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Expanding the Jurisdictional Reach for Intentional Torts: Implications for Cyber Contacts

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NOTE

EXPANDING THE JURISDICTIONAL REACH FOR INTENTIONAL TORTS: IMPLICATIONS FOR CYBER CONTACTS

I. INTRODUCTION

Over the last century, the courts have slowly relaxed Constitutional constraints on the exercise of personal jurisdiction over out of state defendants.[1] Recently, the Court of Appeals for the Ninth Circuit permitted a California district court to exercise jurisdiction over an out of state defendant on the basis of a letter sent by the defendant in Georgia, to a third party in Virginia.[2] It appears that, at least in the Ninth Circuit, expansive interpretations of the courts' jurisdictional powers will continue into the twenty-first century.

Originally, the foundation of jurisdictional jurisprudence in the United States rested on the premise that no state could exercise jurisdiction over a person outside its territorial borders.[3] With the advent of modern industrial society, solely territorial based notions of sovereignty and jurisdiction became strained and unworkable.[4] The concept that a state has control over everything within its borders and nothing beyond began to erode.[5] As a result, during the twentieth century, the

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[1] *See* JOHN J. COUND ET AL., CIVIL PROCEDURE CASES AND MATERIALS ch., 2 §§ B, C (7th ed. 1997).

[2] *See generally* Bancroft & Masters, Inc. v. Augusta National Inc., 223 F.3d 1082 (9th Cir. 2000).

[3] *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 70-71 (3rd ed. 1996).

[4] *See generally* McGee v. International Life Insurance Co., 355 U.S. 220 (1957).

[5] *See generally* Hess v. Pawloski, 274 U.S. 352 (1927) (which discussed that notice

courts began to shift their focus from a territorial concept of jurisdiction to a notice-based concept.[6] State courts exercised jurisdictional powers beyond their geographical territory so long as the party over whom the court sought jurisdiction had fair notice that jurisdiction might be asserted.[7] The requirement that a party have notice refers to both the rules concerning the actual service of process and the Constitutional limits imposed by the due process clause.[8] It is the latter requirement that is the subject of this note.

With the development of the Internet, deeply rooted territorial based concepts of jurisdiction have clashed with the notice-based system.[9] While courts have moved towards a notice-based system, generally some tangible link with the forum state is found that gives rise to the constitutionally based notice requirement.[10] Within the context of the Internet, courts have struggled with how to apply the notice-based system because Internet contacts occur in cyberspace rather than in a particular territory.[11] If cyber-contacts alone constituted suffi-

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serves to put non-residents on equal jurisdictional footing with residents and therefore a party need not be actually physically present within the state in order for process to be served). *See generally* Gray v. American Radiator, 176 N.E.2d. 761 (Ill. 1961). In *Gray,* the Supreme Court of Illinois reversed a district court's grant of a motion to squash service of process for lack of personal jurisdiction over an out of state defendant alleged to have committed tortious conduct resulting in an injury in Illinois. *See id* at 761. There, the defendant allegedly negligently manufactured a valve on a water heater causing injury to the plaintiff in the State of Illinois. *See id.* at 762. *See generally* Kane v. New Jersey, 242 U.S. 160 (1916).

[6] *See Gray,*176 N.E.2d. at 765 (discussing *McGee,* 355 U.S. at 222-224).

[7] *See Gray,*176 N.E.2d. at 765-767. Corporations are treated similarly to persons for purposes of establishing jurisdiction. *See* Klein v. Board of Supervisors, 282 U.S. 19, 24 (1930). To say a corporation is present within a state's jurisdiction for the purposes of satisfying the due process requirement is to say a corporation's activities within the state satisfy the due process clause. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316-317 (1945) (discussing *Klein*, 282 U.S. at 24).

[8] *See generally* COUND, *supra* note 1, ch. 2-3.

[9] The Internet has been defined as "a worldwide network of computers that enables various individuals and organizations to share information. The internet allows computer users to access millions of web sites and web pages. A web page is a computer data file that can include names, words, messages, pictures, sounds, and links to other information." Panavision v. Toeppen, 141 F.3d 1316, 1318 (9th Cir. 1998).

[10] *See* Tech Heads, Inc. v. Desktop Service Center, Inc., 105 F.Supp.2d 1142, 1148-1149 (D. Or. 2000). *See* CompuServe Inc. v. Patterson, 89 F.3d 1257, 1260 (6th Cir. 1996). *See Panavision,* 141 F.3d at 1319.

[11] *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419-420 (9th Cir. 1997);

cient notice to subject a defendant to jurisdiction in a distant state, a court's ability to exercise its jurisdictional authority beyond its own territory would be greatly expanded. Courts have attempted to limit their jurisdictional reach into cyberspace by distinguishing web sites that passively provide information or advertisements from those that facilitate the exchange of information or do business over the Internet.[12]

The exercise of jurisdiction based on remote contacts is not a new concept.[13] The United States Supreme Court attempted to expand the notice-based concept of jurisdiction to permit the exercise of jurisdiction when geographic or physical contacts are lacking.[14] In *Calder v. Jones,*[15] the Court held that jurisdiction was proper over a defendant in a foreign jurisdiction who purposefully directed tortious conduct from one state to an individual in the forum state.[16] This note will discuss the Ninth Circuit's recent decision in Bancroft & Masters, Inc. v. Augusta National Inc,[17] which broadly interpreted

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Panavision, 141 F.3d at 1320-1322; *Tech Heads,* 105 F.Supp.2d at 1147-1149 (D. Or. 2000). For example, an Internet user in one state may now visit an Internet site of a citizen in another state. Cyber space is the on-line world of computer networks. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 287 (10th ed. 2000).

[12] *See Tech Heads,* 105 F.Supp.2d at 1148-1149. For an informative discussion of the differences of passive, active, and interactive web sites. *See id* at 1148-1151. A passive web site generally only furnishes information to those who visit the site, and is not a sufficient basis for the exercise of personal jurisdiction. *See id.* at 1149-1150. *See also* Weber v. Jolly Hotels, 977 F.Supp. 327, 333 (D.N.J. 1997). Further complicating matters, a home page or web site on the Internet is not necessarily created by a corporate entity but may also be created by an individual. Thus, an individual who conducts business over the Internet may now be subjected to the jurisdiction of a forum state the same way a corporation would be. In *Panavision,* the court found the burden of exercising jurisdiction over the defendant was significant but not determinative. *See Panavision,* 141 F.3d at 1323. While it may not be that burdensome or unreasonable for a huge corporate entity to defend itself in an out of state court, it seems less fair that one individual could be suddenly subjected to jurisdictional claims throughout the country.

[13] *See generally Hess,* 274 U.S. 352; *Gray,* 176 N.E.2d. 761.

[14] *See generally* Calder v. Jones, 465 U.S. 783 (1984).

[15] *See id.*

[16] *See id.* at 791.

[17] 223 F.3d 1082 (9th Cir. 2000). The appeal from the United States District Court for the Northern District of California was argued and submitted April 13, 2000 before Circuit Judges Mary M. Schroeder, Circuit Judge Joseph T. Sneed, and Circuit Judge Stephen S. Trott. *See id.* The decision was filed August 18, 2000. Circuit Judge Schroeder authored the opinion. *See id.* Circuit Judge Sneed filed a con-

tortious conduct in an effort to extend its jurisdictional reach on the most intangible contacts. The court's decision stretches the definition of forum related activities so far, that it largely divests the limitation of any purpose in the context of intentional torts.

II. FACTS & PROCEDURAL HISTORY

Bancroft & Masters Inc. brought suit against Augusta National, Inc. in the United States District Court for the Northern District of California seeking a declaratory judgment for non-dilution[18] and non-infringement.[19] Bancroft, a small California corporation, sold computer and networking products, and support services.[20] Bancroft conducted nearly all of its business in San Francisco, California.[21] Bancroft has owned and operated the Internet domain name[22] "masters.com" since February 8, 1995.[23] Augusta, a Georgia corporation, operated the Augusta National Golf Club in Georgia.[24] Augusta's club sponsored the annual Masters golf tourna-

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curring opinion in which Circuit Judge Trott joined. *See id.*

[18] The term "dilution" means the lessening of the capacity of a famous mark to identify and distinguish goods and services, regardless of the presence or absence of- (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake, or deception. *See* 15 U.S.C. §1127 (1991 & Supp. V 2000).

[19] *See* 15 U.S.C. § 1114 (1991). Bancroft also sought an order canceling Augusta's federally registered trademarks. *See* Bancroft & Masters, Inc. v. Augusta National, Inc., 45 F. Supp. 2d 777, 779 (N.D. Cal. 1998). Infringement is defined as a violation of another's intellectual-property right. BLACK'S LAW DICTIONARY POCKET EDITION 314 (1996).

[20] *See Bancroft,* 45 F. Supp. 2d at 778.

[21] *See* Bancroft & Masters, Inc. v. Augusta National Inc., 223 F.3d 1082, 1084 (9th Cir. 2000).

[22] The term "domain name" means any alphanumeric designation, which is registered with, or assigned by any domain registrar, domain registry, or other domain name registration authority as part of an electronic address on the Internet. See 15 U.S.C. § 1127 (1991 & Supp V 2000). "Every web page his its own web site which is its address, similar to a telephone number or street address. Every web site on the Internet has an identifier called a "domain name." The domain name often consists of a person's name or a company's name or trademark. For example, Pepsi has a web page with a web site consisting of the company name, Pepsi, and .com, the "top level" domain designation; Pepsi.com." Panavision v. Toeppen, 141 F.3d 1316, 1318 (9th Cir. 1998).

[23] *See Bancroft,* 45 F. Supp. 2d at 778.

[24] *See id.* at 779.

ment.[25] Augusta owned several federally registered[26] trademarks[27] for the mark "Masters" and operated a web site at the domain name "masters.org."[28]

In 1997, Augusta sent a letter to Network Solutions Inc., (hereinafter, "NSI"), contesting Bancroft's right to use the "masters.com" domain name.[29] At the time, NSI was the only registrar administering domain names in the United States.[30] Augusta's letter to NSI triggered NSI's dispute resolution policy for disputes between registered holders of Internet domain names and holders of the same or similar registered trademark names.[31] According to NSI's policy, Bancroft's domain name "masters.com" would be placed on hold unless it filed suit against Augusta seeking a declaratory judgment establishing its right to use the "masters.com" domain name.[32] Consequently, Bancroft brought suit against Augusta.[33]

The district court dismissed the action for lack of personal jurisdiction because the letter Augusta sent to NSI did

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[25] *See id.*

[26] The term "registered mark" means a mark registered under the Lanham Act or under the Act of March 3, 1881, or the Act of February 20, 1905, or the Act of March 19, 1920. *See* 15 U.S.C. 1127 (1991). The term "mark" includes any trademark, service mark, collective mark, or certification mark. *See id.*

[27] The term "trademark" includes any word, name, symbol, or device or any combination thereof. *See* 15 U.S.C. § 1127 (1991).

[28] *See Bancroft*, 223 F.3d at 1084.

[29] *See Bancroft,* 45 F. Supp. 2d at 779. Augusta also sent a letter to Bancroft in California but this fact was not relied by Bancroft at trial and is not pertinent to the court's analysis. *See id.* at 779, 782.

[30] *See Bancroft,* 223 F.3d at 1084-1085. For an interesting discussion of the evolution of the domain name system *see Image Online Design, Inc. v. Core Association*, 120 F. Supp. 2d 870, 872-875 (C.D. Cal. 2000).

[31] *See Bancroft*, 223 F.3d at 1085. Under the policy Bancroft could (1) transfer the "masters.com" domain name to Augusta; (2) allow the domain to be placed on hold which would mean that neither party could use it until the dispute was settled; or (3) seek a declaratory judgement from a court of competent jurisdiction, establishing its right to the "masters.com" domain name. *See id.*

[32] See id. A person seeking to have a declaration of her property rights or duties may ask for such a declaration and the court may make a binding declaration of her rights or duties whether or not further relief is claimed at that time. *See* CAL. CIV. PROC. CODE § 1060 (West Supp. 2000). Had the domain name been placed on hold, neither party could have used the domain name during the settlement of the dispute. *See Bancroft,* 223 F.3d at 1085.

