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Ignorance is Bliss: A Comment on Pavlovich v. Superior Court

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IGNORANCE IS BLISS: A COMMENT ON *PAVLOVICH V. SUPERIOR COURT*

I. INTRODUCTION

In *Pavlovich v. Superior Court*,[1] the California Supreme Court refused to find personal jurisdiction based upon the "defendant's knowledge that his tortious conduct may harm industries centered in California."[2] Although the defendant, Matthew Pavlovich, knew that industries centered in California would be harmed by his actions, the court found that he did not know precisely whom he was harming.[3] Applying the *Calder effects test*,[4] the court found that Pavlovich had not expressly directed his conduct at the forum state because he only suspected, but did not know, that the entity his actions harmed resided in California.[5]

Pavlovich was decided by a bare majority 4-3 vote.[6] This comment will summarize the majority opinion, then critically analyze it. Justice Baxter's strong dissent, joined by Chief Justice George and Justice Chin, will be discussed when relevant to the analysis of the majority's holding.

II. PROCEDURAL AND SUBSTANTIVE FACTS OF PAVLOVICH

A. Background Facts and Procedural History

Matthew Pavlovich was a computer engineering student at Purdue University in Indiana when he founded and operated the LiVid video project (LiVid).[7] By the time the California Supreme

1. 29 Cal. 4th 262, 58 P.3d 2, 127 Cal. Rptr. 2d 329 (2002) [hereinafter *Pavlovich #2*].
2. *Id.* at 278, 58 P.3d at 13, 127 Cal. Rptr. 2d at 343.
3. *See id.* at 275–76, 58 P.3d at 11–12, 127 Cal. Rptr. 2d at 340–41.
4. *See infra* Part III.
5. *See Pavlovich #2*, 29 Cal. 4th at 278, 58 P.3d at 13, 127 Cal. Rptr. 2d at 343.
6. *See id.* at 262, 58 P.3d at 2, 127 Cal. Rptr. 2d at 329–30.
7. *See id.* at 266, 58 P.3d at 5, 127 Cal. Rptr. 2d at 333.

Court ruled on the case, Pavlovich had moved to Texas and become president of his own consulting company, Media Driver LLC.[8] LiVid,[9] which stands for "Linux[10] Video and DVD," operated a website.[11]

Pavlovich's goal was to use the LiVid site to encourage the development of video and DVD (Digital Versatile Disc) support for Linux by providing a central location for users and developers to "'combine the resources and the efforts of the various individuals that were working on related things.'"[12]

Pavlovich and others sought to design a method for developing DVD players that would work on Linux systems.[13] One of the obstacles faced in developing an unlicensed Linux DVD player was the Content Scrambling System (CSS) used by the DVD industry to encrypt and protect copyrighted material—particularly major motion pictures—from playback or copying in the absence of the decryption algorithms and keys.[14] A program called DeCSS[15] was developed to

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8. *See id.*

9. Contrary to the case reporter, the successor website capitalizes the last "d", i.e., LiViD. For consistency, I will use the case reporter spelling. *See* LiViD, *The Linux Video and DVD Project*, *at* http://www.linuxvideo.org (last updated Nov. 1, 2001).

10. Linux is a Unix-type computer operating system whose source code is "freely available to everyone." Linux Online! *at* http://www.linux.org/ (last visited Feb. 19, 2003). Linux was developed in 1991 by Linus Torvald, who at that time was a student at the University of Helsinki in Finland. *See* Linux Online!, *What is Linux?*, *at* http://www.linux.org/info/index.html (last visited Feb. 19, 2003).

11. *See Pavlovich #2*, 29 Cal. 4th at 266, 58 P.3d at 5, 127 Cal. Rptr. 2d at 333.

12. *Id.* at 267, 58 P.3d at 5, 127 Cal. Rptr. 2d at 333.

13. *See* Electronic Frontier Foundation, *DVD Update—REVEALED: DeCSS Led to Competing Linux DVD Player*, *at* http://www.eff.org/IP/Video/DVD_Updates/20000721_dvd_update.html (July 21, 2000) [hereinafter *Revealed*].

14. *See Pavlovich #2*, 29 Cal. 4th at 266, 58 P.3d at 5, 127 Cal. Rptr. 2d at 333.

15. CSS may actually not prevent the copying of DVDs, but in the course of performing its function, DeCSS may sidestep other protections that do prevent copying. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 438 n.5 (2d Cir. 2001). At the time DeCSS was developed, Linux did not support any licensed DVD players. *See id.* at 437. For a history of the development of DeCSS, along with an insightful background discussion of how CSS performs its function, see *Universal City Studios, Inc. v. Corley*, 273 F.3d at 436–40.

circumvent CSS and allow an unlicensed Linux DVD player to be developed and to decrypt DVDs.[16]

The source code for DeCSS was posted to the LiVid website by October 1999.[17] Pavlovich did not seek or obtain a license to use CSS technology in developing a Linux-based DVD player.[18] In addition to his work with LiVid, Pavlovich was also known as a leader of the "open source" movement.[19] Followers of the open source movement believe that source code should be "freely available for others to view, amend, and adapt."[20] Software producers such as Microsoft operate under the traditional "closed model" and allow few programmers access to their source code.[21] Publishing DeCSS was consistent with Pavlovich's open source philosophy, making it available for all to see and use.

