

By Kent A. Halkett

Determining Personal Jurisdiction in Internet-Related Litigation

Courts have developed approaches to the challenges posed by Internet usage

Over the past decade, the Internet has become a mainstay of interstate and international commerce as well as the noncommercial exchange of information. The rapid expansion of Internet use by individuals and entities has spawned myriad legal issues in the United States and other countries, including a significant threshold concern for Internet users: Where can they be sued based upon their use of the Internet? In other words, what forum may exercise personal jurisdiction over defendant Internet users?

The parameters of personal jurisdiction based upon a party's use of the Internet are evolving in federal and state courts in the United States as well as courts in other countries. Not surprisingly, federal and state courts in California—the home of Silicon Valley and the entertainment industry—have taken a leading role in developing the law in this area. The California Supreme Court, however, entered the fray for the first time in late 2002 with its decision

in *Pavlovich v. Superior Court*,¹ noting that “the so-called Internet revolution has spawned a host of new legal issues as courts have struggled to apply traditional legal frameworks to this new communication medium. Today, we join this struggle and consider the impact of the Internet on the determination of personal jurisdiction.”² By doing so, the California Supreme Court became one of the few state high courts to render an opinion regarding this issue.³

The U.S. Supreme Court has yet to publish any decisions on personal jurisdiction and the Internet, but it may be looking for an occasion to express its opinion in this new and vital area of the law, particularly in light of the High Court of Australia's recent decision in *Dow Jones & Company Inc. v. Gutnick*⁴ holding that a U.S. corporation was subject to jurisdiction in Australia

based upon the corporation's postings on the Internet. (See “A Ruling from Australia,” page 22). Indeed, the *Pavlovich* decision might provide the U.S. Supreme Court with just such an opportunity. In fact, Justice Sandra Day O'Connor imposed, and then quickly with-

drew, an emergency temporary stay against the defendant in *Pavlovich* in January, and the plaintiff has indicated that it is considering an appeal to the U.S. Supreme Court.

Traditional principles provide

a template for determining whether personal jurisdiction exists, and California state and federal courts have published opinions containing guidance on this issue in Internet-related litigation. All actions seeking to impose a liability or obligation on a particular individual or entity must be brought in a forum that has the authority, or personal jurisdiction, to order the defendant into court. California's personal jurisdiction requirements are codified in its long-arm statute, which provides that “[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.”⁵ Accordingly, a constitutional due process analysis is necessary to determine whether a nonresident is properly subject to

personal jurisdiction in California.

Personal jurisdiction over nonresident individuals and entities may be either “general” or “specific” so long as the forum court's exercise of personal jurisdiction “does not violate “traditional notions of fair play and substantial justice.”⁶ Courts may exercise general jurisdiction over nonresidents when their contacts with the forum state are so “substantial...continuous and systematic” that they should expect to be within the jurisdiction of its courts on any claim.⁷ Alternatively, under a lower threshold, courts may exercise specific jurisdiction over nonresidents when they have “purposefully availed [themselves] of forum benefits” and the claim “arises out of” their contacts with the forum state.⁸ The “purposeful

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availment” requirement for specific jurisdiction may be satisfied in intentional tort cases, under the so-called effects test, which is used to determine whether the defendant’s conduct is aimed at, or has a significant effect in, the forum state.⁹

These fundamental principles apply to U.S. residents and foreigners, although the U.S. Supreme Court has cautioned that “[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.”¹⁰ Apparently, the High Court of Australia is not so reserved.

Sliding Scale and Something More

In the 1990s, during the Internet’s infancy, federal and state courts began addressing the threshold issue of the limits of their exercise of personal jurisdiction over domestic and foreign nonresidents who used the Internet for their personal and commercial activities. In 1997, a federal trial court in Pennsylvania rendered a landmark decision on the issue in *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*¹¹ The *Zippo* court observed that:

The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The cases are scant. Nevertheless, our review of the available cases and materials reveals that *the likelihood that personal jurisdiction can be constitutionally exercised*

is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This *sliding scale* is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of information that occurs on the Web site.¹²

The vast majority of courts addressing the issue after *Zippo* expressly or impliedly adopted its “sliding scale” approach and its emphasis on the factual distinction between active and passive uses of the Internet. Federal and state courts in California have applied such an approach, although the Ninth Circuit in *Cybersell, Inc. v. Cybersell, Inc.*¹³ and *Panavision International, L.P. v. Toeppen*¹⁴ adopted its own “something more” require-

ment, which closely parallels the sliding scale in *Zippo*.