[33] *See id.*

not satisfy the "effects" doctrine"[34] under the purposeful availment prong of the test for specific jurisdiction.[35] The court also concluded that the contacts with the forum state did not give rise to the cause of action because the intellectual property dispute did not arise out of Augusta's letter to NSI.[36] Furthermore, the court stated that it "would be unreasonable to require an intellectual property owner to risk having to submit to the jurisdiction of an alleged infringer in order to exercise his rights."[37] Bancroft appealed to the United States Court of Appeals for the Ninth Circuit.[38]

III. BACKGROUND

Under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, a state may not deprive any person of life, liberty, or property without due process of law.[39] Judgments affecting the rights and obligations of a party, over which a court lacks personal jurisdiction, offend a party's due process rights.[40] The United States

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[34] In tort cases a defendant satisfies the purposeful availment prong if the defendant performs the following: (1) an intentional act (2) that is expressly aimed at the forum state (3) which causes harm, the brunt of which is suffered in the forum state and the defendant knows the harm is likely to be suffered there. *See* Core-Vent Corp. v. Nobel Industries AB, 11 F.3d 1482, 1486 (9th Cir. 1993).

[35] *See Bancroft*, 45 F. Supp. 2d at 783. California permits the exercise of jurisdiction over an out of state defendant under CAL. CIV. PROC. CODE § 415.40 (West Supp. 2000).

[36] *See Bancroft,* 45 F. Supp. 2d at 782.

[37] *Id. citing* Douglas Furniture Co. v. Wood Dimensions, Inc 963 F.Supp. 899, 903 (C.D. Cal. 1997).

[38] *See Bancroft*, 223 F.3d at 1085. On appeal Bancroft essentially argued, inter alia, that based on Augusta's letter to NSI the district court had a sufficient basis for exercising specific jurisdiction over Augusta. *See id.*

[39] The 14th Amendment states in relevant part; "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Untied States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . " U.S. CONST. amend. XIV, § 1.

[40] *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1877). Jurisdiction is defined as: 1) a government's general power to exercise authority over all persons and things within its territory. 2) A court's power to decide a case or issue a decree. 3) A geographic area within which political or judicial authority may be exercised. 4) A political or judicial subdivision within such an area. BLACK'S LAW DICTIONARY 855 (7th ed. 1999). The tribunal before which an action is tried, must be competent by its constitution which created its power to render a judgment over the proceeding. Pennoyer, 95 U.S.

Supreme Court addressed the extent to which a state may exercise its jurisdictional powers in the seminal case *Pennoyer v. Neff*.[41] In *Pennoyer,* the Court stated that a forum state may exercise personal jurisdiction over an absent nonresident defendant only if the defendant appeared in the court, was found within the state, was a resident thereof, or had property therein.[42] The Court held that a state court violates due process when it enters a judgment against a person without jurisdiction over that person.[43]

The *Pennoyer* requirement of actual physical presence within the forum state became particularly strained with the advent of the automobile.[44] Due to automobile accidents in-

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at 733. When the subject matter involves the personal liability of a defendant, the due process clause requires that the defendant appear before the court or alternatively the court may bring the person of the defendant within its jurisdiction through personal service of process. Personal jurisdiction is against the person of the defendant by service of process, whereas in rem jurisdiction is a procedure against property located within the jurisdictional territory of the court and does not personally bind the defendant beyond the property in question. *Id. at* 724. This note's discussion is limited to personal jurisdiction.

[41] 95 U.S. 714. In *Pennoyer,* plaintiff Neff sought to recover a tract of land in Oregon to which defendant Pennoyer claimed title and right of possession. *See id.* at 719. The Court determined that the judgment entered in the prior proceeding against Neff was invalid from defects in both the affidavit from which the order of publication was obtained, and in the affidavit by which the publication was proved in that proceeding. *See id.* at 720. The Court affirmed that the judgment was invalid on other grounds. *See id.* at 721-722.

[42] *See Pennoyer*, 95 U.S. at 720 (citing the Code of Oregon's then existing provision for the service of process on a non-resident, absent defendant with property in the state.) *See id.* The Court found no personal jurisdiction because the defendant was not a resident of Oregon, he was not found within the state, and he did not appear before the court. *See id.* The Court further stated that when jurisdiction is exercised based on property, jurisdiction was proper only to the extent of such property at the time jurisdiction is attached. *See id.*

[43] *See Pennoyer*, 95 U.S. at 733-734. While a statute provided for jurisdiction over out of state defendants with property in the Oregon, the *Pennoyer* Court invalidated the judgment because jurisdiction based on the property had not attached before the court entered judgment. *See id.* at 728. The Code of Oregon declared "that no natural person is subject to the jurisdiction of a court of the State, "unless he appear in the court, or be found within the State, or be a resident thereof, or have property therein; and in the last case, only to the extent of such property at the time the jurisdiction attached." *Id.* at 720.

[44] *See* Hess v. Pawloski, 274 U.S. 352, 354 (1927) (involving a Massachusetts statute providing for automatic service of process within the state for all out of state motorists). The Court found that by the operation of a motor vehicle in another state,

volving out of state parties, states enacted "long arm statutes," which allowed state courts to assert personal jurisdiction over out of state defendants.[45] The Court recognized the public policy served by such statutes and held that such statutes did not offend the Due Process Clause of the 14th Amendment thereby heralding the beginning of the end of territorial based notions of personal jurisdiction.[46] Today, many state long arm statues simply provide for the exercise of jurisdiction to the fullest extent allowable by the due process clause.[47]

The Court again addressed the limits on the exercise of jurisdiction over foreign defendants imposed by the due process clause in *International Shoe Co. v. Washington.*[48] The International Shoe Court decided whether the State of Washington could permissibly exercise jurisdiction over a Delaware corporation conducting activities in Washington.[49] The Court noted that while historically the exercise of jurisdiction over a person was based on the actual presence of that person within a court's territorial jurisdiction, the focus had shifted to whether the defendant had notice that personal jurisdiction

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the driver had given implied consent to be subject to the jurisdiction of the courts of the foreign state for proceedings growing out of accidents or collisions. *See id.* at 356.

[45] *See id.* at 354. These statutes provided that the operation of a motor vehicle in the state was evidence of the driver's acceptance of rights and responsibilities including a designated registrar in the state on whom process could be served. *See id.* at 357.

[46] *See id.* at 356-357.

[47] *See* Gordy v. Daily News, L.P., 95 F.3d 829, 831 (9th Cir. 1996), California's long arm statute allows a court to exercise personal jurisdiction over a defendant to the fullest extent permitted by the due process clause of the Constitution of the United States. *See also* CAL. CIV. PROC. CODE § 415.40 (West Supp. 2000). A person outside the State of California may be served in any manner under Article 3 Manner of Service of Summons or by sending a copy of the summons by first class mail, postage prepaid, requiring a return receipt. *See also* CAL. CIV. PROC. § 410.10 (West Supp. 2000). Federal courts apply the personal jurisdiction rules of the forum state in which they sit in diversity of jurisdiction cases. *See* Murray Brand v. Menlove Dodge, 796 F.2d 1070, 1072-1073 (9th Cir. 1986). This note will only address these constitutional limits imposed by the due process clause and will not deal with any state's self imposed statutory limitations.

[48] *See* 326 U.S. 310, 311 (1945).

[49] *See id.* A corporation is a person and while it maybe a fiction, it is a fiction intended to be acted upon as though it were a fact. *See* Klein v. Board of Supervisors, 282 U.S. 19, 24 (1930).

may be asserted.[50] The Court stated that the exercise of personal jurisdiction over the defendant was proper so long as the defendant had "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[51] The Court clarified that the test is not merely quantitative, but depends on the quality and nature of the defendant's contacts ties and relations.[52] The Court concluded that systematic and continuous contacts resulting in a large amount of business with the forum state all of which received the benefits and protections of that state were sufficient to justify the exercise of personal jurisdiction.[53]

Following *International Shoe*, the Court assumed the terms "general" and "specific" jurisdiction to distinguish the exercise of personal jurisdiction in suits that arise out of a defendant's contacts with the forum from suits that do not

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[50] *See International Shoe*, 326 U.S. at 316.

[51] *See id., citing Milliken v. Meyer*, 311 U.S. 457, 463 (1940). Where a person engages in activities, which afford him of the privileges and protections of a state, the state may exact reciprocal duties involving the incidences of citizenship. *See International Shoe*, 326 U.S. at 316. So where the suit involved those activities and extraterritorial service of process was actually accomplished, traditional notions of fair play and substantial justice required by due process are satisfied. *See Milliken*, 311 U.S. at 463.

[52] *See International Shoe*, 326 U.S. at 319. The court stated that when a corporation has continuous and systematic contacts that give rise to the liabilities sued on "presence" within the forum exists. *See id.* at 317. However, casual presence or isolated activities in the forum state do not satisfy the requirements of due process when the suit does not arise out of such activities. *See id.*

[53] *See International Shoe*, 326 U.S. at 320. International Shoe was a Delaware corporation with its principal place of business is in St. Louis, Missouri. *See id.* at 313. It had no offices in the State of Washington. *See id.* The corporation did not make contracts for sale or purchase in the state nor did it maintain stocks of merchandise in Washington. *See id.* International Shoe's only connection with Washington was through its approximately thirteen salesmen who resided there. *See id.* These salesmen exhibited their samples to customers in Washington and then transmitted orders to the corporation's St. Louis office from where they were supervised. *See International Shoe*, 326 U.S. at 313-314. The salesman had no authority to enter into contracts or make collections and all shipments were shipped f.o.b. from out of state. *See id.* at 314. The Court found that the privilege of employing salesman within Washington gave rise to the right of the State of Washington to collect a tax imposed on the exercise of this privilege. *See id.* at 320-321. Therefore, International Shoe's contacts should have put it on notice that it may be haled into a Washington court regarding those contacts and therefore doing so was not unreasonable under the traditional conceptions of fair play and substantial justice. *See id.* at 321.

arise out of those contacts.[54] Thus, when a court exercises jurisdiction over a foreign defendant in a suit arising out of the defendant's contacts with the forum it is commonly referred to as "specific" jurisdiction.[55] Conversely, when the defendant has significant contacts with the forum state, courts will exercise what is commonly referred to as "general" jurisdiction, regardless of whether the suit arises out of the defendant's forum related activities.[56]

A. GENERAL JURISDICTION

This note will only briefly discuss general personal jurisdiction because the Ninth Circuit in *Bancroft & Masters, Inc. v. Augusta National, Inc.* focused on specific jurisdiction. The United States Supreme Court considered whether sufficient contacts existed with the State of Texas to permit the exercise of general personal jurisdiction over the defendant in *Helicopteros Nacionales De Colombia, S.A. v. Hall.*[57] In *Helicopteros,* the Court concluded that even when the cause of action does not arise out of the defendant's forum related activities, the exercise of jurisdiction does not violate due process so long as the defendant has sufficient contacts with the forum state.[58] The Court stated that mere purchases, even if occurring at regular intervals, do not constitute sufficient contacts to warrant the exercise of general personal jurisdiction

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[54] *See* Helicopteros Nacionales De Colombia, S.A. v. Hall, et al., 466 U.S. 408, 414 nn.8-9 (1984), *citing* Von Mehren & Trautman, *Jurisdiction to adjudicate: A suggested Analysis,* 79 HARV. L. REV. 1121, 1136-1164 (1966); Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction,* 1980 S. CT. REV. 77, 80-81; and Calder v. Jones, 465 U.S. 783, 786 (1984).

[55] *See id.*

[56] *See id.*

[57] *See Helicopteros*, 466 U.S. at 408.