DVD Copy Control Association, Inc. (DVD CCA) brought suit in California state court against Pavlovich alleging that the website posting of DeCSS misappropriated trade secrets "because the 'DeCSS program . . . embodies, uses, and/or is a substantial derivation of confidential proprietary information which DVD CCA licenses.'"[22]

DVD CCA was founded in December 1998 by the DVD industry as a nonprofit trade association with a mission "to control and administer licensing of the CSS technology."[23] It became the "sole licensing entity" for CSS technology shortly after December 1999.[24] Although incorporated under Delaware law,[25] DVD CCA

16. *See Revealed*, *supra* note 13.

17. *See Pavlovich #2*, 29 Cal. 4th at 267, 58 P.3d at 5, 127 Cal. Rptr. 2d at 333. The website posting at subject in this case could formerly be found at http://www.livid.on.openprojects.net. However, that site is no longer accessible.

18. *See* Pavlovich v. Superior Court, 109 Cal. Rptr. 2d 909, 912 (2001) *superceded by* 127 Cal. Rptr. 2d 329 (2002) [hereinafter *Pavlovich #1*].

19. *See id.*

20. Richard Poynder, *The Open Source Movement: Does This Software Provide a Viable, User-Friendly Alternative to Proprietary Solutions?*, INFORMATION TODAY, Oct. 2001, *available at* http://www.infotoday.com/it/oct01/poynder.htm.

21. *See id.*

22. *Pavlovich #2*, 29 Cal. 4th at 267, 58 P.3d at 6, 127 Cal. Rptr. 2d at 333–34.

23. *Id.* at 266, 58 P.3d at 5, 127 Cal. Rptr. 2d at 333.

24. *Id.*

25. *See id.*

claimed that Pavlovich caused harm in California, its principal place of business.[26]

In response to the lawsuit, Pavlovich filed a motion to quash service of process, claiming that California courts did not have personal jurisdiction over him.[27] The trial court denied the motion, and Pavlovich appealed. The court of appeal refused to issue a writ of mandate, but the California Supreme Court granted review, transferring the matter back to the court of appeal with directions to vacate the order denying mandate, and to order the trial court to show cause why the motion to quash service should not be granted.[28]

The court of appeal then issued an opinion where it held that Pavlovich had "purposefully availed himself of forum benefits under the *Calder effects test*,"[29] and it was reasonable for the trial court to exercise personal (specific) jurisdiction over him.[30] The court found this consistent "with notions of fair play and substantial justice under the due process clause of the United States Constitution."[31] Pavlovich appealed to the California Supreme Court, which granted review.[32]

B. Facts Pertinent to the Question of Personal Jurisdiction

Pavlovich did not have any of the traditional contacts with California under which personal jurisdiction might be found. He did not reside, work, own real property, have a telephone listing, bank account, or place of business in California.[33] By the time his case had been brought on appeal, Pavlovich had started his own technology consulting company in Texas.[34] Neither he nor his company had any business contacts with California.[35]

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26. *See id.* at 275, 58 P.3d at 10–11, 127 Cal. Rptr. 2d at 339–40.
27. *See id.* at 267, 58 P.3d at 6, 127 Cal. Rptr. 2d at 334.
28. *See Pavlovich #1*, 109 Cal. Rptr. 2d 909, 911 (Ct. App. 2001), *superceded by* 127 Cal. Rptr. 2d 329 (2002).
29. *Pavlovich #2*, 29 Cal. 4th at 268, 58 P.3d at 6, 127 Cal. Rptr. 2d at 334.
30. *See id.*
31. *Pavlovich #1*, 109 Cal. Rptr. 2d 909, 918 (2001), *superceded by* 127 Cal. Rptr. 2d 329 (2002).
32. *See Pavlovich #2*, 29 Cal. 4th at 268, 58 P.3d at 6, 127 Cal. Rptr. 2d at 334.
33. *See id.* at 266, 58 P.3d at 5, 127 Cal. Rptr. 2d at 333.
34. *See id.*
35. *See id.*

The LiVid website provided information only, consisting of "a single page with text and links to other Web sites."[36] It was not interactive.[37] Visitors to the site could not exchange information with the site operators.[38] Furthermore, the site did not transact or solicit any business.[39] Aside from its accessibility in California, LiVid had no traditional contacts with California.[40]

In deposition testimony, Pavlovich admitted knowing of an organization that licensed DVD technology, and that he had heard "you've got to apply for a license and whatnot."[41] He also knew that DeCSS had been created through "reverse engineering" of CSS[42] and was probably illegal.[43] He admitted that DeCSS facilitated the pirating of DVD's and that pirating was illegal.[44]

Particularly pertinent to the lower court's finding of personal jurisdiction, Pavlovich admitted in deposition testimony that he knew that the motion picture industry, which relied on CSS to protect its copyrighted material, was centered in California.[45] He also admitted knowing that the computer technology industry had a dominant presence in California.[46] He identified Silicon Valley, California as one of the two technology hot spots in the United States, the other being Texas.[47]

III. THE CALIFORNIA SUPREME COURT'S HOLDING

The California Supreme Court determined that California courts could not exercise jurisdiction over Pavlovich based on the facts