In *Panavision*, the holder of the registered trademarks Panavision and Panaflex, which are used in connection with motion picture camera equipment, accused Toeppen, an Illinois resident, of being a “cyber pirate” who was in the business of stealing valuable trademarks by establishing domain names on the Internet using the trademarks and then selling those domain names to the rightful trademark owners. Panavision brought an action in federal court in Los Angeles against Toeppen for dilution of trademark based upon Toeppen’s attempt to extract \$13,000 from Panavision in exchange for the domain name Panavision.com, which Toeppen had previously registered for himself.

The Ninth Circuit held that Toeppen was subject to specific personal jurisdiction in California even though “simply registering someone else’s trademark as a domain name and posting a web site on the Internet is not sufficient to subject a party domiciled in one state to jurisdiction in another.”¹⁵ It explained, however, that “something more” was required by the federal courts in California. In *Panavision*, that requirement was satisfied because the nonresident defendant’s scheme to extort money from Panavision knowingly injured it “in California where Panavision has its principal place of business and where the movie and television industry is centered.”¹⁶

Two recent federal district courts in California have applied the “something more” test in Internet-related cases. In 1999, in *Quokka Sports, Inc. v. Cup International Ltd.*,¹⁷ the California operator of a Web site named Americascup.com—which claimed to have the exclusive rights to operate “the official website” for the America’s Cup yachting event—brought an action in federal court in San Francisco for trademark infringement and unfair competition against a New Zealand company and its two individual shareholders arising out of the New Zealanders’ operation of several Web sites (including Americascup2000.org.nz) related to the 2000 America’s Cup competition. The trial court held that it had personal jurisdiction over the company and its shareholders. The court reasoned that the New Zealand defendants’ activities in operating their Web sites satisfied the “something more” test because they had “aimed a significant portion of their commercial effort at the United States” and they “apparently targeted the U.S. market because there is substantial interest in the America’s Cup in the U.S.,” particularly in California, which was home to 3 of the 11 teams vying for the yachting trophy that was held, at the time of the dispute, by a team from New Zealand.¹⁸

The *Quokka* court noted that the defen-

A Ruling from Australia

In *Dow Jones & Company Inc. v. Gutnick*,¹ an Australian resident brought an action for defamation in his local Australian court against a U.S. corporation, Dow Jones & Company, Inc. The lawsuit was based on an article that contained allegedly derogatory references to the plaintiff and appeared in an edition of Barron’s Online, which Dow Jones (headquartered in New York) posted on its WSJ.com Web site. Dow Jones challenged the Australian court’s personal jurisdiction over it, but the plaintiff countered that he had been defamed in Victoria, Australia (where he lived) and limited his claim to the damages caused to his reputation there.

Applying Australian law, which ordinarily finds that the tort of defamation is deemed to arise in the jurisdiction in which the damage to the plaintiff’s reputation occurs, the High Court of Australia held that personal jurisdiction over Dow Jones existed in Australia. It reasoned that “[i]n the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on the computer of a person who has a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done.” Moreover, one justice noted his concern that if the argument by Dow Jones opposing jurisdiction in Australia were to be accepted by the Australian high court, the practical effect would be to impose “an American legal hegemony in relation to Internet publications” and, further, “to place commercial publishers in [Australia] at a disadvantage to commercial publishers in the United States.”—K.A.H.

¹ Dow Jones & Co. Inc. v. Gutnick (2002) HCA 56, 194 A.L.R. 433 (2002).