[58] *See Helicopteros*, 466 U.S. at 414. The Court relied on *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), where the Court considered whether or not jurisdiction was proper by an Ohio court over a defendant Philippine mining corporation. *See id.* at 438. The corporation had maintained an Office in Ohio, held meetings there, maintained records, distributed salary checks and used an Ohio bank as a transfer agent during the Japanese occupation of the Philippines. *See id.* at 448. The Court found that where continuous and systematic contacts were shown the exercise of general jurisdiction over the corporation for unrelated causes of action was permissible. *See id.* at 448.

over a defendant.[59] Therefore, the Court found that the defendant's contacts with Texas did not rise to the level of continuous and systematic contacts.[60]

B. SPECIFIC JURISDICTION

The United States Supreme Court addressed the criteria for finding personal jurisdiction when the suit arises out of a defendant's contacts with the forum in *Burger King Corp. v. Rudzewicz*.[61] In *Burger King*, the Court discussed whether the exercise of jurisdiction by the Florida court over a Michigan resident in a breach of contract action violated the due process clause.[62] The Court restated that an individual's liberty interest[63] is protected by the due process clause if that individual has fair warning that his activities will subject him to the jurisdictional reach of the forum.[64] The Court applied the two-part test set out in *International Shoe,* requiring a showing of minimum contacts, ties, or relations with the forum

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[59] *See id* at 418. *See also* Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923). An Oklahoma retail store that sent a buyer on regular trips to New York to purchase clothing did not subject buyer to personal jurisdiction in New York. *See id. But see Helicopteros*, 466 U.S. at 418 n.12 (where the Court clarifies that the continuing validity of *Rosenberg* with respect to specific jurisdiction was not decided by the *Helicopteros* Court since this was purely a case involving the exercise of general jurisdiction).

[60] *See Helicopteros*, 466 U.S. at 416. Helicopteros' contacts with the state of Texas consisted of a contract-negotiating session in Texas attended by its chief executive officer, acceptance of checks drawn on a Texas bank account, the purchase of helicopters, equipment, training services from a Texas corporation and sending personnel to Texas for training. *See id.*

[61] 471 U.S. 462 (1985).

[62] *See id.* at 463.

[63] *See* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-703 n.10 (1982) (where the Supreme Court rejected in dicta, the notion that personal jurisdiction was governed by the federalism concept of restricting states' power). Instead it is the individual's liberty interest as preserved by the due process clause, which limits a state's power to exercise jurisdiction over a foreign defendant. *See id.* While personal jurisdiction embodies an element of federalism it clearly does not operate as an independent restriction on the sovereign power of a court because if it did it would not be possible for a defendant to waive the personal jurisdiction requirement. *See id.*

[64] *See Burger King*, 471 U.S. at 471-472, *citing* and *quoting Shaffer v. Heitner*, 433 U.S. 186, 218 (1977); *See also* International Shoe Co. v. Washington, 326 U.S. 310, 319 n.13 (1945).

state and a showing that maintenance of jurisdiction based on those contacts, ties, or relations does not offend traditional notions of fair play and substantial justice.[65]

The Court in *Burger King* noted that in order to satisfy the minimum contacts requirement, the contacts must be such that a defendant could reasonably anticipate being haled into the forum's courts.[66] The Court stated that a defendant could reasonably anticipate being haled into a forum state if the defendant purposefully availed himself of the privileges of conducting activities in the forum.[67] In *Burger King,* defendant Rudzewicz entered into a twenty-year franchise agreement with the restaurant chain, a Florida corporation with its principal place of business in Florida.[68] The franchise agreement was Rudzewicz's only significant contact with Florida.[69]

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[65] *See Burger King*, 471 U.S. at 476.

[66] *See id.* at 474. *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (where the Supreme Court distinguishes that the forseeability of causing injury in another forum is not a sufficient benchmark for exercising personal jurisdiction, but rather it is conduct that should make a defendant reasonably anticipate being haled into the forum's court). In *World-Wide,* the plaintiff's had purchased an automobile and driven it to another state where they were involved in an accident. *See id.* at 288. The Court found that the car was being used as intended after its purchase and was therefore in the stream of consumption. *See id.* at 298-299. This aspect distinguishes this case from cases where a defendant puts a product into the stream of commerce with the expectation that the product would reach the forum state. *See id.* Thus, the Court concluded that the exercise of jurisdiction by the forum state did not satisfy the forseeability of being haled into court requirement of the minimum contacts prong. *See World-Wide,* 444 U.S. at 297-299.

[67] *See Burger King*, 471 U.S. at 474-475. *See also* Hanson v. Denckla, 357 U.S. 235, 253 (1958). In Hanson, the Court found that unilateral activities of the plaintiff such as the carrying on of bits of trust administration, would not satisfy the minimum contact's requirement where the defendant has not engaged in any purposeful acts towards the forum. *See id.* at 253. The *Burger King* Court distinguished *Hanson* from *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), where a non-resident defendant was haled into a California court. *See Burger King*, 471 U.S. at 474-476. There, the Court found that jurisdiction was proper because the life insurance offer was accepted in the State of California and all payments were made from there giving the contract a substantial connection with the forum. *See McGee*, 355 U.S. at 223. However, in *Hanson*, the contract was executed in Delaware by a resident of Pennsylvania. *See id.* at 238. The *Burger King* Court also noted that in *McGee*, California had a strong interest in providing effective redress to its citizens for an activity deemed by a California statute to be exceptional and subject to special regulation. *See Burger King*, 471 U.S. at 483.

[68] *See Burger King*, 471 U.S. at 479-480.

[69] *See id.* at 479-480. The Court stated that the purposeful availment require-

The Court found that Rudzewicz contemplated continuing and wide-reaching contacts with Burger King and that the long-term contract provided Rudzewicz the benefits of affiliation with Burger King in Florida.[70] The Court concluded that Rudzewicz's purposeful availment of the protection and benefits of the forum state's laws made it reasonably foreseeable that he might be haled into a Florida court.[71] Thus, the Court found that Rudzewicz had purposefully availed himself of the benefits and protections of the State of Florida thereby satisfying the minimum contacts test.[72]

The *Burger King* Court then considered whether the exercise of specific jurisdiction offended the "fair play and substantial justice" prong.[73] The Court noted that even if sufficient contacts with a forum state existed, the exercise of jurisdiction may still offend the due process clause if it would be unreasonable to assert jurisdiction over the defendant.[74]

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ment was to ensure that a defendant would not be haled into court on the basis of random, fortuitous, or attenuated contacts with the forum state. *See id.* at 475. The Court remarked that it has never held that a contract with an out of state party alone would subject a defendant to a foreign jurisdiction. *See id.* at 478. The Court further stated that in its opinion a contract alone cannot subject a defendant to a foreign jurisdiction. *See id.*

[70] *See Burger King*, 471 U.S. at 479-480. The contract was executed in Florida, was governed by the laws of Florida and disputes arising out of the contract were to be governed by Florida law. *See id.* at 481. Furthermore, in their course of dealing the parties made key negotiations not with the Michigan district office but with the Miami office. *See id.* These included the negotiations that gave rise to the suit. *See id.* at 480-481. The Court stated that factors such as the contract's negotiation and contemplated consequences, as well as its terms and the parties' course of dealing, guided the Court in determining whether the defendant had purposefully availed himself of contacts with the forum state. *See id.* at 479.

[71] *See Burger King*, 471 U.S. at 482.

[72] *See id.*

[73] *See id.* at 476.

[74] *See id.* at 477-478. There is a presumption of reasonableness upon a showing of purposeful direction of activities towards the forum state which the defendant bears the burden of overcoming by showing that the exercise of jurisdiction would be unreasonable. *See Burger King*, 471 U.S. at 477-478. In establishing reasonableness, the Court looked to the extent of a defendant's purposeful interjection into the forum, the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in the efficient resolution of controversies, the existence of an alternative forum and the shared interest of the several states in furthering fundamental substantive social policies. *See id.* at 476-477. Additionally, the Court stated that sometimes jurisdiction may be established on a lesser showing of minimum con-

The Court recognized that Florida had a legitimate interest in providing an effective means of redress for contractual disputes arising from contracts made in Florida and governed by the laws of Florida.[75] Furthermore, Rudzewicz was an experienced businessman who had purposefully entered into an agreement with Burger King obligating him to payments of over $1 million dollars per year.[76] Thus, the Court found that Florida's exercise of jurisdiction was reasonable.[77]

1. Intentional Torts

Courts are more permissive in their assertion of jurisdiction over a foreign defendant when the defendant has committed an intentional tort having an effect within the forum state.[78] For example, in *Calder v. Jones*,[79] two Florida residents, had written, edited, and published an article in the National Enquirer, Inc.[80] Shirley Jones, a television entertainer and California resident, subsequently filed a libel action against them in California.[81] The United States Supreme Court distinguished untargeted negligence, where jurisdiction without more is not proper, from an intentional act expressly aimed at a California resident.[82] Defendants' knowledge that the article would potentially cause injury to Mrs. Jones, the brunt of which would be felt in California, and defendants' in-

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tacts than necessary if the assertion of jurisdiction would be highly reasonable. *See id.* at 477.

[75] *See Burger King*, 471 U.S. at 483. The contract's choice of law provision, providing for Florida law to govern all contract disputes, resolved any possibility of conflicting substantive social policies. *See id* at 482.

[76] *See id.* at 485-487.

[77] *See id.* at 487.

[78] *See generally* Calder v. Jones, 465 U.S. 783 (1984); Panavision v. Toeppen, 141 F.3d 1316 (9th Cir. 1998).

[79] 465 U.S. 783 (1984).

[80] *See id.* at 785-786.

[81] *See id.*

[82] *See id.* at 789. The Court rejected the defendant's contention that they were like welders who had worked on a boiler that explodes in another state and were, therefore, not subject to jurisdiction in California. *See id.* The Court stated that under *Buckeye Boiler Co, v. Superior Court*, 458 P.2d 57 (Cal. 1969) and *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d. 761 (Ill. 1961), jurisdiction over the defendant was not proper because the defendant had engaged in mere untargeted negligence and had no control over nor direct benefit from his employer's sales in the forum state. *See Calder,* 465 U.S. at 789.

tentional publication of the article was enough to establish jurisdiction over the defendants.[83] The Court stated that even though the defendants lacked the minimum contacts with California normally necessary to assert specific jurisdiction, their intentional direction of wrongdoing at a California resident made the exercise of jurisdiction proper.[84] Thus, the Court held that intentional conduct calculated to cause injury to an individual in California allowed a California court to assert jurisdiction over the defendants.[85]

2. The Ninth Circuit Interpretation

The Court of Appeals for the Ninth Circuit adopted a three-part test for determining whether specific jurisdiction may be exercised without violating the Due Process Clause of the 14th Amendment.[86] In *Cybersell, Inc. v. Cybersell, Inc.*,[87] the court addressed whether the maintenance of a home page on the world wide web, which allegedly infringes on the use of a service mark, established specific personal jurisdiction over the infringer in the service mark holder's principal place of business.[88] The court stated that in order for jurisdiction to be proper, the defendant must; 1) either perform an act or transaction with the forum or perform an act by which the defendant purposefully avails itself of the privilege of conducting activities in the forum;[89] 2) those activities giving rise to the benefits and protections of the forum must also give rise to

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[83] *See id.* at 789-790.

[84] *See id.* at 788-790.

[85] *See id.* at 791. No contention was raised arguing the reasonableness of the assertion of jurisdiction. *See Calder*, 465 U.S. at 789.

[86] *See* Cybersell, Inc. v. Cybersell, Inc. 130 F.3d 414, 416 (1997). *See also* Voysys Corp v. Elk Industries, 1996 WL 119473 (N.D.Cal. 1996) (recognizing the modification of the three-part test as stated in *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280 (9th Cir. 1977)).

[87] *See* 130 F.3d at 416.

[88] *See id.* at 415.

[89] *See id.* at 416. *See also* Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995). This "purposeful availment prong" does not require that the defendant have physical contacts with the forum state as long as the defendant's efforts are purposefully directed towards that forum. *See Cybersell,* 130 F.3d at 416-417. *See also generally* CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc., 205 F.3d 1244 (2000).

the cause of action;[90] 3) the exercise of jurisdiction must be reasonable.[91] *Cybersell* presented a question of first impression in the Ninth Circuit; thus the court looked for guidance from the Sixth and Second Circuits.[92]

The Sixth Circuit previously addressed whether a Texas resident, who had Internet contacts with CompuServe, an Ohio corporation, had sufficient contacts to satisfy the requirements of the due process clause in *CompuServe, Inc. v. Patterson*.[93] In *CompuServe*, the defendant transmitted software files to CompuServe via the web under an agreement governed by Ohio law.[94] CompuServe displayed the software to its subscribers over the Internet, made sales of the software, and transmitted money from the sales to the defendant in Texas.[95] The Sixth Circuit held that the defendant's act of sending software to Ohio indicated that the defendant knowingly reached out to purposefully avail himself of the privilege of doing business in Ohio.[96] Thus, the Sixth Circuit found that the Ohio court properly exercised jurisdiction over the defendant.[97]

Conversely, the Second Circuit found jurisdiction improper in *Bensusan Restaurant Corp. v. King*.[98] In Bensusan, the New York district court held that the creation of a passive web page that potentially infringed on plaintiff's trademark

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[90] *See Cybersell,* 130 F.3d at 416. *See also Ballard,* 65 F.3d at 1498.