36. *Id.* at 266–67, 58 P.3d at 5, 127 Cal. Rptr. 2d at 333.
37. *See id.* at 267, 58 P.3d at 5, 127 Cal. Rptr. 2d at 333.
38. *See id.*
39. *See id.*
40. *See id.*
41. *Pavlovich #1*, 109 Cal. Rptr. 2d 909, 912 (2001), *superceded by* 127 Cal. Rptr. 2d 329 (2002).
42. *See id.*
43. *See Pavlovich #2*, 29 Cal. 4th at 267, 58 P.3d at 5, 127 Cal. Rptr. 2d at 333.
44. *See Pavlovich #1*, 109 Cal. Rptr. 2d 909, 912 (2001), *superceded by* 127 Cal. Rptr. 2d 329 (2002).
45. *See id.*
46. *See id.*
47. *Id.* at 915–16.

present in his case.[48] Noting that California's long-arm statute[49] allows California courts to exercise personal jurisdiction to the limits of due process under the United States Constitution, the court applied the "minimum contacts" test of *International Shoe Co. v. Washington*[50] to determine whether Pavlovich had sufficient contacts with California such that asserting jurisdiction would "not violate 'traditional notions of fair play and substantial justice.'"[51]

Personal jurisdiction can be either general or specific.[52] General jurisdiction exists when a defendant's contacts with the forum state "are 'substantial' or 'continuous and systematic'" such that the defendant can expect to be "haled into court in that state" on causes of action that are unrelated to its contacts with the state.[53] The California Supreme Court observed that DVD CCA had not alleged that California courts had general jurisdiction over Pavlovich, which left it to consider only the question of specific personal jurisdiction.[54]

Tracing the United States Supreme Court's development of specific personal jurisdiction,[55] the court considered "'the relationship among the defendant, the forum, and the litigation.'"[56] In order for a court to exercise specific jurisdiction over an out-of-state defendant, that court must consider a three-part test. First, did the defendant "purposefully [avail] himself or herself of forum benefits"?[57] Second, is the controversy "related to or [arising] out of

48. *See Pavlovich #2*, 29 Cal. 4th at 268, 58 P.3d at 6, 127 Cal. Rptr. 2d at 334.

49. *See* CAL. CIV. PROC. CODE § 410.10 (West 2002).

50. 326 U.S. 310, 316 (1945).

51. *Pavlovich #2*, 29 Cal. 4th at 268, 58 P.3d at 6, 127 Cal. Rptr. 2d at 334 (citations omitted).

52. Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 223 F.3d 1082, 1086 (9th Cir. 2000).

53. *See id.*

54. *See Pavlovich #2*, 29 Cal. 4th at 269, 58 P.3d at 6, 127 Cal. Rptr. 2d at 335.

55. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nationales de Colombia v. Hall, 466 U.S. 408 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denckla, 357 U.S. 235 (1958); Int'l Shoe v. Washington, 326 U.S. at 310.

56. *Pavlovich #2*, 29 Cal. 4th at 269, 58 P.3d at 6, 127 Cal. Rptr. 2d at 335 (citations omitted).

57. *Id.* at 269, 58 P.3d at 7, 127 Cal. Rptr. 2d at 335 (internal quotations and citations omitted).

[the] defendant's contacts with the forum"?[58] Third, would "the assertion of personal jurisdiction . . . comport with notions of fair play and substantial justice"?[59]

The beginning and end of the California Supreme Court's analysis dealt with the purposeful availment prong of the test. Pavlovich claimed to have no contacts with California, and thus had never availed himself of forum benefits.[60] As an alternative means for assessing purposeful availment, the United States Supreme Court has provided the *Calder effects test.*[61] The *effects test* substitutes for actual contact with the forum state when dealing with cases of defamation.[62]

In *Calder v. Jones*, the Court found that California was both the focal point of the defendant's action and the focal point of the harm suffered by the plaintiff.[63] Thus, the Court approved of the California court's exercise of personal jurisdiction over an out-of-state defendant who had no prior contacts with California.[64]

In applying the *effects test* to the business tort in *Pavlovich*, the California Supreme Court addressed the two requirements that almost all circuits had adopted:[65] 1) the defendant must have "expressly aimed at or target[ed]" intentional conduct at the forum state, and 2) the defendant must have known that "his intentional conduct would cause harm in the forum."[66] DVD CCA contended that this test was met, as Pavlovich knew his intentional posting of DeCSS targeted the licensing entity as well as "the motion picture,

58. *Id.* (internal quotations and citations omitted).
59. *Id.* (internal quotations and citations omitted).
60. *See Id.*
61. *See Id.*
62. *See id.*
63. *See* Calder v. Jones, 465 U.S. 783, 789 (1984).
64. *See id.* at 791.
65. *See* Griffis v. Luban, 646 N.W.2d 527 (Minn. 2002); United States v. Swiss American Bank Ltd., 274 F.3d 610 (1st Cir. 2001); Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 223 F.3d 1082 (9th Cir. 2000); Wien Air Alaska, Inc. v. Brandt, 195 F.3d 208 (5th Cir. 1999); IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254 (3d Cir. 1998); ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617 (4th Cir. 1997); Far West Capital, Inc. v. Towne, 46 F.3d 1071 (10th Cir. 1995); Hicklin Eng'g, Inc. v. Aidco, Inc., 959 F.2d 738 (8th Cir. 1992).
66. *Pavlovich #2*, 29 Cal. 4th at 271, 58 P.3d at 8, 127 Cal. Rptr. 2d at 336–37.