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dants, by using their Web sites to sell books on sailing and sightseeing cruises along the race course off the coast of New Zealand, were “essentially operating as a storefront, selling services and products, and entering into contracts with U.S. advertisers.” The court held that this was the “type of interactive commercial activity, aimed at U.S. consumers, to be evidence of purposeful availment” by the defendants.¹⁹ The court also held that it had personal jurisdiction over both of the company’s individual shareholders based upon their “apparent control over all of the corporate defendants’ contacts with California and the United States.”²⁰

In *Callaway Golf Corporation v. Royal Canadian Golf Association*,²¹ a golf club manufacturer headquartered in California brought an action in federal court in Southern California for trade libel and unfair competition against the nonprofit Royal Canadian Golf Association arising out of the association’s posting of press releases concerning the manufacturer on the association’s Web site. The trial court declined to exercise personal jurisdiction over the association. The court reasoned that the test for specific jurisdiction was not satisfied, particularly because the Canadian association had not purposefully availed itself of the California forum “[s]imply

by maintaining a website accessible to California users and including information [such as press releases related to the manufacturer’s products] on the site.”²² Such activity was too passive for personal jurisdiction under the “something more” test followed by the federal courts in California. Moreover, general jurisdiction did not exist over the Canadian association because its contacts with California were not “continuous, systematic, or substantial,” even though California’s residents could access its Web site anytime.²³

The California Court of Appeal explicitly referenced the sliding scale approach, and specifically did not find personal availment, in *Jewish Defense Organization, Inc. v. Superior Court*.²⁴ In that case, an individual plaintiff brought a defamation action in state court in Los Angeles against an organization headquartered in New York and its founder arising out of allegedly defamatory statements about the plaintiff posted on the organization’s Web site. The plaintiff, Steven Rambam, the president of a private investigative agency located in Brooklyn, New York, employed a California private investigator to assist in an action against Mordechai Levy, the founder of the Jewish Defense Organization. The JDO registered several domain names, including RAMBAM-STEVE.COM, and posted numer-

ous allegedly defamatory statements concerning Rambam, including that he was a “dangerous psychopath” and “an anti-Semite who has been known to entrap Jews with no prior criminal record into committing crimes.”²⁵ Levy and the JDO moved to quash service, but the trial court denied their motion.

The court of appeal, however, found that the “defendants’ conduct in registering [the plaintiff’s] name as a domain name and posting passive Web sites on the Internet is not sufficient to subject them to jurisdiction in California.”²⁶ Moreover, it held that the California courts could not exercise personal jurisdiction over these defendants based upon their “contracting, via computer, with Internet service providers, which may be California corporations which may maintain offices or databases in California” because such conduct was insufficient to constitute purposeful availment for specific jurisdiction purposes.²⁷

The Pavlovich Decision

When the California Supreme Court weighed in last year in *Pavlovich*, it held, by a 4 to 3 majority, that California courts could not exercise personal jurisdiction over a Texas resident based upon postings that he had made on a Web site he operated while attending Purdue University in Indiana. Although

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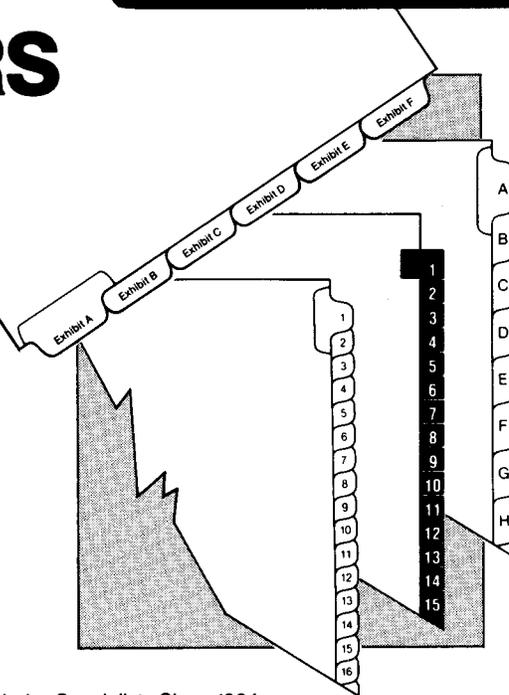
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the majority expressly “emphasize[d] the narrowness of [its] decision” given the particular facts of the case,²⁸ it clarified and advanced California law regarding the constitutional requirements for personal jurisdiction in Internet-related litigation.