[91] *See id.*

[92] *See Cybersell,* 130 F.3d at 417.

[93] 89 F.3d 1257 (6th Cir. 1996).

[94] *See id.* at 1260-1261.

[95] *See id.* at 1261.

[96] *See id.* at 1266-1267. *See also* Kevin R. Lyn, *Personal Jurisdiction and the Internet: Is a Home Page Enough to Satisfy Minimum Contacts?,* 22 CAMPBELL L. REV. 341, 350 (2000). Under the single point presence view taken by some courts the internet is a physically traveled highway. *See id.* Presence is determined by residence of the defendant or location of the defendant's server and whether the defendant initiated the contacts with the forum state. *See id.*

[97] *See CompuServe,* 89 F.3d at 1268-1269.

[98] 937 F.Supp. 295, 301 (S.D.N.Y.1996), *aff'd*, 126 F.3d 25 (2d Cir.1997). The district court dismissed for lack of jurisdiction on both due process grounds and on the grounds that the exercise of jurisdiction was not allowed under New York's long arm statute. *See id.* The Second Circuit affirmed but did not discuss the due process grounds for dismissal. *See generally* Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir.1997). *Cybersell* thus looked to the district court's opinion. *See Cybersell,*130 F.3d at 417 n.4.

was not a sufficient contact on which to base jurisdiction.[99] The district court distinguished the defendant's passive web page from the defendant's activities in *CompuServe*.[100] The court stated that in *CompuServe,* the defendant targeted the State of Ohio by subscribing to CompuServe's service, entering an agreement, advertising, and sending software via the Internet, all of which benefited the defendant's business.[101] By contrast, in *Bensusan,* the defendant had not purposefully availed himself in any way of the benefits of conducting business in New York.[102] The district court concluded that the mere potential for confusion by maintenance of the web site did not satisfy the minimum contacts test.[103] Consequently, the court dismissed the complaint for lack of personal jurisdiction.[104]

In *Cybersell*, the Ninth Circuit found the defendant's actions more similar to those of the defendant in *Bensusan*.[105] The Florida defendant's only contact with the forum state, Arizona, occurred when Arizonans visited his home page over the Internet.[106] The court noted that in each case where courts have found jurisdiction proper based on web contacts, "something more" must be shown than a mere Internet adver-

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[99] *See Bensusan,* 937 F.Supp at 301. In *Bensusan,* the defendant owned the "Blue Note" jazz club in Columbia, Missouri. *See id.* at 297. The defendant created a web page, advertising his club, which allowed browsers to order tickets by using the names and addresses of ticket outlets in Columbia. *See id.* The site also showed a phone number whereby browsers could call to order tickets for pickup at the club. *See id.* Plaintiff, the owner of "The Blue Note" trademark and the "Blue Note" club in Greenwich Village, sued the defendant for trademark infringement in the United States District Court for the Southern District of New York. *See id.* at 297-298.

[100] *See Bensusan*, 937 F.Supp. at 301. *See* Tech Heads, Inc. v. Desktop Service Center, Inc., 105 F.Supp.2d 1142, 1148-1151 (D. Or. 2000) (for an informative discussion of the differences of passive, active, and interactive web sites). A passive web site generally only furnishes information to those who visit the site, and is not a sufficient basis for the exercise of personal jurisdiction. *See id.* at 1149-1150.

[101] *See Bensusan,* 937 F.Supp at 301. In *CompuServe,* the defendant sold under $650 dollars worth of software to Ohio residents through the CompuServe shareware service. *See CompuServe,* 89 F.3d at 1264-1265

[102] *See Bensusan*, 937 F.Supp. at 301.

[103] *See id.*

[104] *See id.*

[105] *See Cybersell,* 130 F.3d at 417-418.

[106] *See id.* at 415.

tisement.[107] The court stated that the nature and quality of commercial activity conducted over the Internet directly relates to a court's ability to exercise jurisdiction over a defendant.[108] The court held that the defendant's passive homepage, which did not seek out or receive any part of its business from Arizonans, did not constitute the contacts necessary to satisfy the purposeful availment requirement.[109] The court further rejected the plaintiff's argument that the defendant's home page satisfied the effects test for intentional torts because there was no evidence of intentional aiming at the forum state.[110] Interestingly, the court stated that the effects test does not apply with equal force to corporations as it does to individuals because corporations do not suffer from harm in a particular location as individuals do.[111] Thus, the court dismissed the suit for lack of personal jurisdiction.[112]

While finding that the effects test was not satisfied in *Cybersell*, the Ninth Circuit elaborated on the effects test in *Ziegler v. Indian River County.*[113] In *Ziegler*, the court noted that it applied a different purposeful availment test for tort cases than it did for contract cases.[114] In tort cases, jurisdiction could attach if the defendant merely engaged in conduct aimed at and having an effect in the forum state.[115] In *Ziegler,* a California plaintiff, John Ziegler, sued Florida defendants for conspiracy to violate his constitutional rights by having him arrested for writing a fraudulent check that was valid at

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[107] *See id.* at 418.

[108] *See id.* at 419, *quoting* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119, 1124 (W.D.Pa.1997).

[109] *See Cybersell,* 130 F.3d at 420. The court noted that there was no evidence that any Arizonan had ever even hit the defendant's web site besides the plaintiff. *See id.* at 419. Furthermore the web page was not aimed intentionally at Arizona. *See id.* at 420.

[110] *See Cybersell,* 130 F.3d at 420.

[111] *See id., quoting* Core-Vent Corp. v. Nobel Industries AB, 11 F.3d 1482, 1486 (9th Cir. 1993). This statement implies that the effects test would be more difficult to satisfy if the defendant is a corporation rather than an individual.

[112] *See Cybersell,* 130 F.3d at 420.

[113] *See* 64 F.3d 470, 473-474 (9th Cir. 1995).

[114] *See id.* at 473. The court rejected the contention that a contract with a resident of a foreign state is alone sufficient to establish jurisdiction in a breach of contract action and stated that it was consistent with the holding of *Burger King. See id., citing* Roth v. Garcia Marquez, 942 F.2d 617, 621 (9th Cir. 1993).

[115] *See id.*

the time written.[116] The court used a three-part effects test in order to satisfy the purposeful availment prong for specific jurisdiction.[117] The three parts are "(1) intentional action; (2) aimed at the forum state; and (3) causing harm that the defendant should have anticipated would be suffered in the forum state."[118]

In *Ziegler,* the court found that the defendants had committed an intentional act by obtaining a warrant for Ziegler's arrest in Florida, despite their apparent knowledge that no crime had been committed.[119] The court deemed these actions to be intentional acts expressly aimed at the forum state.[120] The court stated that because the defendants anticipated Ziegler's arrest in his home state of California, they had satisfied the third part of the effects test.[121]

In *Panavision Int'l, L.P. v. Toeppen*,[122] the Ninth Circuit applied the effects test as stated in *Ziegler*.[123] The *Panavision* court considered whether the district court properly asserted personal jurisdiction over the defendant Toeppen, who had committed tortious conduct in cyberspace.[124] The court applied the same three-part specific jurisdiction test used in *Ziegler*

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[116] *See Ziegler,* 64 F.3d at 473.

[117] *Id.* at 474.

[118] *Id., citing Core-Vent*, 11 F.3d at 1486.

[119] *See Ziegler,* 64 F.3d at 474.

[120] *See id.*

[121] *See id.* Because the effects test was satisfied, so too was the purposeful availment prong of the three part specific jurisdiction test used by the Ninth Circuit. *See id.*

[122] 141 F.3d 1316 (9th Cir. 1998).

[123] *See id.* at 1321-1322, *citing Ziegler*, 64 F.3d at 473.

[124] *See id.* Toeppen had registered Panavision's trademark as his domain name through NSI. *See id.* at 1319. When Panavision attempted to register the Internet domain name "Panavision.com" it found Toeppen had already done so. *See id.* The site merely contained a display of photographs of Pana, Illinois. *See Panavision,* 141 F.3d at 1319. Panavision's counsel sent Toeppen a letter in an attempt to get Toeppen to stop use of the site. *See id.* Toeppen responded by a letter which offered to sell the "Panavision.com" domain name to Panavision for $13,000, an act often referred to as cyber-squatting or cyber-piracy. *See id* at 1318-1319. Toeppen also promised not to register other internet addresses alleged to be Panavision's if Panavision purchased the web site. *See id.* When Panavision refused the defendant's demand, the defendant registered Panavision's other trademark "Pananflex", as the domain name "Panaflex.com". *See id.* The defendant's web page for "Panaflex.com" displayed only the word "Hello." *See Panavision,* 141 F.3d at 1318.

and *Cybersell.*[125] The court then distinguished Panavision from *Cybersell.*[126] Unlike Cybersell, involving inadvertent trademark infringement, the plaintiff in *Panavision* brought an action for intentional trademark dilution.[127] Thus, the court stated that jurisdiction may be proper for tort cases if the defendant's conduct was aimed at or had an effect in the forum state.[128]

The *Panavision* court then applied the effects test under the purposeful availment prong of the test for specific jurisdiction.[129] The court found that the defendant, Toeppen, had purposefully engaged in a scheme to register Panavision's trademarks.[130] Furthermore, Toeppen knew his conduct would likely injure Panavision in California, its principal place of business.[131] The court stated that physical contacts with the

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[125] *See id.* at 1321-1322. *See also Ziegler,* 64 F.3d at 474.

[126] *See Panavision,* 141 F.3d at 1321-1322. The *Panavision* court referred to the *Cybersell* opinion's statement that "something more" is required than a mere Internet advertisement to show that a defendant purposefully directed activities towards the forum state. *See id.* (discussing *Cybersell,* 130 F.3d at 418).

[127] *See Panavision,* 141 F.3d at 1321. In an action for trademark dilution, the owner of a famous mark may only be entitled to injunctive relief unless willful intent can be shown. *See* 15 U.S.C. § 1125(c) 2 (Supp. 2000). If such willful intent is proven, "the owner of the famous mark shall also be entitled to the remedies set forth in sections 35 (a) and 36 [15 U.S.C. §§ 1117(a), 1118], subject to the discretion of the of the court and the principles of equity." *Id. But see* the Cyberpiracy prevention act 15 U.S.C § 1125(d) was not in effect at the time of *Panavision. See generally* Sporty's Farm L.L.C v. Sportsman's Market, Inc., 202 F.3d 489 (2nd Cir. 2000) (discussing the application of the Anticybersquatting Consumer Protection Act).

[128] *See Panavision,* 141 F.3d at 1321, *citing Ziegler,* 64 F.3d at 473.

[129] *See Panavision,* 141 F.3d at 1322. *See also generally* Maggos v. Helm, No. 98-15751, 1999 U.S.App. LEXIS 13244 (9th Cir. June 11, 1999) [unpublished opinion] (where effects test is found to be satisfied).

[130] *See Panavision,* 141 F.3d at 1322. *Compare generally* U-Haul International, Inc. v. Osborne, No. CIV 98-0366-PHX-RGS, 1999 U.S. Dist. LEXIS 14466 (D.Az. Feb 17, 1999) (where the first purposefully directed prong of the effects test was not satisfied by defendant's posting of web site that allegedly libeled plaintiff).