computer and consumer electronics industries" located in California, where the harm would be felt.[67]

Noting that the Seventh Circuit in *Janmark, Inc. v. Reidy*[68] had focused solely on the location where the harm—and thus, the tort—had occurred, the California Supreme Court found *Janmark* in conflict with the seminal holding of *World-Wide Volkswagen*.[69] The court observed that it is not enough that the injury in the forum state be foreseeable, but that the defendant should be able to reasonably foresee, based on his or her "'conduct and connection with the forum State[,] . . . being haled into court there.'"[70]

Complicating the court's analysis was the nature of Pavlovich's contact with California—the posting of DeCSS's source code on LiVid's Internet website, which was accessible by any person anywhere with Internet access, including California.[71] Although the California Supreme Court had not yet considered how personal jurisdiction would be affected when the only contact was through the Internet, the court observed that other jurisdictions[72] had implemented a sliding scale approach, finding no grounds to exercise personal jurisdiction from passive sites that only provide information.[73]

LiVid's site was passive, providing information only, with no interactive features.[74] Furthermore, no evidence had been offered showing that a California resident had visited or downloaded from the website.[75] The court decided that the passive website alone was insufficient for establishing specific personal jurisdiction.[76]

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67. *Id.* at 275, 58 P.3d at 11, 127 Cal. Rptr. 2d at 340.

68. 132 F.3d 1200 (7th Cir. 1997).

69. *Pavlovich #2*, 29 Cal. 4th at 272, 58 P.3d at 9, 127 Cal. Rptr. 2d at 338.

70. *Id.* (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

71. *See id.* at 273, 58 P.3d at 10, 127 Cal. Rptr. 2d at 339.

72. *See, e.g.*, Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997). *Zippo* created a sliding scale based on the "nature and quality of commercial activity that an entity conducts over the Internet." *Zippo*, 952 F. Supp. at 1124. *Cybersell* applied a simlar standard based on the amount of interactivity. *See Cybersell*, 130 F.3d at 418.

73. *Pavlovich #2*, 29 Cal. 4th at 274, 58 P.3d at 10, 127 Cal. Rptr. 2d at 339.

74. *See id.*

75. *See id.* An interesting question, outside the scope of this paper, is whether the geographical location of website visitors can be ascertained. The

Because the website itself proved insufficient to provide the necessary minimum contacts on which to base specific jurisdiction, the court considered the alternative argument that Pavlovich's activities satisfied the first prong of the *effects test.*[77] The court examined three different possibilities on which to base a finding that Pavlovich's posting intentionally targeted individuals or businesses within California.[78]

First, DVD CCA alleged that Pavlovich knew that a licensing entity existed that owned the licensing rights to CSS.[79] The court found that this provided an inadequate basis for two reasons: there was no evidence that Pavlovich was aware that DVD CCA had its principal place of business in California, and due to an ironic sequence of events, DVD CCA was not administering licenses to CSS technology until December 1999, nearly two months after DeCSS had been posted to LiVid's website.[80] Pavlovich could not have known about DVD CCA's interest when the misappropriated code was posted and thus, could not have intentionally targeted DVD CCA.[81]

Second, DVD CCA alleged that Pavlovich knew that the motion picture industry was centered in California and that DVD pirating of copyrighted movies would harm that industry.[82] The court expressed doubt that those effects were relevant because the cause of action at issue was not "the illegal pirating of copyrighted motion pictures."[83] Specific jurisdiction depends upon the relationship between the defendant's "activity in the forum" and the "particular cause of

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web server that services a website can "log the originating Internet protocol address of visiting users." Terrence Berg, *www.wildwest.gov: The Impact of the Internet on State Power to Enforce the Law*, 2000 BYU L. REV. 1305, n.91 (2000). However, that address may correspond to the geographical location of the Internet service provider ("ISP") that the visitor uses, rather than the location of the website visitor. The ISP and the website visitor may be located in different states. *See id.*

76. *See Pavlovich #2*, 29 Cal. 4th at 274, 58 P.3d at 10, 127 Cal. Rptr. 2d at 339.

77. *See id.* at 275–78, 58 P.3d at 11–13, 127 Cal. Rptr. 2d at 340–43.

78. *See id.*

79. *See id.* at 275, 58 P.3d at 11, 127 Cal. Rptr. 2d at 340.

80. *See id.*

81. *See id.*

82. *See id.* at 276, 58 P.3d at 11, 127 Cal. Rptr. 2d at 341.

