PAVLOVICH V. SUPERIOR COURT OF SANTA CLARA COUNTY

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Over the last several years, courts and commentators alike have attempted to establish when the exercise of personal jurisdiction over the Internet is appropriate. In conducting their analyses, they have sought to balance competing interests—limiting jurisdiction over the Internet while ensuring plaintiffs adequate fora to protect and enforce their rights. In trying to formulate a test that properly balances these objectives, and provides consistent and predictable outcomes, courts and commentators have proposed various standards.

This Note analyzes the state of Internet jurisdiction one year into the new millennium. Using the case of Matthew Pavlovich as its vehicle, this Note surveys recent case law on the exercise of personal jurisdiction over the Internet and demonstrates the inconsistency that currently exists. Underlying this inconsistency, however, is a common thread whereby courts implicitly consider the "bad faith" of defendants when deciding whether to exercise jurisdiction. In proposing a return to the reasonableness prong of the jurisdictional analysis, this Note attempts to formulate a test for Internet jurisdiction that considers this common thread in a concrete manner.

I. CASE SUMMARY

A. Facts

Jon Johansen, a Norwegian teenager, purchased a DVD player while on vacation elsewhere in Europe.[1] Upon returning home to Norway, he discovered that it would not play Norwegian DVDs due to Region Code Restrictions.[2] Using their expertise with Linux, he and a couple of others were able to decrypt the software safeguards employed by the consortium

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1. DVD Update: Movie Studios Admit DeCSS Not Related to Piracy, available at http://www.eff.org/IP/Video/DVD_Updates/20000718_dvd_update.html (Jul. 18, 2000).

2. *Id.*

of DVD manufacturers.[3] They posted the solution, DeCSS, to a Linux Video ("LiVid") list on the Internet.[4]

Matthew Pavlovich was and continues to be a leader in the open source movement, the purpose of which is to make as much information available over the Internet as possible.[5] Pavlovich founded and operated the LiVid project, aimed at aiding the development of an unlicensed system for DVD playback and copying.[6] Pavlovich owned and operated a website called "livid.on.openprojects.net" where he posted the DeCSS program. DeCSS was the solution to the CSS, the DVD Copy Control Association's copy protection system, or "Content Scramble System." The DeCSS program consisted of misappropriated trade secrets derived through unauthorized reverse engineering.[7] Despite his knowledge of how the DeCSS program incorporated the trade secrets of the DVD Copy Control Association ("DVD CCA"), Pavlovich sought to and actually disseminated those trade secrets.[8]

B. Procedural History

In December 1999, real party in interest DVD CCA filed a complaint in Santa Clara County Superior Court against Pavlovich and other defendants for misappropriation of trade secrets.[9] On June 6, 2000, Pavlovich filed a motion to quash service of summons on the ground that the superior court lacked personal jurisdiction.[10] A student in Indiana and resident of Texas, Pavlovich claimed to have insufficient contacts with the State of California to warrant the exercise of jurisdiction by the state.[11] On August 30, 2000, the superior court denied petitioner's motion to quash.[12]

In mid-September 2000, Pavlovich filed a petition for writ of mandate with the Court of Appeal of California for the Sixth Appellate District ("Court of Appeal") to compel the trial court to quash the service of process.[13] The Court of Appeal summarily denied Pavlovich's writ petition on

3. *Id.*
4. *Id.*
5. Pavlovich v. Super. Ct. of Santa Clara County, 109 Cal. Rptr. 2d 909, 911 (Ct. App. 2001), *hearing granted*, No. S100809 (Cal. Dec. 12, 2001).
6. *Id.* at 911-12.
7. *Id.* at 912.
8. *Id.*
9. *Id.* at 911.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

October 11, 2000.[14] Twelve days later, Pavlovich filed a petition for review with the California Supreme Court.[15] On December 19, 2000, the California Supreme Court granted review and transferred the case back to the Court of Appeal "with directions to vacate its order denying mandate and to issue an order directing respondent superior court to show cause why the relief sought in the petition should not be granted."[16] The Court of Appeal vacated its order denying mandate, and ordered the superior court to show cause why the relief sought in the petition should not be granted.[17] On August 7, 2001, the Court of Appeal again denied Pavlovich's petition for writ of mandate, holding that California's long-arm statute allows for jurisdiction in this case.[18]

C. The Court's Analysis and Conclusion

In finding personal jurisdiction proper, the court relied primarily on several cases outlining personal jurisdiction and the "effects test." The court cited *Calder v. Jones*,[19] in which the United States Supreme Court held that the assertion of jurisdiction was proper if a defendant's conduct caused certain "effects" in the forum state.[20] In *Calder*, the court concluded that California courts had personal jurisdiction over the defendant in Florida because the defendant's conduct was "calculated to cause injury to [the] respondent in California."[21]