[131] *See Panavision,* 141 F.3d at 1322. *See also Core-Vent,* 11 F.3d at 1487 (where the court found that the corporate defendant was injured in its principal place of business but further stated it was not deciding the issue of where a corporation suffers injury because that decision was unnecessary to the out come of the case). Toeppen relied on *Cybersell,* to argue that a large corporation does not suffer injury in one location. *See Panavision,* 141 F.3d at 1322 n.2. The court rejected Toeppen's contention, remarking that since Panavision's principal place of business and its state of incorporation were both in the State of California, the court was not faced with the issue of where a corporation suffers injury. *See id. citing Core-Vent,* 11F.3d at 1487. The court

forum state were not necessary so long as activities were purposefully directed toward the forum state.[132] Thus, the effects test had been satisfied.[133]

The *Panavision* court then stated that for jurisdiction to be proper under the specific jurisdiction test, the claim asserted must arise out of the defendant's forum related activities.[134] Under this prong the court applied a "but for" causation test.[135] The *Panavision* court found that this "but for" causation was satisfied because but for Toeppen's registration of Panavision's trademarks, which was directed towards California, Panavision would not have suffered injury.[136]

After satisfying the first two prongs of the specific jurisdiction test, the court noted that a plaintiff must still show that the exercise of jurisdiction would be reasonable.[137] To establish reasonableness the court stated that all seven factors stated in *Burger King*[138] must be weighed and no one factor was dispositive.[139] The court determined that that the degree

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likened the harm suffered by Panavision to *Indianapolis Colts v. Metropolitan Baltimore Football Club Ltd. Partnership*, 34 F.3d 410, 411-412 (7th Cir. 1994) (where the court determined that the Baltimore CFL Colts team was subject to personal jurisdiction in Indiana because the team entered the State of Indiana by broadcasting games to Indiana thereby injuring the Indianapolis Colts in Indiana where they primarily used their trademarks). *See Panavision,* 141 F.3d at 1321-1322.

[132] *See Panavision,* 141 F.3d at 1320, *citing* Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995.) The court did not mention the reply letter sent by Toeppen to Panavision in California, and apparently did not rely on physical contacts. *See Panavision,* 141 F.3d at 1316.

[133] *See id.* at 1322. *Compare* Tech Heads, Inc. v. Desktop Service Center, Inc., 105 F.Supp.2d 1142, 1148 (D. Or. 2000) (where the district court found no evidence that Desktop intentionally directed its activities at Oregon). Thus, the effects test was not met, however the "something more" requirement of *Cybersell* was met by evidence that the web site was interactive rather than passive and the existence of additional non-web site contacts with Oregon (Desktop conducted one transaction with a resident of Oregon). *See id. See also* Perry v. Righton.Com, 90 F.Supp.2d 1138, 1141 (D. Or. 2000) (where the effects test was not satisfied because defendant did not intentionally direct activities at plaintiff in Oregon with the knowledge that the plaintiff would be injured).

[134] *See Panavision,* 141 F.3d at 1322, *citing Ziegler,* 64 F.3d at 474.

[135] *See Panavision,* 141 F.3d at 1322.

[136] *See id.*

[137] *See id., citing Burger King,* 471 U.S. at 476-477.

[138] *See supra* note 74 and accompanying text.

[139] *See Burger King,* 471 U.S. at 477, *citing Core-Vent,* 11 F.3d at 1488. *See* text accompanying note 74.

of Toeppen's purposeful interjection was substantial and that California's strong interest in providing effective redress did not conflict with the sovereignty of Illinois.[140] Furthermore, the burden on Toeppen in litigating in California did not constitute a depravation of his right to due process, however the alternative forum factor did weigh in his favor.[141] In weighing these factors the court concluded that, on balance, Toeppen had failed to demonstrate that the exercise of jurisdiction would be unreasonable.[142] Therefore, the Ninth Circuit concluded the district court properly exercised specific jurisdiction.[143]

The Third Circuit similarly interpreted the *Calder* effects test in *Imo Industries, Inc. v. Kiekert AG*.[144] The plaintiff, Imo, alleged that the defendant, Kiekert, had tortiously interfered

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[140] *See Panavision,* 141 F.3d at 1323. Toeppen had registered domain names knowing that this action would injure Panavision in California. *See id.* Furthermore, Toeppen sent a letter to Panavision in California demanding money. *See id.* According to the court the state law claims required the same analysis as the federal claims and that the federal trademark analysis would be the same in either California or Illinois. *See id.*

[141] *See Panavision,* 141 F.3d at 1323. The alternative forum factor weighed in the Toeppen's favor because California was not the only forum in which the suit could be tried. *See id.* at 1324. As to the burden on the plaintiff of litigating outside of California, the court stated that little weight should be given to this factor. *See id.* This factor focuses on evaluating the convenience and effectiveness of relief for the plaintiff, which the court stated was given little weight. *See id., citing Ziegler,* 64 F.3d at 476. The court found the burden on Panavision to be slight and thus it weighed in Toeppen's favor. *See Panavision* 141 F.3d at 1324.

[142] *See id.* at 1323-1324. The efficient resolution factor had little to no impact on the reasonableness analysis here because the case involved few witnesses and limited evidence. *See id.*

[143] *See id.* at 1324.

[144] 155 F.3d 254, 260-265 (3d Cir. 1998). In *Imo*, the court stated that because the injury resulted from an alleged intentional tort, the satisfaction of the *Calder* effects test would allow the court to exercise jurisdiction over the defendant. *See Imo,* 155 F.3d at 256. The *Imo* court interpreted the *Calder* effects test similar to the Ninth Circuit. *See id.* at 265-266. In the Ninth Circuit this test is satisfied by first, showing that a defendant committed an intentional act that second, was expressly aimed at the forum state, which third, caused harm that was largely felt in the forum state, which the defendant should have anticipated. *See Ziegler,* 64 F.3d at 473 *citing Core-Vent*, 11 F.3d at 1486. The court required 1) an intentional tort that; 2) causes plaintiff to feel the brunt of the harm in the forum state such that it can be described as the focal point of the harm; and 3) the defendant must have expressly aimed tortious conduct at the forum state so that it can be described as the focal point of the tort. *See Imo,* 155 F.3d at 265-266.

with plaintiff's attempt to sell its Italian subsidiary to a French corporation.[145] The only contact Kiekert had with the forum state of New Jersey, consisted of two letters, one sent to Italy and the other New York, which were then forwarded to Imo in New Jersey.[146] In applying the effects test, the court declined to follow the Seventh Circuit's broad application of the test, and instead recognized that the majority of the circuits applied the effects test to business torts narrowly.[147] The *Imo* court agreed with the conclusions of the First, Fourth, Fifth, Eighth, Ninth and Tenth Circuits that the effects test

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[145] *See id.* at 256. Kiekert sent a series of letters to the Italian subsidiary and to a New York investment firm representing Imo in the attempted sale, which threatened to revoke Kiekert's licensing agreement with the subsidiary. *See id.* This allegedly caused the sale to fall through, resulting in considerable losses. *See id.*

[146] *See id.* at 258-260. Additionally, Imo and Kiekert executives conducted business meetings in Germany and Canada, and Imo had placed a few phone calls to Kiekert in Germany. *See Imo,* 155 F.3d at 258-260. The court noted that the weight of authority among the circuits established that some minimal correspondence alone was sufficient to satisfy the minimum contacts requirement for the purposes of specific jurisdiction. *See id.* at 259-260 n.3.

[147] *See id.* at 261-263. The Seventh Circuit stated that the state in which the victim suffers a tortious injury may exercise personal jurisdiction over the alleged tortfeasor. *See* Janmark, Inc. v. Reidy, 132 F.3d 1200, 1202 (7th Cir. 1997), *citing Indianapolis Colts,* 34 F.3d at 411-412. A tort does not occur until an actual injury occurs. *See* Janmark, 132 F.3d at 1202; *but see* Berthold Types Limited v. European Milkograf Corp., 102 F. Supp. 2d 928, 932 n.1 (N.D. Ill. 2000) (where the court distinguishes that in *Janmark* the claim concerned interference with prospective economic advantage which did not occur until the customer canceled the order in Illinois). However, in the context of trademark violation, the place of sale is deemed where the tort occurs not the place of economic harm. *See id. Compare* Clearclad Coatings, Inc. v. Xontal Ltd., No. 98 C 7199, 1999 WL 652030 at *17 (N.D. Ill. 1999), *citing Janmark,* 132 F.3d at 1202 (where the district court found the tort from a trademark infringement claim under 15 U.S.C. § 1125 occurred in Illinois because that is where the injury (bad financial consequences) occurred. The *Janmark* court reasoned that when the plaintiff corporation suffered the loss of a customer that loss occurred in Illinois, the forum state where the plaintiff's sales operations were based. *See Janmark,* 132 F.3d at 1202. Therefore, a California defendant's phone call to a New Jersey customer causing the customer to cancel an order with an Illinois based defendant caused an injury in Illinois. *See id.* at 1202-1203. Thus, jurisdiction was proper. *See id.* The court in *Janmark* did not address whether the defendant knew where plaintiff was located. This knowledge is required for both the "express aiming" prong and the "brunt of the harm prong." *Imo,* 155 F.3d at 264 n.6. The court in *Imo,* stated that while the *Janmark* court may have assumed that the defendant had knowledge of the location of the plaintiff, this was not sufficient to satisfy the knowledge requirement of the expressly aimed prong or the brunt of the harm/focal point of the harm prong in the Third Circuit. *See id.*

requires more than the mere showing that an intentional tort was felt within the forum.[148] Furthermore, the court agreed with the Fourth, Fifth and Tenth Circuits that the effects test may be satisfied only if the plaintiff can point to specific contacts that show the defendant expressly aimed its act at the particular state, thereby rendering the forum state the focal point[149] of the tortious activity.[150] The court continued that this typically requires some form of entry into the forum state.[151] The *Imo* court focused only on the "expressed aiming" requirement.[152] The court found that Kiekert, unlike the defendant in *Cybersell*, knew that Imo was located in the forum state.[153] The court stated that this knowledge, while necessary, did not alone satisfy the express aiming prong.[154] The court determined that the letters revealed that Kiekert focused its intentions on First Boston in New York and Roltra in Italy, not on Imo in the forum state, New Jersey.[155] Thus,

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[148] *See Imo,* 155 F.3d at 265. *See also* Far West Capital, Inc. v. Towne, 46 F.3d 1071, 1077-1078 (10th Cir. 1995) (intentional business tort alone is not enough to satisfy the effects test); Southmark Corp. v. Life Investors Inc., 851 F.2d 763, 772-773 (5th Cir. 1988) (plaintiff's fortuitous location of its principle place of business within the forum without evidence of express aiming or knowledge of the location of the brunt of the harm is not enough to support the exercise of jurisdiction); ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 625-626 (4th Cir. 1997), *cert. denied*, 523 U.S. 1048 (1998) (defendant's mere knowledge that conduct would lower plaintiffs sales does not satisfy the expressly aimed prong nor does knowledge of plaintiffs principal place of business with out more show that the brunt of the harm prong has been met); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419-420 (9th Cir. 1997) (effects test not met where web site was not expressly aimed at nor was knowledge of location of brunt of harm shown); General Electric Capital Corp. v. Grossman, 991 F.2d 1376, 1387-1388 (8th Cir. 1993) (effects test not satisfied where the brunt of the harm occurs outside of the forum); Noonan v. Winston Co., 135 F.3d 85, 90-92 (1st Cir. 1998) (effects test not satisfied even though effect was felt in forum, where no showing of intentional targeting).

[149] The *Imo* court noted that they did not accept or reject the notion that the effects of Kiekert's conduct were felt in by the plaintiff in New Jersey because its decision did not reach this issue. *See Imo,* 155 F.3d at 265-266 n9. However the court mentioned that it was unclear as to whether a corporation could feel the effects of tortious conduct in a particular geographic location. *See id.*

[150] *See id.* at 265.

[151] *See id.*

[152] *See id.* at 266.

[153] *See Imo,* 155 F.3d at 266.