83. *Id.*

action."[84] Regardless, the court found that even though it was foreseeable that others might use DeCSS to illegally pirate copyrighted movies, Pavlovich had done nothing to encourage that behavior.[85] His awareness that someone might unlawfully utilize DeCSS was too attenuated to show express targeting.[86]

Third, DVD CCA alleged that Pavlovich knew that California was a base for computer industries and consumer electronics, and should have known that many licensees of CSS had their place of business in California.[87] DVD CCA reasoned that Pavlovich should have known his posting of DeCSS would harm those California businesses.[88]

The court found this analysis unpersuasive because the evidence did not demonstrate that Pavlovich knew CSS licensees were in California, but merely that he "should have guessed" they were.[89] Using a test of "mere foreseeability" would result in specific jurisdiction in California over any defendant whose intentional tort affected industries in the state.[90] The court refused to adopt such a broad interpretation in applying the *effects test*.[91]

The court conceded that foreseeability of the effects of a defendant's actions in the forum state can be considered in conjunction with other evidence of express targeting.[92] However, the court found no support for the proposition that an allegation that a defendant "should have known" that potential harm might befall a plaintiff was alone sufficient to establish the express targeting required in a finding of personal jurisdiction.[93] The basis for asserting personal jurisdiction that DVD CCA proposed was not that Pavlovich should have known that his conduct could harm a California plaintiff, but that his conduct could harm "industries associated with that plaintiff."[94] The court felt that basing

84. *Id.* (citations omitted).
85. *See id.*
86. *See id.*
87. *See id.*
88. *See id.*
89. *Id.* at 277, 58 P.3d at 12–13, 127 Cal. Rptr. 2d at 341.
90. *See id.* 278, 58 P.3d at 13, 127 Cal. Rptr. 2d at 342.
91. *See id.*
92. *See id.* at 277, 58 P.3d at 12, 127 Cal. Rptr. 2d at 342.
93. *See id.*
94. *Id.*

jurisdiction on such an expansive application of the *effects test* would result in the elimination of "the purposeful availment requirement" in most intentional tort cases and chose to decline jurisdiction.[95]

IV. AN ANALYSIS OF ISSUES RAISED IN PAVLOVICH

This analysis will look critically at the reasoning employed by the California Supreme Court in declining jurisdiction. To find purposeful availment under the two-part version of the *effects test*, a court must find that the defendant (1) directed intentional conduct at the forum, and (2) had knowledge that the intentional conduct would cause harm there.[96]

First, the court set the hurdle too high by requiring actual knowledge of the name and location of the entity before express aiming or knowledge of harm could be found. Second, the court ignored that the intentional aiming element was met by a combination of Pavlovich's intent to facilitate others' use of DeCSS to cause harm in California and his intent to disclose a trade secret[97] belonging to California businesses. Those express targeting contacts, coupled with Pavlovich's use of a website that could be accessed in California, provided sufficient contact with California such that the *effects test* should have been satisfied under the facts in *Pavlovich*.

A. Knowledge

The California Supreme Court has set an excessively high bar for fulfilling the "knowledge" requirement of the *effects test*. A defendant must have actual knowledge of the name of the entity and that its principal place of business is in California before the California Supreme Court will find personal jurisdiction in California under the *effects test*. Here, Pavlovich knew that a licensing entity existed and knew that the businesses that benefited from that license were in California, but those two facts were not enough for the court to find that he targeted his conduct at the forum.[98]

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95. *See id.* at 278, 58 P.3d at 13, 127 Cal. Rptr. 2d at 342.

96. *See id.* at 271, 58 P.3d at 8, 127 Cal. Rptr. 2d at 336–37.

97. The Uniform Trade Secrets Act protects individuals from the harm of disclosure of trade secrets. *See* CAL. CIV. CODE §§ 3426–3426.11 (West 2002).

98. *Pavlovich #2*, 29 Cal. 4th at 279–81, 58 P.3d at 14, 127 Cal. Rptr. 2d at 343 (Baxter, J., dissenting).

Applying the court's analysis, a defendant can avoid personal jurisdiction under the *effects test* by targeting an entire industry but staying ignorant of the exact name and location of the entities within that industry that the defendant seeks to harm. This result is problematic. When facing a trade secret misappropriation claim, the defendant can acknowledge that he or she knew that someone owned the "trade secret," but deny knowing the name and principal place of business of the plaintiff, and thereby avoid specific jurisdiction. If multiple defendants live in different states, plaintiffs would be forced to carry out duplicative legal actions in multiple locations.

Although the *effects test* has been applied to find specific jurisdiction over out of state tortfeasors when the entity targeted was a corporation,[99] the court was unwilling to extend the test to industries.[100] The court was concerned that this "would effectively subject all intentional tortfeasors whose conduct may harm industries in California to jurisdiction in California."[101]

The court's attempt to draw a bright line between industries and actual entities, even if practical, violates the maxim that personal jurisdiction cannot "turn upon mechanical tests."[102] In fact, the California Supreme Court had already observed in *Cornelison v. Chaney*[103] that determining jurisdiction requires a "flexible approach grounded in the quality and nature of the activity of the defendant in the state seeking to exercise jurisdiction over him, fairness to the parties, and the orderly administration of the law."[104]

A defendant's knowledge that his or her tortious conduct will harm an entire industry should not be automatically dismissed from the equation. As the dissent in *Pavlovich* properly noted:

> [I]t cannot matter that [the] defendant may not have known or cared about the *exact identities or precise locations* of

99. *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998) (finding personal jurisdiction in California where an individual aimed its tortious conduct at a specific California company).

100. *Pavlovich #2*, 29 Cal. 4th at 278, 58 P.3d at 13, 127 Cal. Rptr. 2d at 342–43.

101. *Id.*

102. Vons Co. v. Seabest Foods, Inc., 14 Cal. 4th 434, 463, 926 P.2d 1085, 1104, 58 Cal. Rptr. 2d 899, 918 (1996) (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

103. 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976).

104. *Id.* at 150, 545 P.2d at 268, 127 Cal. Rptr. at 356.