The court also relied upon the California Supreme Court's decision in *Vons Companies, Inc. v. Seabest Foods, Inc.*[22] In *Vons*, the California Supreme Court stated that the assertion of personal jurisdiction in California state courts over a nonresident defendant who had not been served with process comported with due process if the defendant had such minimum contacts with the state that assertion of jurisdiction did not violate "traditional notions of fair play and substantial justice."[23] The court held that the

14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 912. On December 12, 2001, the California Supreme Court again granted review of the Court of Appeal's decision. *See* Supreme Court Minutes, *available at* http://www.courtinfo.ca.gov/courts/minutes/ documents/SDEC12A.PDF (Dec. 28, 2001); *see also* Michael Bartlett, California Supreme Court Will Hear DVD-Copying Appeal, NEWSBYTES, Dec. 13, 2001, *at* http://www.newsbytes.com/news/01/172967.html.
19. 465 U.S. 783 (1984).
20. *Id.* at 789.
21. *Id.* at 791.
22. 14 Cal. 4th 434 (1996).
23. *Id.* at 444 (citing Int'l Shoe Co. v. Wash., 326 U.S. 310, 319 (1945); Burnham v. Super. Ct., 495 U.S. 604 (1990)).

minimum contacts requirement is satisfied "if the defendant has purposefully availed himself or herself of forum benefits, and the 'controversy is related to or "arises out of" a defendant's contacts with the forum.'"[24] The *Vons* court went on to hold that "as long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of specific jurisdiction is appropriate."[25]

In applying personal jurisdiction jurisprudence to the case at bar, the Court of Appeal found that Pavlovich "knew that California is commonly known as the center of the motion picture industry, and that the computer industry holds a commanding presence in the state."[26] The court held that Pavlovich "knew or should have known, that the DVD republishing and distribution activities he was illegally doing and allowing to be done through the use of his Web site, while benefiting him, were injuriously affecting the motion picture and computer industries in California."[27] Because California's long-arm statute looks at "the effects, not at the system that delivered and produced those effects," the court concluded that the exercise of jurisdiction was proper.[28]

The court additionally found there to be a sufficient showing of "purposeful availment" within the meaning of *Vons* and cited the general rule that the "purposeful availment" requirement is "satisfied where a defendant's intentional conduct causes harmful effects within the state."[29] The court reasoned that the Internet was the "functional equivalent" of physical presence of the person posting the material on the Internet, and that "[i]t is as if the poster is instantaneously present in different places at the same time, and simultaneously delivering his material at those different places."[30]

Having established that the exercise of jurisdiction was proper, the *Pavlovich* court went on to address the issue of unreasonableness, ultimately concluding that the exercise of personal jurisdiction by the California court was reasonable.[31] As the court noted, "seven factors may be considered in determining whether jurisdiction over a nonresident defendant comports with notions of fair play and substantial justice under the due

24. *Id.* at 446 (internal citations omitted).

25. *Id.* at 452.

26. Pavlovich v. Super. Ct. of Santa Clara County, 109 Cal. Rptr. 2d 909, 915 (Ct. App. 2001), *hearing granted*, No. S100809 (Cal. Dec. 12, 2001).

27. *Id.* at 916.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 917-18.

process clause."[32] These factors include: (1) the extent of a defendant's purposeful interjection; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.[33] Under factor 1, the court found that Pavlovich knew that his actions would affect the DVD and motion picture industries, each with a significant presence in California, and that Pavlovich knew that his website "allowed the illegal publishing and distribution of DVDs."[34] As to factor 2, the court recognized that defending a lawsuit in California would be burdensome to Pavlovich, but nevertheless held that the "inconvenience was not so great as to deprive him of due process."[35] The court briefly noted that factors four through seven also favored California.[36]

II. LEGAL BACKGROUND

A. Personal Jurisdiction—the General Standard

Under the Due Process Clause, a court may not have personal jurisdiction over a defendant who has "no meaningful 'contacts, ties, or relations'"[37] with the forum state. Furthermore, while a defendant need not have been physically present in the forum state for a court to have jurisdiction,[38] there must be certain "minimum contacts" between the defendant and the forum "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[39]

"Minimum contacts" has been defined as "conduct and connection with the forum . . . such that [the defendant] should reasonably anticipate being haled into court there."[40] A court may determine that the defendant's contacts are sufficient for "general jurisdiction" when the defendant's contacts with the forum are "substantial" or "continuous and systematic," in-

32. *Id.* at 917.

33. *Id.* (citing Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1323 (9th Cir. 1998)).

34. *Id.* at 917.

35. *Id.*

36. *Id.* at 918.

37. Burger King v. Rudzewicz, 471 U.S. 462, 471-72 (1985) (citing Int'l Shoe Co. v. Wash., 326 U.S. 310, 319 (1945)).

38. *See id.* at 476.