[154] *See id.*

[155] *See id.* at 267. The court looked at whether the letters, phone calls, and meetings constituted sufficient evidence of express aiming. *See id.* at 266-267. Kiekert did

because the defendant did not engage in conduct expressly aimed at the forum state, the court did not determine whether the brunt of the harm was felt in the forum state.[156] The court concluded that Imo failed to meet the minimum contacts requirement of the effects test.[157]

3. Cease & Desist Letters

A debate has developed among the Ninth Circuit district courts as to how to treat cease and desist letters for purposes of establishing specific jurisdiction.[158] At first glance, the district courts appear to have a split in opinion as to whether "cease and desist" letters alone are sufficient contacts to satisfy the minimum contacts test.[159] A closer inspection reveals that the cases are distinguishable.

The United States District Court for the Central District of California, in *Douglas Furniture Co. v. Wood Dimensions, Inc.*,[160] addressed whether sending two cease and desist letters established sufficient contacts with California.[161] The court applied the three-part specific jurisdiction test used in the Ninth Circuit[162] and found that the exercise of jurisdiction

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not originate any of the phone calls conducted with Imo and, therefore, did not expressly aim its actions toward New Jersey. *See id.* at 267. *Compare* Brainerd v. Governors of the University of Alberta, 873 F.2d 1257, 1258-1260 (9th Cir. 1990) (uninitiated telephone calls and the response to a letter were sufficient to satisfy the effects test).

[156] The *Imo* court noted that they did not accept or reject the notion that the effects of Kiekert's conduct were felt in by the plaintiff in New Jersey because its decision did not reach this issue. *See Imo,* 155 F.3d at 265-266 n.9. However the court mentioned that it was unclear as to whether a corporation could feel the effects of tortious conduct in a particular geographic location. *See id.*

[157] *See id.* at 268.

[158] *See* Wise v. Lindamood, 89 F.Supp. 2d 1187, 1192 (D.Colo. 1999).

[159] *See id.*

[160] 963 F.Supp. 899 (C.D. Cal. 1997).

[161] *See id.* at 900-901. In *Douglas Furniture*, the defendant Wood Dimensions, Inc., an Arizona corporation, sent plaintiff Douglas Furniture, a California corporation, two cease and desist letters. *See id.* at 900. The letters alleged that Douglas Furniture was marketing a table set that was substantially identical to a table set in which Wood Dimensions claimed it had a proprietary right. *See id.* The letters threatened legal action if Douglas Furniture did not immediately cease selling the table set. *See id.*

[162] In the Ninth Circuit this test is satisfied by first, showing that a defendant committed an intentional act that second, was expressly aimed at the forum state,

was improper under all three prongs.[163] The court distinguished between letters that had a tortious effect in and of themselves, such as letters containing defamatory statements, and letters, the contents of which, do not constitute an actionable injury.[164] Since Wood Dimensions' cease and desist letters complained about the tortious conduct of Douglas Furniture, and were not tortious in and of themselves, the court determined that the standard set for the commercial context applied.[165] In the commercial context, the use of the mail or the telephone does not constitute purposeful activity invoking the protections and benefits of the forum state.[166] Thus, the court found that the purposeful availment prong had not been satisfied.[167] The court continued that even if the letters constituted purposeful availment, they did not satisfy the second prong of the specific jurisdiction test, which requires that the claim arise out of the forum-related contacts.[168] The court noted that the only connection between the letters and the cause of action was that they may have motivated Douglas Furniture to file suit, but that this was insufficient to meet the requirements of the "arising out of" prong.[169] Finally, the court stated that it would be unreasonable to require an intellectual property owner to face suit in a foreign forum based on a letter attempting to protect intellectual property rights.[170]

The United States District Court for the Central District of California in *Meade Instruments Corp. v. Reddwarf Starware, LLC*[171] subsequently criticized the *Douglas Furni-*

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which third, caused harm that was largely felt in the forum state, which the defendant should have anticipated. *See Ziegler v. Indian River County,* 64 F.3d 470, 473-474 (9th Cir. 1995) *citing* Core-Vent Corp. v. Nobel Industries AB, 11 F.3d 1482, 1486 (9th Cir. 1993).

[163] *See Douglas Furniture,* 963 F.Supp. at 901-903.

[164] *See id.* at 902 n.1.

[165] *See id.* at 902.

[166] *See id.*

[167] *See id.*

[168] *See Douglas Furniture,* 963 F.Supp. at 902-903.

[169] *See id.*

[170] *See id.* at 903. The court found that even considering *Burger King's* requirement that the defendant affirmatively show the unreasonablity of a court's assertion of jurisdiction it would on its face be unfair to impose such a burden on an intellectual property holder. *See id.* Consequently, the court dismissed for lack of personal jurisdiction. *See id.*

[171] 47 U.S.P.Q. 2d 1157, 1158 n.4 (C.D. Cal. 1998).

ture decision. In *Meade*, the defendant Reddwarf, sent one cease and desist letter to plaintiff Meade and one to a customer of Meade's both of which were located in California.[172] The court disagreed with *Douglas Furniture's* holding that cease and desist letters with nothing more do not constitute sufficient contacts to satisfy the minimum contacts requirement of the specific jurisdiction test.[173] The court stated that the *Douglas Furniture* holding inconsistently applied the current jurisdictional trend in light of the holding in *Panavision.*[174] The court reiterated *Panavision's* holding that the "something more" requirement of *Cybersell* was satisfied by a subjective intent to do harm by performing an act, the effect of which is felt in the forum state.[175] Thus, the *Meade* court applied the effects test as stated in the Ninth Circuit.[176] The court found that Reddwarf's cease and desist letters that demanded that Meade discontinue the use of an invention claimed by a United States patent or face the legal consequences had a chilling effect on Meade's business.[177] This chilling effect, intentionally directed by the defendant towards California, resulted from the sending of the cease and desist letters.[178] The court found the exercise of jurisdiction over Reddwarf was reasonable because Reddwarf, by threatening a lawsuit, had notice that a California court might exercise jurisdiction over it based on its threats.[179] Therefore, the *Meade* court concluded that the mailing of two cease and desist letters to California satisfied the specific jurisdiction minimum contacts test.[180]

The United States District Court for the District of Colorado recently criticized the *Meade* decision in *Wise v. Lindamood.*[181] In *Wise,* defendants Patricia Lindamood, a resident of California, and Lindamood-Bell, a California corporation, (hereinafter, "Lindamood"), engaged in communications

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[172] *See id* at 1158 n.4.

[173] *See id.*

[174] See id. at 1158 n.2.

[175] *See id.*

[176] *See Meade,* 47 U.S.P.Q. 2d at 1157-1159.

[177] *See id.* at 1158 n.4.

[178] *See id.* at 1158 n.3.

[179] *See id.* at 1159.

[180] *See id.*

[181] 89 F.Supp. 2d 1187, 1192 (D.Colo. 1999).

with plaintiffs Barbara Wise and Remedies for Reading Disabilities, Inc. a Colorado resident and corporation respectively, (hereinafter, "Wise").[182] In the course of this communication Lindamood sent Wise two cease and desist letters.[183] The *Wise* court stated that the touchstone inquiry was whether the defendant had purposefully directed activities, which the suit arises out of and whether the exercise of jurisdiction is reasonable.[184] The court cited *Douglas Furniture* for the proposition that the suit resulted from the alleged tortious conduct of Lindamood and did not result or arise from the cease and desist letters.[185] The court stated that the exercise of jurisdiction based on two cease and desist letters would allow the unilateral activity of one party or third person to subject another to the jurisdictional reach of the forum state in contradiction of the fair play and substantial justice requirement of *Burger King*.[186] The court recognized that a split in authority existed as to whether a cease and desist letter constituted sufficient contacts to support the exercise of jurisdiction.[187] The court concluded that the courts that had taken what it deemed to be the minority position, that jurisdiction was proper based on multiple cease and desist letters, were in tension with the precedent from their respective circuits.[188] Therefore, the *Wise*

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[182] *See id.* at 1188-1189. Lindamood believed that Wise was infringing on copyright and trademark rights to developmental programs authored by Patricia Lindamood and her late husband. *See id.*

[183] *See id.* at 1189. Wise filed suit seeking declaratory judgment of non-infringement in a United States District Court for the District of Colorado. *See id.*

[184] *See Wise,* 89 F.Supp. 2d at 1190. The court found that the letters were insufficient to permit the exercise of jurisdiction. *See id.* at 1191.

[185] *See id. citing Douglas Furniture,* 963 F.Supp. at 902.

[186] *See id. See also Burger King,* 471 U.S. at 476, *quoting International Shoe,* 326 U.S. at 320.

[187] *See Wise,* 89 F.Supp. 2d at 1192.

[188] *See id.* For decisions rendering personal jurisdiction proper on the basis of multiple cease and desist letters *see generally Meade,* 47 U.S.P.Q. 2d 1157; Bounty-Full Entertainment, Inc. v. Forever Blue Entertainment Group, Inc., 923 F. Supp. 950 (S.D. Tex. 1996); Burbank Aeronautical Corp. II v. Aeronautical Development Corp., 16 U.S.P.Q.2D (BNA) 1069 (C.D. Cal. 1990); Tandem Computers Inc. v. Yuter, No. C 89-20646 RFP, 1989 U.S. Dist. LEXIS 18384 (N.D. Cal. 1989). For personal jurisdiction based on multiple phone calls, letters, or facsimiles, *see generally* Oki America, Inc. v. Tsakanikas, No. C 93-20728, 1993 U.S. Dist. LEXIS 19475 (N.D. Cal. 1993); Edwards v. Pulitzer Publishing Co., 716 F.Supp. 438 (N.D. Cal. 1989). One court determined that a single cease and desist letter satisfied the minimum contacts test,

court chose to follow what it claimed to be the majority position, that a cease and desist letter alone is not sufficient to support the exercise of jurisdiction.[189]

IV. THE NINTH CIRCUIT'S ANALYSIS

In *Bancroft & Masters, Inc. v. Augusta National, Inc.*,[190] the Ninth Circuit considered whether California properly asserted personal jurisdiction over Augusta.[191] The court stated that because California allows the exercise of personal jurisdiction under its long arm statute to the fullest extent permitted by due process, the determination of whether jurisdiction is proper must be confined to constitutional limitations.[192]

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see generally Dolco Packaging Corp. v. Creative Industries, Inc., 1 U.S.P.Q.2D (BNA) 1586 (C.D. Cal. 1986). For circuit courts that are in tension with district courts that have found personal jurisdiction to exist based on cease and desist letters *See* Ham v. La Cienega Music Company, 4 F.3d 413, 416 (5th Cir. 1993); Peterson V. Kennedy, 771 F.2d 1244, 1261-1262 (9th Cir. 1985).

[189] *See Wise*, 89 F.Supp. 2d at 1192. For courts determining that they lacked personal jurisdiction *see generally* Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc., 148 F.3d 1355, 1360-1361 (Fed. Cir. 1998); Med-Tec, Inc. v. Kostich, 980 F.Supp. 1315, 1329 (N.D. Iowa 1997); Stairmaster Sports/Medical Products, Inc. v. Pacific Fitness Corp., 916 F.Supp. 1049 (W.D. Wash. 1994); Zumbro, Inc. v. California Natural Prods., 861 F.Supp. 773, 781 (D.Minn. 1994); Database America, Inc. v. Bellsouth Advertising and Publishing Corp., 825 F.Supp. 1195, 1213 (D.N.J. 1993); BIB Mfg. Co. v. Dover Mfg. Co., 804 F.Supp. 1129, 1132-1133 (E.D. Mo. 1992); KVH Industries, Inc. v. Moore, 789 F.Supp. 69 (D. R.I. 1992).

[190] 223 F.3d 1082 (9th Cir. 2000).

[191] *See id.* at 1084. The court disagreed with Augusta's threshold arguments that the appeal was moot due to a settlement offer and a change in NSI's dispute resolution policy. *See id.* at 1085. Augusta had offered to waive all trademark infringement, dilution, and unfair competition claims if Bancroft agreed to stay out of the golf business. *See id.* The Ninth Circuit stated that the appeal was not rendered moot because the promise was qualified and secondly the agreement, if made, would not have mooted Bancroft's request that Augusta's "Masters" trademarks be cancelled. *See id.* The Ninth Circuit also rejected Augusta's assertion raised at oral argument that the appeal was moot because NSI's dispute resolution procedures had changed. *See Bancroft*, 223 F.3d at 1085. Since, this argument was not developed on appeal and unsupported in the record the Ninth Circuit stated it was unable to evaluate the merits of the argument. *See id.* The Ninth Circuit stated that where no evidentiary hearing is held by the district court, Augusta's assertion that there were insufficient facts is irrelevant because on appeal the court will presume the facts set forth in the pleadings and supporting declarations can be proven. *See id.*

[192] *See id.* at 1086. *See also* Gordy v. Daily News, L.P., 95 F.3d 829, 831 (9th Cir. 1996).