The defendant, Matthew Pavlovich, is a resident of Texas and president of a technology firm there. While he was attending college, Pavlovich founded and headed a video project called LiVid that, among other things, sought to enable the decryption of DVDs containing motion pictures. LiVid operated a passive Web site on which it posted the source code of a program it called DeCSS. This program allowed its users to circumvent the Content Scrambling System (CSS) used to encrypt and protect copyrighted motion pictures on DVDs. DVD Copy Control Association, Inc. (DVD CCA), a nonprofit trade association created by the DVD industry to control and administer licensing of the CSS technology, brought an action for misappropriation of trade secrets against Pavlovich and others in state court in San Jose, California. The DVD CCA was seeking injunctive relief.

Pavlovich asserted that California state courts could not exercise personal jurisdiction over him. The trial court and appellate court

disagreed. The California Supreme Court granted review to determine “whether the trial court properly exercised personal jurisdiction over Pavlovich’s person based solely on the posting of the DeCSS source code on the LiVid Web site.”²⁹ It held that personal jurisdiction did not exist over Pavlovich in California, but that DVD CCA could pursue its claims against him in other forums such as Indiana or Texas.³⁰

The majority reviewed and clarified California law on personal jurisdiction, including the requirements for determining purposeful availment under the effects test. It determined that the knowledge that harm will likely be suffered in the forum state is, by itself, insufficient to satisfy the effects test for determining personal jurisdiction, and that California law required “additional evidence of express aiming or intentional targeting.”³¹ The dissent agreed that “one cannot be sued in another forum simply because his or her conduct has *foreseeable* effects there.”³²

Applying that general principle to Pavlovich, the majority held that “the evidence in the record fails to show that [he] expressly aimed his tortious conduct at or intentionally targeted California.”³³ The dissenting justices, however, opined that

Pavlovich should have reasonably anticipated being brought into California’s courts because “the intended injurious effects of posting DeCSS were aimed directly at the computer hardware industry involved in producing CSS-encrypted DVD players—an industry Pavlovich knew was heavily concentrated in California” and “by publishing material he understood [to be] an infringement of the CSS trade secret, [Pavlovich] took an action calculated to harm the movie industry, which [he] knew was centered in California.”³⁴

With respect to the Internet, the supreme court acknowledged that “[a]lthough we have never considered the scope of personal jurisdiction based solely on Internet use, other courts have considered this issue, and most have adopted a sliding scale analysis.”³⁵ It quoted *Zippo* and effectively endorsed the sliding scale approach (as the court of appeal had done in the *Jewish Defense Organization* decision).

In addition, the majority observed that: Pavlovich’s alleged conduct in posting a passive Web site on the Internet is not, by itself, sufficient to subject him to jurisdiction in California. Creating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but,

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without more, it is not an act purposefully directed toward the forum state. Otherwise, personal jurisdiction in Internet-related cases would almost always be found in any forum in the country. Such a result would vitiate long-held and inviolate principles of personal jurisdiction.³⁶

The dissent agreed:

[The] mere operation of an Internet Web site cannot expose the operator to suit in any jurisdiction where the site's contents might be read, or where resulting injury might occur. Communications by a universally accessible Internet Web site cannot be equated with "express aiming" at the entire world.³⁷

The dissent diverged from the majority, however, by criticizing the characterization of Web sites as "passive" when they include "content intended and expected to harm particular individuals, entities, or interests in specific places."³⁸

Significantly, the California Supreme Court did not foreclose the possibility of exercising personal jurisdiction in California over a nonresident Internet user based upon a passive Web site. Rather, as the dissenting opinion explained:

[D]efendants who aim conduct at particular jurisdictions, expecting and intending that injurious effects will be felt in those specific places, cannot shield themselves from suit there simply by using the Internet, or some other generalized medium of communication, as the means of inflicting harm....In such circumstances, the defendant is not exposed to universal and unpredictable jurisdiction. He faces suit only in a particular forum where he directed his injurious conduct, and where he must reasonably anticipate being called to account.³⁹

In essence, the California Supreme Court split almost evenly on that factual distinction with respect to Pavlovich—the four-member majority (lead by Justice Brown) concluded that he had not crossed that line, whereas the three-member dissent (lead by Justice Baxter) found that he had done so based upon the extensive evidentiary record.