39. *Int'l Shoe*, 326 U.S. at 316 (citation omitted).

40. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

dicating that the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[41] While the defendant's contacts may be less than continuous when the plaintiff seeks to establish "specific jurisdiction," the plaintiff has the burden of showing that the defendant took action "purposefully directed" at the forum, and that the cause of action arises from this action.[42] The Supreme Court has held that "purposeful availment," or "purposeful direction," occurs when "the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State."[43]

Beyond the basic minimum contacts standard, the court must consider several "reasonableness" factors in its personal jurisdiction analysis.[44] Thus, although a court may determine that the defendant's contacts with the forum meet the minimum contacts threshold, it may nevertheless find personal jurisdiction improper.

B. Personal Jurisdiction on the Internet—a Special Case

1. Inset—the Old Standard

Inset Systems, Inc. v. Instruction Set, Inc.[45] was one of the first cases to address personal jurisdiction over the Internet. In *Inset*, the court held that the defendant's website, which contained advertising and a toll-free number, constituted sufficient minimum contacts for the state to exercise personal jurisdiction.[46]

In *Inset*, the defendant, Instruction Set, Inc. ("ISI"), was a Massachusetts corporation with its principal place of business in Massachusetts.[47] ISI had no employees or offices in Connecticut and did not conduct business on a regular basis in the state.[48] Nevertheless, the district court found specific jurisdiction in Connecticut proper because ISI's website directed its advertising activities towards *all* states.[49] In its holding, the court found that Internet advertisements were even more continuous and persistent

41. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

42. *See* Calder v. Jones, 465 U.S. 783, 789 (1984) (upholding jurisdiction where conduct was allegedly calculated to cause injuries in the forum state and the cause of action arose from this conduct).

43. *Burger King*, 471 U.S. at 475.

44. *See supra* note 33 and accompanying text; *Burger King*, 471 U.S. at 476-77.

45. 937 F. Supp. 161 (D. Conn. 1996).

46. *Id.* at 162-65.

47. *Id.* at 162-63.

48. *Id.*

49. *Id.* at 165.

than television or radio advertisements since the Internet is accessible twenty-four hours a day.[50] The district court therefore concluded that personal jurisdiction over ISI was proper because it had purposefully availed itself of the privilege of doing business within Connecticut.[51]

2. Zippo—*the Sliding Scale*

Less than one year after *Inset, Zippo Manufacturing Company v. Zippo Dot Com, Inc.*[52] described *Inset* as "the outer limits of the exercise of personal jurisdiction based on the Internet."[53] The *Zippo* court attempted to limit the *Inset* approach, instead proposing a sliding scale to govern the jurisdictional inquiry. At one end of the spectrum were defendants who "clearly [did] business over the Internet"[54] with persons in the forum state. Here, exercise of personal jurisdiction was appropriate.[55] At the other end of the spectrum were defendants with "passive Web site[s]"[56] that merely made information available to interested users in foreign jurisdictions. Exercise of jurisdiction over these defendants was not appropriate.[57] In the middle of the spectrum were "interactive Web sites where a user can exchange information with the host computer."[58] The court concluded that "[i]n these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[59]

Several circuit courts and numerous district courts have cited *Zippo* as the proper standard in Internet jurisdiction cases.[60] In practice, however, *Zippo* seems to have added little to these courts' personal jurisdiction

50. *Id.*
51. *Id.*
52. 952 F. Supp. 1119 (W.D. Pa. 1997).
53. *Id.* at 1125.
54. *Id.* at 1124.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *See, e.g.*, Intercon, Inc. v. Bell Atl. Internet Solutions, Inc., 205 F.3d 1244, 1248 (10th Cir. 2000); Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1296 (10th Cir. 1999); Mink v. AAAA Dev't LLC, 190 F.3d 333, 336 (5th Cir. 1999); Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998); Cybersell v. Cybersell, 130 F.3d 414, 418 (9th Cir. 1997); Blumenthal v. Drudge, 992 F. Supp. 44, 55-56 (D.D.C. 1998); SF Hotel Co. v. Energy Invs., Inc., 985 F. Supp. 1032, 1034 (D. Kan. 1997); Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356, 1365 (W.D. Ark. 1997).

analyses, which instead seem to rely exclusively on traditional personal jurisdiction principles.[61]

The first example of this is the Ninth Circuit's decision in *Panavision International, L.P. v. Toeppen*.[62] Here, the defendant was a cybersquatter[63] who had deliberately registered plaintiff Panavision's trademarks as his own domain name for the purpose of extorting money from Panavision.[64] The defendant's websites were completely passive, exhibiting photographs or the word "Hello."[65] The Ninth Circuit did not base its finding of purposeful direction upon the fact that the defendant clearly did business over the Internet, or upon the level of interactivity or the commercial nature of the defendant's websites, as required by *Zippo*. Rather, the court relied on the "intended effects doctrine" set forth by the U.S. Supreme Court in *Calder v. Jones*.[66] By aiming his extortion scheme at Panavision, the defendant intended to cause harm in California where most of the motion picture industry and Panavision's activities were located.[67] The *Panavision* court, in direct opposition to *Zippo*, held that the defendant's use of passive and noncommercial websites supported a finding of personal jurisdiction.