> each individual target . . . . By acting with the broad intent to harm *industries he knew were centered or substantially present in this state*, [the] defendant forged sufficient 'minimum contacts' with *California*.[105]

Here, it was clear that Pavlovich had targeted the movie and computer technology industries that relied upon CSS technology. In his deposition, he admitted knowing that both industries were centered in California.[106] There was evidence that he had been put on notice that release of the trade secret—the decoding of CSS—would harm those industries.[107]

Despite the court's fears over expanding personal jurisdiction based on mere knowledge that an industry is located in a certain geographic region, the court could have narrowed the test by requiring plaintiffs to demonstrate that there was conduct intentionally targeted at an entire industry. This is distinguishable from a situation in which an intentional tortfeasor targets one company within an industry centered in California. Knowledge that an industry is present in California need not imply that any particular business within that industry is also present.[108] Perhaps the court could have limited the sweep of the knowledge component by finding that where the *entire* industry is targeted by the conduct—and not just one business in the industry—the knowledge that the industry is primarily centered in California would satisfy that component of the *effects test*.

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105. *Pavlovich #2*, 29 Cal. 4th at 279, 58 P.3d at 14, 127 Cal. Rptr. 2d at 343 (Baxter, J., dissenting).

106. *See Pavlovich #1*, 109 Cal. Rptr. 2d 909, 915–16 (Ct. App. 2001), *superceded by* 127 Cal. Rptr. 2d 329 (2002) (reproducing partial transcript from Pavlovich's deposition).

107. *See Pavlovich #2*, 29 Cal. 4th at 283, 58 P.3d at 16, 127 Cal. Rptr. 2d at 346 (Baxter, J., dissenting) (summarizing a posting on LiVid's website warning that "CSS was a licensed trade secret . . . [designed] to prevent the pirating of movies from DVD's, that Hollywood was 'paranoid' about pirating, and that if CSS were 'cracked,' there was a 'good chance' no new movie titles would be released on DVD.").

108. *See, e.g.*, Callaway Golf Corp. v. Royal Canadian Golf Ass'n., 125 F. Supp. 2d 1194 (C.D. Cal. 2000) (finding no personal jurisdiction over a Canadian defendant in California where the defendant knew that the golf equipment manufacturing industry was centered in part in California, but did not know that plaintiff's business was actually located in California).

B. Intentional Aiming

1. The intentionally aimed harm and the cause of action do not have to be identical

The majority in *Pavlovich* was incorrect in dismissing the relevance of the harmful effects of third-party pirating. The court questioned whether the harmful effects of third-party pirating of DVD's were relevant because DVD CCA did not "assert a cause of action premised on the illegal pirating of copyrighted motion pictures."[109] However, the pirating was offered to show the harmful effects of the intentional targeting, which substituted for forum contacts. DVD CCA did not have to prove a strict one-to-one correlation between the forum contacts and the cause of action.

Purposeful availment is analyzed within the context of "the defendant, the forum, and the litigation."[110] As the court properly noted in *Vons Companies, Inc. v. Seabest Foods, Inc.*, the cause of action does not have to perfectly correspond with the "nonresident's forum contacts."[111] Here, the defendant's forum contacts are the resulting harm in California from his intentional distribution of DeCSS.

Pavlovich knew he would cause harm to the movie industry by posting a trade secret that allowed others to illegally pirate copyrighted movies.[112] "[A]s long as the claim bears a *substantial connection* to the nonresident's forum contacts, the exercise of specific jurisdiction is appropriate."[113] Pavlovich's misappropriation and distribution of DeCSS trade secrets has a substantial connection to the resulting harm caused when others pirate DVDs.[114]

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109. *Pavlovich #2*, 29 Cal. 4th at 276, 58 P.3d at 11, 127 Cal. Rptr. 2d at 341.

110. *Id.* at 269, 58 P.3d at 6, 127 Cal. Rptr. 2d at 335 (quoting Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984), quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).

111. 14 Cal. 4th 434, 452, 926 P.2d 1085, 1096–97, 58 Cal. Rptr. 2d 899, 910 (1996).

112. *See Pavlovich #2*, 29 Cal. 4th at 288, 58 P.3d at 19–20, 127 Cal. Rptr. 2d at 350–51 (Baxter, J., dissenting).

113. *Vons Co.*, 14 Cal. 4th at 452, 926 P.2d at 1096, 58 Cal. Rptr. 2d at 910 (1996).

114. *See Pavlovich #2*, 29 Cal. 4th at 276, 58 P.3d at 12, 127 Cal. Rptr. 2d at 340.

The court felt Pavlovich's awareness that someone "might" unlawfully utilize DeCSS was too attenuated to show express targeting.[115] However, the dissent takes the better view that Pavlovich intended the direct consequences of his actions.[116] He posted a trade secret which allowed those who downloaded it to use it for illegal copying.

Courts have found personal jurisdiction based on third-party contacts, such as those of a co-conspirator.[117] Pavlovich's posting of the DeCSS could be compared to a tacit conspiracy. Although Pavlovich did not actively encourage others to copy DVDs illegally, neither did he discourage them.[118] His posting of the trade secret is enough encouragement so that those harms resulting from third-party misuse should be attributed to him for purposes of personal jurisdiction.