Pavlovich avoided personal jurisdiction in California, but other Internet users potentially causing harm to California residents and interests should not take much comfort from this result. The California Supreme Court noted that its decision was narrow and indicated that, with a slightly different set of facts, it might have come to a different conclusion. Domestic and foreign nonresidents who use the Internet should be aware that

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they may be haled into court in California by local individuals and entities under California's long-arm statute and the expanding body of case law, including *Pavlovich*. ■

¹ *Pavlovich v. Superior Court*, 29 Cal. 4th 262 (2002).
² *Id.* at 266.

³ *See, e.g., Metcalf v. Lawson*, 802 A. 2d 1221 (N.H. 2002) (New Hampshire Supreme Court noting that "most courts hold that the constitutionality of a State's exercise of jurisdiction is proportionate to the nature and quality of the commercial activity the defendant conducts over the Internet" and that the analytical framework commonly applied in such cases is the sliding scale approach in *Zippo*); *Klun v. American Suzuki Motor Corp.*, 56 P. 3d 829 (Kan. 2002) (Kansas Supreme Court observing that "[p]ersonal jurisdiction is not appropriate when Internet use involves a passive web site").

⁴ *Dow Jones & Co. Inc. v. Gutnick* (2002) HCA 56, 194 A.L.R. 433 (2002).

⁵ CODE CIV. PROC. §410.10; *Pavlovich*, 29 Cal. 4th at 268.

⁶ *Vons Cos., Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 444-45 (1996) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *Pavlovich*, 29 Cal. 4th at 268-69 (following *Vons*).

⁷ *Vons*, 14 Cal. 4th at 445-46 (citing, e.g., *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1984)).

⁸ *Id.* at 446-48 (citations omitted); *Pavlovich*, 29 Cal. 4th at 269 (following *Vons*).

⁹ *Calder v. Jones*, 465 U.S. 783 (1984) (establishing the effects test); *Pavlovich*, 29 Cal. 4th at 269-70 (explaining *Calder* and the application of the effects test in cases involving intentional torts, including business torts).

¹⁰ *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (citation omitted).

¹¹ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

¹² *Id.* at 1123-24 (citations omitted, emphasis added).

¹³ *Cybersell, Inc. v. Cybersell, Inc.*, 130 F. 3d 414, 418 (9th Cir. 1997).

¹⁴ *Panavision Int'l, L.P. v. Toeppen*, 143 F. 3d 1316, 1322 (9th Cir. 1998).

¹⁵ *Id.* at 1322 (citation omitted).

¹⁶ *Id.* (footnote omitted).

¹⁷ *Quokka Sports, Inc. v. Cup Int'l Ltd.*, 99 F. Supp. 2d 1105 (N.D. Cal. 1999).

¹⁸ *Id.* at 1111-12.

¹⁹ *Id.* at 1112.

²⁰ *Id.* at 1114.

²¹ *Callaway Golf Corp. v. Royal Canadian Golf Ass'n*, 125 F. Supp. 2d 1194 (C.D. Cal. 2000).

²² *Id.* at 1204.

²³ *Id.* at 1208.

²⁴ *Jewish Def. Org., Inc. v. Superior Court*, 72 Cal. App. 4th 1045 (1999).

²⁵ *Id.* at 1050.

²⁶ *Id.* at 1060 (footnote and citation omitted).

²⁷ *Id.* at 1062.

²⁸ *Pavlovich v. Superior Court*, 29 Cal. 4th 262, 278 (2002).

²⁹ *Id.* at 268.

³⁰ *Id.* at 279.

³¹ *Id.* at 273.

³² *Id.* at 293 (footnote omitted, emphasis in original).

³³ *Id.* at 273.

³⁴ *Id.* at 288.

³⁵ *Id.* at 274.

³⁶ *Id.* at 274-75 (citations and internal punctuation omitted).

³⁷ *Id.* at 289 (citations omitted, emphasis in original).

³⁸ *Id.* at 290 n.4.

³⁹ *Id.* at 289-90 (citations and footnote omitted).



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