thereby subjecting themselves to personal jurisdiction in that state.

In a case like Rano, however, the same logic cannot be applied. Rano did not always live in California, but rather, happened to move there during the course of an eight-year business relationship with Sipa. To allow jurisdiction in this case would be akin to allowing Burger King to haul Rudzewicz and his partner into a court in Texas or some other state simply because Burger King moved its corporate headquarters. Quite simply, Sipa could not have known that Rano would move to California nearly a decade after contracting with him to distribute his photographs. Therefore, the Burger King rationale could not have controlled in Rano. As should be obvious, however, the court in Roth clearly stretched the doctrine of "foreseeable consequences" to ensnare Garcia Marquez and Balcells in its jurisdiction.

135. 471 U.S. 462 (1985). Interestingly, Burger King was essentially an intellectual property case as well, involving tortious infringement of its trademarks and service marks. See id. at 468-69.
136. Id. at 467.
137. Id. at 481.
2. Nonresident-Defendants With Foreign-National Status

In both Roth and Rano, the plaintiffs argued that they could overcome the various concerns raised by trying to force a foreign citizen into American courts. Only in Roth, however, did the Ninth Circuit find personal jurisdiction proper. The question is why, especially considering that, when deciding Rano, the circuit court could have drawn on Roth—a case decided by the Ninth Circuit only two years prior to Rano—for direct support. Moreover, the Rano court never reached a discussion of “reasonableness,” the circuit’s third prong of a successful showing of personal jurisdiction.

Questions of American jurisdiction over foreign defendants should certainly be decided under the simple, analytical aegis of reasonableness. Specifically, however, that simplified reasonableness inquiry should turn on purposeful availment; if a defendant did not purposefully avail himself of the benefits and protections of state law, it should be unreasonable to assert personal jurisdiction. Unfortunately, this is not the status of the law post-Roth in the Ninth Circuit.

V. THE FUTURE OF PERSONAL JURISDICTION IN THE NINTH CIRCUIT

The Ninth Circuit, beyond a doubt, conspicuously ignored its decision in Roth when deciding Rano. This is puzzling because both were intellectual property cases involving a resident-plaintiff of California and a citizen of a foreign country as the nonresident-defendant. These factual similarities should not necessarily dictate the outcome, but if Roth is still good law, it is reasonable that it would at least deserve a mention in the court’s analysis in Rano, even if just for the applicable standards of law.

The only possible answer to this oddity is that the Ninth Circuit drew a distinction when analyzing a case involving photographic licensing versus a case rooted in the motion picture industry. This uneven approach to personal jurisdiction jurisprudence, however, poses a genuine threat to the creative personalities abroad who might wish to transact business in the United States. This threat results in a “chilling effect” which, if creative personalities are paying attention, could frighten them away from contractual dealings in California. For example, at least one author has postulated that:

[A]n aggressive producer has been handed a powerful weapon by the Roth court. The producer will know that as long as a bargain is rooted in motion pictures and the agreement is
sufficient to sustain a motion to dismiss, the Los Angeles-based business person can haul an artist halfway around the world to defend that artist's own creation.\textsuperscript{138}

It can only be speculated upon, and hoped for, that the \textit{Roth} decision is now effectively curtailed in force. At the very least, \textit{Roth} has been relegated to a possible standard for judging the narrow category of motion picture cases. Possibly, the \textit{Roth} holding can be limited to its facts. Or, perhaps, the decision has been implicitly overruled. This last hypothesis is probably too optimistic though; after all, the \textit{Rano} opinion failed to even mention \textit{Roth}, let alone overrule it. Finally, there is always the chance that \textit{Roth} and \textit{Rano} were sufficiently different on their facts such that a true reconciliation of the cases is both impossible and unnecessary.

Due to California's omnipresence in the motion picture industry, however, the possibility exists that the Ninth Circuit could reconsider the ill-conceived \textit{Roth} opinion. If not, the United States Supreme Court awaits as the final guardian of due process, and an appeal to that Court now seems to be the only hope of harmonizing the law of personal jurisdiction in the intellectual property arena. A decision overruling \textit{Roth} is necessary to effect this change, and until such a decision comes, the waters of personal jurisdiction shall remain murky and dangerously navigable for foreign artists and other creative personalities.

\section*{VI. Conclusion}

Perhaps the tension between the disparate decisions of \textit{Roth} and \textit{Rano} is due merely to highly fact-specific scenarios which are necessarily bound to occur. More troubling, however, is the possibility that the entire edifice of personal jurisdiction is really much less secure than it appears, and is ready to fall like the walls of Jerico.\textsuperscript{139} If a future litigant can trumpet loudly enough for the United States Supreme Court to hear, the Court might step in and harmonize the \textit{Burger King} dicta which has left the various circuit courts of appeals to their own designs. One possibility for the Court to consider is eliminating the use of the \textit{Burger King} dicta in order to "compensate for a defendant's lack of minimum contacts" in the forum state.\textsuperscript{140} Instead, the focus could return to the due process rights of the defendant based upon minimum contacts, the only genuine surrogate for presence in the forum as the means of granting personal jurisdiction.

\begin{footnotesize}
\begin{itemize}
\item 138. Daniels, supra note 3, at 379.
\item 139. See Joshua, 6:1.
\item 140. Lee, supra note 6, at 967.
\end{itemize}
\end{footnotesize}
In the Ninth Circuit, special problems exist. In close cases like Roth, the "pre-set bias towards a presumption of reasonableness [can be] invoked." All too often that bias favors the plaintiff. Since the Ninth Circuit is home to Hollywood, the beacon to the world of arts and entertainment, California faces the sad, economic reality that foreign, creative artists and personalities may become much more hesitant before engaging in business negotiations with anyone in California, even if those negotiations have only a possible "foreseeable effect" in California. Such negotiations can now result in the artists being hauled off to court halfway around the world to defend themselves in a lawsuit — at least in regards to motion pictures. This result is regrettable because international art, creative ideas, and entertainment are now threatened at a time of increasing xenophobia in the United States. This is the last thing which should be rewarded. The extent to which Rano may have curtailed the power of Roth as precedent in the Ninth Circuit could make all the difference.

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141. Id. at 965.
142. Id. at 965-66.

* This Comment is dedicated to my family. Thank you for all your love and support. Thanks also to the staff writers and editors of the Loyola of Los Angeles Entertainment Law Journal for their patience and assistance.