Furthermore, the court's concern that the foreseeability of third-party actions was not the type of foreseeability that due process required was misplaced. The foreseeability required by due process was satisfied here in that the defendant could foresee being haled into this jurisdiction based on his forum contacts. Under the Uniform Trade Secrets Act,[119] misappropriation of a trade secret includes "[d]isclosure . . . of a trade secret of another without express or implied consent."[120] The disclosure itself is the harm that is protected against because disclosure allows third parties who have no right to do so to use the trade secret. It was Pavlovich's disclosure of the California-based movie and computer industries' trade secret—and the harm done to them because of that disclosure, including third-party use of that secret—that intentionally targeted California and became the contact that made being haled into California courts foreseeable.

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115. *See id.* at 276–77, 58 P.3d at 12, 127 Cal. Rptr. 2d at 340–41.

116. *See id.* at 294, 58 P.3d at 24, 127 Cal. Rptr. 2d at 355 (Baxter, J., dissenting).

117. *See* Cleft of the Rock Found. v. Wilson, 992 F. Supp. 574, 581–82 (E.D.N.Y. 1998).

118. *See Pavlovich #2*, 29 Cal. 4th at 276, 58 P.3d at 12, 127 Cal. Rptr. 2d at 341.

119. CAL. CIV. CODE § 3426–3426.11 (West 2002).

120. CAL. CIV. CODE § 3426.1(b)(2) (West 2002).

2. Intentional aiming has to target the forum and not necessarily the plaintiff

The court was wrong when it required that the harm intended had to be aimed at the named plaintiff. The court found that because the date that DVD CCA started administrating the license was subsequent to Pavlovich's posting, Pavlovich could not have known that DVD CCA held the license, so he could not have intentionally aimed his conduct at DVD CCA.[121] In doing so, the court ignored that DVD CCA had been formed by the initial holders of the CSS trade secret, "the motion picture and DVD industries," and was their successor in interest.[122] In actuality, Pavlovich knew that the movie industry and the computer industries, both of which were involved in the development of CSS, were located in California.[123]

Again, the court is imposing a rigid requirement that is inconsistent with its own standards.[124] Other courts have held that a defendant does not have to aim at the plaintiff as long as the defendant intentionally aims his conduct at the forum.[125] Here, Pavlovich intentionally aimed at the movie and computer industries centered in California, and should expect to be haled into California courts based on that contact.

C. Operation of a Passive Website Can Be a Forum Contact

In considering intentional targeting under the *effects test*, the intent of a poster of a website to provide access to his or her website in all forums is a contact that should be considered, regardless of the site's passive nature.

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121. *See Pavlovich #2*, 29 Cal. 4th at 275, 58 P.3d at 11, 127 Cal. Rptr. 2d at 340.

122. *Id.* at 281, 58 P.3d at 14–15, 127 Cal. Rptr. 2d at 344 (Baxter, J., dissenting).

123. *See Pavlovich #1*, 109 Cal. Rptr. 2d 909, 915–16 (Ct. App. 2001), *superceded by* 127 Cal. Rptr. 2d 329 (2002) (reproducing partial transcript from Pavlovich's deposition).

124. *See* Cornelison v. Chaney, 16 Cal. 3d 143, 150, 545 P.2d 264, 268, 127 Cal. Rptr. 352, 356 (1976) (implying that California has rejected application of rigid tests in evaluating questions of personal jurisdiction as consistent with *International Shoe*).

125. *See* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321 (9th Cir. 1998).

The California Supreme Court separated its analysis of the website's passive nature from its analysis of the intentional aiming requirement of the *effects test.*[126] The court noted that other courts had found that the exercise of personal jurisdiction based on an Internet website "'is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.'"[127] The court dismissed the contacts inherent in a passive website and failed to incorporate those contacts into its analysis.[128]

As seen in *Keeton v. Hustler Magazine, Inc.*,[129] a magazine distributed in a forum can provide sufficient minimum contacts to justify personal jurisdiction over a cause of action for defamation.[130] Although magazines mailed, distributed, or sold within a forum state are different from a passive website that is accessed in a forum state, a comparison of the two aptly illustrates the problem of applying a rigid rule that exempts passive websites from the minimum contacts analysis.

A publisher who mails, distributes, or sells its magazines in a forum state has committed an intentional act to establish minimum contacts with that forum such that it should expect to be haled into court in that forum based on those contacts.[131] In contrast, a publisher that only distributes in New York, but whose magazine is carried to Florida and who has no other contacts with Florida, is not subject to personal jurisdiction in Florida because the intervening act of a third party has swept the magazine within the forum.[132]

With a passive website, the intentional act takes place when the poster posts its message to a website, making it available for anyone in the world to access it. Under the current theory that most courts

126. *See Pavlovich #2*, 29 Cal. 4th at 273–74, 58 P.3d at 10, 127 Cal. Rptr. 2d at 339.

127. *Id.* at 274, 58 P.3d at 10, 127 Cal. Rptr. 2d at 339 (quoting Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

128. *See id.*

129. 465 U.S. 770 (1984).

130. *See id.* at 774–75.

131. *See id.* at 781.

132. "[M]ere 'unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.'" World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

follow, a passive website, without more, is not enough to establish specific jurisdiction in any forum.[133] Thus, the only place that the poster can be sued is in a state that has general jurisdiction over the poster. The courts do not consider the location of those who access the website when looking at minimum contacts.[134] Those contacts are seen as the actions of a third party whose unilateral conduct cannot establish minimum contacts and are distinguished from those contacts created when a magazine is provided to residents of a forum by a publisher.