A. GENERAL JURISDICTION

The Ninth Circuit initially distinguished general personal jurisdiction from specific personal jurisdiction.[193] The Ninth Circuit recognized that the United States Supreme Court has held that a defendant, who has "substantial" or "continuous and systematic" contacts with the forum state, may be haled into court in the forum state regardless of the contacts' relation to the suit.[194] The Ninth Circuit agreed with the trial court's determinations that Augusta's contacts with California did not amount to substantial or continuous and systematic contacts.[195] The Ninth Circuit described Augusta's web site as "passive,"[196] meaning that consumers could not use it to make purchases or to exchange information.[197] Finally, the court determined that occasional unsolicited sales of tournament tickets and merchandise to residents of California did not suffice to meet the general jurisdiction standard.[198] Therefore, the court concluded that Augusta's contacts were not sufficient to establish general jurisdiction.[199]

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[193] *See Bancroft*, 223 F.3d at 1086.

[194] *See id. citing* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 415 (1984). The Ninth Circuit considered the following factors in determining if the defendant's contacts are sufficient to support general personal jurisdiction; whether the defendant: 1) makes sales, solicits or engages in business in the forum state or serves its markets; 2) has a designated agent for service of process; 3) is licensed or incorporated in the forum. *See Bancroft*, 223 F.3d at 1086, *citing* Hirsch v. Blue Cross, Blue Shield of Kansas City, 800 F.2d 1474, 1478 (9th Cir. 1986).

[195] *See Bancroft*, 223 F.3d at 1086. The standard for establishing general jurisdiction is "fairly high." *See* Brand v. Menlove Dodge, 796 F.2d 1070, 1073 (9th Cir. 1986). The court noted Augusta had no bank accounts in California, was not licensed or registered to do business in California, and did not pay taxes in California. *See Bancroft*, 223 F.3d at 1086. Additionally, Augusta did not target print, television, or radio advertising toward California. *See id.*

[196] A passive web site generally only furnishes information to those who visit the site, and is not a sufficient basis for the exercise of personal jurisdiction. *See* Tech Heads, Inc. v. Desktop Service Center, Inc., 105 F.Supp.2d 1142, 1149-1150 (D. Or. 2000).

[197] *See Bancroft*, 223 F.3d at 1086.

[198] *See id.* The court distinguished between Augusta's license agreements with two television networks and a few vendors in California as doing business with California not in California. *See id.*

[199] *See id.*

B. SPECIFIC JURISDICTION

The Ninth Circuit next analyzed whether the trial court had specific personal jurisdiction over Augusta on the basis that the case arose out of Augusta's forum related acts.[200] The Ninth Circuit stated that specific jurisdiction exists if the defendant has purposefully availed himself of the privileges of the forum state.[201] Additionally, the claim must have arisen out of the defendant's forum related activities and lastly, the exercise of jurisdiction over the defendant must be reasonable.[202]

1. Purposeful Availment

The first prong of the specific jurisdiction test requires that the defendant purposefully avail him or herself of the privileges of the forum state.[203] In addressing the first prong, the Ninth Circuit focused on Augusta's letter to NSI in Virginia.[204] The letter, which contested Bancroft's right to use the "masters.com" domain name, triggered NSI's dispute resolution policy forcing Bancroft to bring suit or lose control of its web site.[205] The Ninth Circuit conducted a prima facie jurisdictional analysis and was, therefore, required to accept Bancroft's factual allegations as true.[206] Bancroft alleged that the letter sent by Augusta to NSI in Virginia intended to affect Bancroft in California and thereby satisfied the effects test.[207] The Ninth Circuit recognized that in order for the *Calder* effects test to be satisfied there must have been an: 1) intentional act; 2) expressly aimed at the forum state; 3) causing harm that the defendant knows the brunt of which will be felt in the forum state.[208]

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[200] *See id.*

[201] *See Bancroft*, 223 F.3d at 1086. *See also* Cybersell Inc. v. Cybersell Inc., 130 F.3d 414, 416 (9th Cir. 1997).

[202] *See Bancroft*, 223 F.3d at 1086.

[203] *See Bancroft*, 223 F.3d at 1086, *citing Cybersell*, 130 F.3d at 416.

[204] *See Bancroft*, 223 F.3d at 1087.

[205] *See id.*

[206] *See id.*

[207] *See id.*

[208] *See id. See also Panavision*, 141 F.3d at 1321.

Applying the effects test, the Ninth Circuit summarily concluded that Augusta's letter to NSI was an intentional act because Augusta acted intentionally when it sent the letter.[209] In addition the court found that the letter sent to NSI in Virginia satisfied the third "brunt of the harm" requirement of the effects test.[210] The court stated that since the effect of the intentional act was to cause harm, the brunt of which was felt in California and Augusta knew the harm would be felt in California, the third requirement had been satisfied.[211]

Regarding the express aiming requirement, the Ninth Circuit noted that the effects test would not be satisfied by a mere foreign act with foreseeable effects in the forum state.[212] Rather, the plaintiff must show "something more."[213] The court stated that "express aiming" at the forum is the "something more" discussed but not spelled out in prior cases.[214] The court then stated that the express aiming requirement is satisfied if the defendant targeted wrongful conduct at an individual whom the defendant knew to be a resident of the forum state.[215] The court asserted that individualized targeting of wrongful conduct stood as the distinguishing fact in determining whether the effects test could be satisfied.[216]

The Ninth Circuit illustrated the individualized targeting requirement by contrasting *Calder* with *Cybersell v. Cybersell.*[217] The court noted that in *Calder*, the defendants' knowledge that the article would potentially cause an injury, the brunt of which would be felt in California and its intentional publication sufficed to establish jurisdiction over the defend-

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[209] *See Bancroft*, 223 F.3d at 1088.

[210] *See id.*

[211] *See id.*

[212] *See id.* at 1087.

[213] *See id. citing Panavision,* 141 F.3d at 1322.

[214] *See Bancroft, 223* F.3d at 1087. *See also Panavision,* 141 F.3d 1316, 1322; *Cybersell,* 130 F.3d 414, 418.

[215] *See Bancroft,* 223 F.3d at 1087-1088.

[216] *See id.* at 1088. *See also* Metropolitan Life Insurance Co. v. Neaves, 912 F.2d 1062, 1065-1066 (9th Cir. 1990); Brainerd v. Governors of the University of Alberta, 873 F.2d 1257, 1259-1260 (9th Cir. 1989); Gordy v. Daily News, L.P., 95 F.3d 829, 833 (9th Cir. 1996); Lake v. Lake, 817 F.2d 1416, 1422-1423 (9th Cir. 1987); Haisten v. Grass Valley Med. Reimbursement Fund, Ltd., 784 F.2d 1392, 1398 (9th Cir. 1986).

[217] See Bancroft, 223 F.3d at 1088.

ants.[218] Since the article in *Calder*, was written about Shirley Jones, a well-known Californian, the writer clearly knew that she would suffer the brunt of the harm in California.[219] However, in *Cybersell,* the court determined jurisdiction was not proper because no evidence indicated that the defendants knew of the existence of the plaintiffs and individually targeted wrongful conduct at them.[220] In *Cybersell*, the defendant allegedly infringed on a service mark held by an Arizona corporation by merely maintaining a home page on the World Wide Web that was accessible to Arizonans.[221] Thus, the *Cybersell* court concluded that the defendant did not individually target the plaintiff.[222]

In analyzing the letter sent by Augusta to NSI, the Ninth Circuit found that Augusta's letter more closely resembled the expressly aimed actions described in *Calder*.[223] Similar to *Calder*, the court found that the letter individually targeted Bancroft in California where Bancroft was doing business almost exclusively.[224] Additionally, the court likened *Bancroft* to *Panavision* in which the defendant, Toeppen, had deliberately chosen to register the plaintiff Panavision's trademarks in order to extort compensation.[225] In *Panavision,* Toeppen individually targeted Panavision's web site, knowing that Panavision had trademark rights to the web site's name.[226] Furthermore, Panavision's principal place of business was in the forum state, California.[227] The *Panavision* court, therefore, concluded that the express aiming requirement was satisfied by Toeppen's "scheme" to register trademarks in order to extort money from Panavision.[228] The Ninth Circuit analogized that, like Toeppen, Augusta knew Bancroft held the "masters.com" web site, which would be affected if the NSI dispute resolu-

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[218] *See id.* at 1087. *See also* Calder v. Jones, 465 U.S. 783, 789-790 (1984).

[219] *See Calder,* 465 U.S. at 789-790.

[220] *See Bancroft,* 223 F.3d at 1088, *citing* Cybersell Inc. v. Cybersell Inc., 130 F.3d 414, 420 (9th Cir. 1997).

[221] *See Cybersell Inc,* 130 F.3d at 415.

[222] *See id.* at 419-420.

[223] *See Bancroft,* 223 F.3d at 1088.

[224] *See id.*

[225] *See id. See also Panavision,* 141 F.3d at 1321.

[226] *See Bancroft, 223* F.3d a 1088, *citing Panavision,* 141 F.3d at 1321.

[227] *See Panavision,* 141 F.3d at 1321.

[228] *See id.* 1321-1322.

tion policy were triggered.[229] Thus, Augusta's letter to NSI individually targeted Bancroft in the forum state of California thereby satisfying the express aiming requirement.[230]

Since writing and sending the letter was an intentional act, targeting Bancroft in California, and Augusta knew that the brunt of the harm would be felt in California, the effects test had been satisfied.[231] Therefore, having satisfied the effects test, the Ninth Circuit determined that the purposeful availment prong for specific jurisdiction had been met.[232]

2. Contacts Gave Rise To The Suit.

The Ninth Circuit looked to whether Augusta's contacts, which gave rise to its purposeful availment of the California forum, also gave rise to the current suit.[233] Utilizing a "but for" causation analysis,[234] the court stated that but for the letter that Augusta sent to NSI, triggering the dispute resolution policy, Bancroft would not have been forced to bring suit against Augusta.[235] Therefore, the court concluded that the second prong of specific jurisdiction had been met.[236]

3. Reasonableness Of Exercising Specific Jurisdiction

The Ninth Circuit also disagreed with the district court's finding that California's exercise of jurisdiction was unreasonable, because the defendant did not present a compelling case regarding the seven reasonableness factors.[237] If a defendant

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[229] *See Bancroft*, 223 F.3d at 1088. Although the court did not say so, one may assume that because Bancroft conducted almost all of its business in California, Augusta knew or should have known that California was the forum where the tortious harm would occur.

[230] *See id.*

[231] *See id.*

[232] *See id.*

[233] *See id.*

[234] *See* Ziegler v. Indian River County, 64 F.3d 470, 474 (9th Cir. 1995).

[235] *See Bancroft,* 223 F.3d at 1088.

[236] *See id.*

[237] *See id.* at 1088-1089. The court stated that a general denial of reasonableness, supported by questionable precedent is not enough to defeat *Burger King's* requirement that the defendant present a compelling case regarding the seven reasonableness factors. *See id., citing* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-477 (1985).

has purposefully directed his activities towards the forum state, the defendant must present a compelling case that other considerations would render the exercise of jurisdiction unreasonable.[238] The Ninth Circuit distinguished those cases based solely on cease and desist letters, where jurisdiction has been found unreasonable, from Augusta's letter to NSI.[239] The court stated that the letter did more than warn or threaten Bancroft because under NSI's dispute resolution policy the letter operated to automatically place Bancroft's web site on hold unless Bancroft filed suit.[240] The court concluded that the district court erred in finding jurisdiction unreasonable, because Augusta had failed to demonstrate a specific reason why the exercise of jurisdiction would be unreasonable.[241] Thus, the Ninth Circuit reversed the district court's order and remanded for further proceedings.[242]

C. CONCURRING OPINION

Judge Sneed, joined by Judge Trott, concurred in the opinion only on the grounds that on remand it could be shown that Augusta intended to engage in tortious conduct.[243] Judge Sneed stated that had Augusta acted in good faith to protect its trademark, rather than in an effort to effect a conversion of the domain name, California's exercise of jurisdiction was ripe for challenge.[244]

V. CRITIQUE

A. THE EFFECTS TEST: KNOWLEDGE BUT NOT INTENT

In *Bancroft & Masters, Inc. v. Augusta National Inc*, the Ninth Circuit determined that Augusta had committed an intentional tort by sending a letter to NSI.[245] The court reasoned that the letter's triggering of the dispute resolution pol-

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[238] *See Bancroft* 223 F.3d at 1088 citing *Burger King*, 471 U.S. at 476-477.
[239] *See Bancroft,* 223 F.3d at 1089.
[240] *See id.*
[241] *See id.*
[242] *See id.*
[243] *See id.*
[244] *See Bancroft,* 223 F.3d at 1089.
[245] *See id.* at 1088.

icy, which threatened Bancroft's use of its web site, was sufficient to establish that the act was tortious.[246] Had NSI's dispute resolution policy not required that Bancroft's web site be placed on hold, the court would probably not have deemed Augusta's actions as tortious. The concurrence supported the exercise of jurisdiction on the assumption that Augusta "engaged in tortious conduct, i.e., that they intended to effect a conversion of the <masters.com> domain name."[247] While the concurring opinion states that jurisdiction depends on whether a tortious act was committed, the example used suggests that the crucial inquiry was whether the tort had been committed intentionally. Thus, the concurrence concluded that the exercise of jurisdiction turned on whether Augusta's letter to NSI constituted an intentional tortious act.[248]

The negative implications of the concurring opinion suggests that the majority held that jurisdiction would be proper even if Augusta was merely seeking to protect its trademark. Thus, according to the majority opinion the mere fact that Augusta's letter had a tortious effect, that Augusta knew was likely to occur, established jurisdiction under the effects test.[249] The fact that two judges concurred, stating that jurisdiction might not be proper if Augusta was merely seeking to protect its trademark from dilution, implies that knowledge without intent would not permit the exercise of jurisdiction under the concurring opinion.

The disagreement between the majority and concurring opinions seems to be over whether the defendant needs to have only knowledge that a tortious effect is likely to occur, or whether the defendant needs to have intended the tortious effect to occur. The majority's opinion supports the former proposition. This seems correct under the Ninth Circuit's effects test, because the intentional act prong is analyzed separately from the prong requiring knowledge of the tortious effect.[250]

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[246] *See id.*

[247] *See id.* at 1089.

[248] *See id.*

[249] *See Bancroft,* 223 F.3d at 1087-1088.

[250] The separation of the knowledge and intent prongs would not pose such a problem if the intent requirement was analyzed by using the three elements of intent described by the Restatement. The Restatement requires "a state of mind (2) about consequences of an act (or omission) and not about the act ifself, and (3) it extends

The separation of these prongs led to an unfair result in this case and suggests that the concurring opinion offers the wiser course.[251] The result of the majority opinion seems unfair because while Bancroft had agreed to NSI's dispute resolution procedure concerning the "masters.com" domain name, Augusta had not. Subjecting a defendant to personal jurisdiction in the forum state on the basis of contractual relations between the plaintiff and a third party is unjust.[252]

B. SPECIFIC JURISDICTION WITHOUT FORUM RELATED ACTIVITIES

Assuming that the effects test was satisfied, the Ninth Circuit in *Bancroft,* allowed the assertion of specific jurisdiction on what appears to be the lowest threshold of forum related activities or contacts allowed to date. In *Calder v. Jones*,[253] the slanderous article was published in a national magazine sold in the State of California. In *Ziegler v. Indian River County*,[254] the defendants improperly obtained a Florida arrest warrant which they then used to effectuate Ziegler's arrest in California.[255] In *Panavision Int'l, L.P. v. Toeppen*,[256] the defendant sent letters to California demanding payment and

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not only to having in the mind a purpose (or desire) to bring about given consequences but also to having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act." PROSSER AND KEETON ON THE LAW OF TORTS 34 (W. Page Keeton et al. eds., 5th ed. 1984) (emphasis and footnotes omitted). The Bancroft court merely stated that Augusta acted intentionally when it sent its letter to NSI. *See Bancroft*, 223 F.3d at 1088.

[251] In *Calder*, this distinction is difficult because while the defendant's intended to libel the plaintiff, it was not shown that they intended the tortious effect of their libel. Rather, the intent of their article was to attract readers. Thus, a requirement that the defendant intended the tortious effect may conflict with the holding of *Calder*.

[252] Under the reasoning of *Bancroft*, a plaintiff's contractual relations with a third party allowed for the exercise of jurisdiction over the defendant. This is unfair because generally the court focuses on the defendant's forum related conduct in determining whether jurisdiction may be asserted. When a court exercises jurisdiction beyond its territory the due process inquiry is whether the *defendant's acts* have given rise to notice that jurisdiction might be asserted. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-475 (1985).

[253] *See* 465 U.S. 783, 789-790 (1984).

[254] 64 F.3d 470 (9th Cir. 1995).

[255] *See id.* at 474.

[256] 141 F.3d 1316 (9th Cir. 1998).

threatening Panavision with future tortious conduct.[257] In *Meade Instruments Corp. v. Reddwarf Starware, LLC.*,[258] the defendant sent a cease and desist letter to a California customer of Meade's, which caused harm to Meade in California.[259] Thus, while in all these cases the defendant's contacts with California were highly attenuated, in each case the defendant acted in a manner that established a contact, tie, or relationship within the forum state of California. The Ninth Circuit in *Bancroft* required no such entry into the forum, or forum related activity. Augusta in Georgia sent its letter to NSI in Virginia. Augusta had no contractual relations with NSI concerning its trademark rights for the name "masters." The court merely stated that the "contacts constituting purposeful availment must be the ones that give rise to the current suit."[260] It appears the court considered either Augusta's letter to NSI or the letter's effect in California as the contact constituting purposeful availment.[261]

If the court used the effect of Augusta's letter as the basis for satisfying the requirement that the suit arose out of forum related activities; the requirement is pointless because anyone injured by an intentional tort could automatically bring suit in whatever forum they felt the effect.[262] Specific jurisdiction requires that the suit arose out of forum related activities, but under *Bancroft,* the effects test is used to satisfy the requirement.[263] The effects test does not, however, require there to be forum related activity.[264] Therefore, using the effects test to satisfy the requirement that the suit arose out of forum re-

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[257] *See id.* at 1318-1319.

[258] 47 U.S.P.Q 2d. 1157 (C.D.Cal. 1998).

[259] *See id.* at 1157-1159.

[260] *See Bancroft,* 223 F.3d at 1088.

[261] If the court relied on the letter alone (and not its effect), it is a stretch to paint the letter a forum related activity.

[262] Of course, the effects test would first have to be satisfied and jurisdiction would have to be reasonable.

[263] *See Bancroft,* 223 F.3d at 1088.

[264] The express aiming prong of the effects test is satisfied when the defendant engages in tortious conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state. *See Bancroft,* 223 F.3d at 1087. Such conduct is not however always forum related where it is possible to injure the plaintiff in some foreign state. If such conduct did establish a relationship with the forum, it is unclear what that the relationship consists of other than a tortious effect.

lated activities is illogical. A clearer test might state that in order for a court to assert jurisdiction over an out of state defendant for an intentional tort, the effects test must be satisfied and jurisdiction must be reasonable. This removes the requirement that the suit arose out of forum related activity and thus separates the test from the specific jurisdiction analysis. Since the Ninth Circuit does not appear to be requiring forum related activities anyway, clarification of the test would be appropriate.[265]

VI. CONCLUSION

The *Bancroft* decision adds to the debate among the district courts in the Ninth Circuit as to whether a cease and desist letter alone constitutes sufficient contacts for the assertion of jurisdiction over a defendant. The language used by the *Meade* and *Wise* courts indicates disagreement on the issue.[266] However, the reasoning of *Bancroft* supports the conclusion that the cases are not in conflict and are in fact distinguishable.[267] The question is not whether a cease and desist letter creates a sufficient basis for the exercise of juris-

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[265] *See* Myers v. Bennett Law Offices, No. 99-15873, No. 99-15902, 2001 U.S. App. LEXIS 1539, at *14 (9th Cir. Feb. 5, 2001) (where the test used is whether defendant's conduct outside of the forum caused plaintiff to suffer harm in the forum). In *Myers*, the Utah defendant's contacts with National Data Research in Arizona, had a tortious effect in Nevada. *See id.; see also* Report & Recommendation of U.S. Mag. J. at 6, Myers v. Bennett Law Offices, DC No. CV-S-98-01179-DWH-(RHL). The District Court for the District of Nevada dismissed for lack of personal jurisdiction, apparently relying on the recommendation of the U.S. Magistrate Judge, that a foreign act causing plaintiff injury does not give rise to jurisdiction in the forum state of Nevada based on the mere fortuitous fact that plaintiff's reside in Nevada. *See* Report & Recommendation of U.S. Mag. J. at 6, Myers, DC No. CV-S-98-01179-DWH-(RHL); *Myers*, 2001 U.S. App. LEXIS 1539, at *1. The Ninth Circuit reversed, finding that the defendant's communication from Utah to Arizona was sufficient to permit the exercise of personal jurisdiction in Nevada based on the effects of those acts. *See Myers*, 2001 U.S. App. LEXIS 1539, at *17. The Ninth Circuit used the novel term "local conduct" to describe the basis on which the claim arose. *See id.* at *14. The court did not clarify on what authority it relied for determining that local conduct could satisfy the second prong of its personal jurisdiction analysis, which it merely described as causation. *See id.*

[266] *See* Meade Instruments Corp. v. Reddwarf Starware LLC., 47 U.S.P.Q. 2d 1157, 1158 n.4 (C.D. Cal. 1998); Wise v. Lindamood, 89 F.Supp. 2d 1187, 1192 (D.Colo. 1999).

[267] *See Bancroft*, 223 F.3d at 1087-1088.

diction, but rather whether the letter in and of itself has an intentional tortious effect. The *Bancroft* court found that a tortious effect resulted from Augusta's intentional act and that the application of the effects test was appropriate.[268] This reasoning, therefore, distinguishes *Meade,* in which the court found a tortious effect from *Douglas Furniture* and *Wise*, in which no tortious effect was found.[269]

As the use of the Internet grows more cases will involve only the most remote cyber contacts. The *Bancroft* facts could have easily revolved around an e-mail as opposed to a letter. *Bancroft* suggests that for cases involving remote contacts, the crucial jurisdictional inquiry is whether the contacts have a tortious effect. The *Bancroft* court's determination that Augusta's letter constituted an intentional tort is questionable and clearly two concurring judges had some reservations. However, it is apparent that the exercise of jurisdiction turned on this determination. Furthermore, the *Bancroft* court indicated that the lack of forum related activities for an intentional tort does not bar the assertion of personal jurisdiction over an out of state defendant.[270] Thus, it is evident that the Ninth Circuit is leading the expansive jurisdictional trend of the twentieth century into the twenty-first century.

*Christopher Allen Kroblin**

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[268] In *Bancroft,* no actual adverse effect to Bancroft's business was shown. Rather the eminent threat that Bancroft's web site would be placed on hold was enough to permit the use of the effects test. *See Bancroft,* 223 F.3d at 1087.

[269] The *Meade,* decision relied on the chilling effect on business caused by the cease and desist letter. *See Meade,* 47 U.S.P.Q. 2d at 1159. In *Douglas Furniture,* the court determined that the cease and desist letters did not constitute tortious conduct in and of themselves. *See Douglas Furniture,* 963 F.Supp. at 902. The *Douglas Furniture* court did not, therefore, apply the effects test and instead dismissed under the purposeful availment test. *See id. See also* Wise, 89 F.Supp. 2d at 1192.

[270] *See also Myers*, 2001 U.S. App. LEXIS 1539, at *17 (allowing the exercise of personal jurisdiction on the basis of a mere effect in the forum state regardless of the absence of forum related activities).

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