It is at this point that the comparison is most illustrative. As opposed to a magazine, the *only* way a passive website can be brought into a forum is by the unilateral activity of someone accessing it. Yet, that very access is what posters intended when they place their messages for the world to see, just as the magazine publisher who puts its magazines on a rack for sale or free distribution wants forum residents to buy or take a copy.

Courts find themselves in a difficult situation when dealing with the Internet. If a passive website, standing alone, can generate minimum contacts anywhere, then someone who posts onto the Web can be haled into court anywhere in the world to answer for the content of his or her message.[135] That view of personal jurisdiction is simply too broad for the courts to accept. On the other hand, when a website is truly passive, the poster can only be sued in a court with general jurisdiction,[136] requiring that all potential plaintiffs travel to the poster's state to file a lawsuit against the poster, thereby forfeiting the benefit and convenience of suing in the forum where harm from the posting occurred.[137]

Either always finding purposeful availment based on a passive website, or never finding it, presents an extreme result. When a court has to assess contacts within a forum, the flexible nature of the current tests for personal jurisdiction invites the court to discard a bright-line analysis in favor of a balanced approach.

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133. *See Pavlovich #2*, 29 Cal. 4th at 274, 58 P.3d at 10, 127 Cal. Rptr. 2d at 339.

134. *See id.*

135. *See id.* (citing GTE New Media Servs., Inc. v. BellSouth Corp., 199 F.3d 1343 (D.C. Cir. 2000)).

136. For an explanation of general jurisdiction, see *supra* Part III.

137. *See Pavlovich #2*, 29 Cal. 4th at 279, 58 P.3d at 13, 127 Cal. Rptr. 2d at 343 (noting that DVD CCA can still pursue Pavlovich in Texas).

In preferring a finding of no contacts based on a passive website, courts must recognize that the poster's intent is that the world should have access to his or her message. In taking on the benefits of world-wide distribution, the poster should also take on at least some of the risk of being drawn to a foreign court to answer for harm resulting from the posting. It is conceivable that if posters become concerned over the possibility that out-of-state courts might find personal jurisdiction over them, computer programs will be developed to allow posters to select who can access their websites based on geographical location.

Thus, a balanced approach that takes into account the reality of the poster's intent—that residents of all forums have access to what he or she posts—needs to be developed. Precedent for this analysis can be found in *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club.*[138] There, the court found that the defendant had "established minimum contacts with Indiana, among other ways, through nationwide cable telecasts of football games."[139] Much like the Internet, cable does not reach a forum without the intervention of a third party who subscribes to the cable service, turns on the television set, and selects the appropriate channel.

In considering whether a defendant has expressly aimed at the plaintiff's forum, courts should consider the contacts created by a passive website and factor those in against the defendant in satisfying the express aiming requirement. Here, such considerations should have resulted in a finding that California courts had jurisdiction over Pavlovich in this case.

V. CONCLUSION

It seems unusual that the California Supreme Court went out of its way to disclaim jurisdiction in *Pavlovich.* The court was clear that it felt uncomfortable in providing whole industries with the ability to hale individuals into court in the jurisdiction in which the industries reside.[140]

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138. 34 F.3d 410 (7th Cir. 1994).

139. *Pavlovich #2*, 29 Cal. 4th at 290, 58 P.3d at 21, 127 Cal. Rptr. 2d at 352 (Baxter, J., dissenting) (summarizing the holding in *Indianapolis Colts*).

140. *See id.* at 278, 58 P.3d at 13, 127 Cal. Rptr. 2d at 342.

Historically, California has been at the forefront of expanding personal jurisdiction.[141] The United States Supreme Court has reviewed many California cases that expanded personal jurisdiction, upholding some and denying others.[142] Ironically, *Calder*, which gave rise to the *effects test*, was a California case. The court's holding in *Pavlovich* may indicate a change in California's liberal approach to personal jurisdiction.

It is also possible that the court did not want California to become a magnet for all movie or computer industry-related cases. Much like the New York legislature did when it excepted certain defamation suits from its long-arm statute,[143] the California Supreme Court may have used its judicial pruning shears to ensure that California's courts were not overloaded with all movie and computer industry cases.

However, it is equally arguable that a jurisdiction should offer its residents a judicial forum in which their cases can be heard. An out-of-state tortfeasor should not be able to elude jurisdiction because the tortfeasor stayed ignorant of the exact entity harmed by its conduct. Pavlovich expressly aimed at industries in California, knowing that his intentional disclosure of their trade secret would cause harm to those industries in California. He should be subject to jurisdiction in California to answer for his acts.

Gena M. Stinnett*

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141. *See* Vons Co. v. Seabest Foods, Inc., 14 Cal. 4th 434, 926 P.2d 1085, 58 Cal. Rptr. 2d 899 (1996); Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

142. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Calder v. Jones, 465 U.S. 783 (1984).

143. Granting personal jurisdiction in New York over one who "commits a tortious act without the state causing injury to person or property within the state, *except as to a cause of action for defamation of character arising from the act*." N.Y. C.P.L.R. 302 (McKinney 2002) (emphasis added).

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