The Tenth Circuit in *Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*[68] similarly cited *Zippo*, but based its finding of specific jurisdiction on the theory of intentional effects established in *Calder*.[69] In *Intercon*, the court held that the defendant knowingly and intentionally directed unauthorized e-mail traffic through the plaintiff's server in the forum state.[70] While the court acknowledged that the defendant may have had legitimate business reasons for not terminating its unauthorized use of the plaintiff's

61. Michael Traynor & Laura Pirri, *Personal Jurisdiction and the Internet: A Return to Basic Principles* (Working Paper, 2002) (on file with author).

62. 141 F.3d 1316 (9th Cir. 1998).

63. A "cybersquatter" can be defined as someone who registers an Internet domain name that is "the same as or related to the name of a trademark of another entity, usually a company or organization." Susan Thomas Johnson, Note, *Internet Domain Name and Trademark Disputes: Shifting Paradigms in Intellectual Property*, 43 ARIZ. L. REV. 465, 476 (2001) (citing G. Peter Albert, *Right on the Mark: Defining the Nexus Between Trademarks and Internet Domain Names*, 15 J. MARSHALL J. COMPUTER INFO. L. 277, 304 (1997)).

64. *Panavision*, 141 F.3d at 1319.

65. *Id.*

66. *Id.* at 1321-22 (citing Calder v. Jones, 465 U.S. 783 (1984)).

67. *See Panavision*, 141 F.3d at 1322.

68. 205 F.3d 1244 (10th Cir. 2000).

69. *Id.* at 1248.

70. *Id.* at 1247-48.

server, it found that the use still constituted purposeful direction.[71] The Tenth Circuit subsequently held that the defendant's activities in the forum state satisfied the minimum contacts required by due process and allowed for the exercise of personal jurisdiction.[72]

Finally, in *Cybersell, Inc. v. Cybersell, Inc.*,[73] another trademark infringement case, the Ninth Circuit indicated its approval of the *Zippo* spectrum,[74] but also affirmed *Asashi Metals*' "something more" requirement for purposeful direction.[75] Finding that a nonresident defendant's advertisements on its corporate website were insufficient by themselves to justify personal jurisdiction, the Ninth Circuit required "'something more' to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state."[76] The *Cybersell* court held that there was no jurisdiction because the defendant did not: (1) encourage forum residents to access its site; (2) otherwise solicit or transact business in the forum state; and (3) intentionally aim its website at the forum, knowing that the plaintiff's trademark rights were likely to be harmed there.[77]

3. *A Move Away from* Zippo

In the last couple of years, courts have begun moving away from the *Zippo* approach—or more accurately, lip service to the *Zippo* approach—and have returned to general personal jurisdiction analyses rooted in Supreme Court precedent.[78] For example, the D.C. Circuit in *GTE New Media Services Inc. v. BellSouth Corporation*[79] rejected the district court's application of the *Zippo* framework.[80] GTE sued five regional Bell operating companies, alleging that they had violated antitrust laws by providing Internet Yellow Pages services.[81] Three of the five defendants moved to

71. *Id.* at 1248.
72. *Id.*
73. 130 F.3d 414 (9th Cir. 1997).
74. *Id.* at 419 ("In sum, the common thread, well stated by the district court in *Zippo*, is 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.'").
75. *Id.* at 418 (citing Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102 (1987)).
76. *Cybersell*, 130 F.3d at 418.
77. *Id.* at 419.
78. Traynor & Pirri, *supra* note 61.
79. 199 F.3d 1343 (D.C. Cir. 2000).
80. *Id.* at 1349-50.
81. *Id.* at 1346.

dismiss for lack of personal jurisdiction.[82] Placing the defendants' Yellow Pages websites in the middle of *Zippo*'s spectrum, the district court upheld specific jurisdiction, finding that the sites were "highly interactive" and provided the defendants with significant economic benefit.[83]

The D.C. Circuit reversed, rejecting the *Zippo* court's assumption that if a defendant's website is active and commercial, as opposed to passive and noncommerical, the defendant has purposefully availed itself of the benefits of doing business in the forum state.[84] The court instead found that the interactive use of the Yellow Pages sites reflected little more than unilateral acts by the D.C. residents themselves; they did not constitute persistent conduct by the defendants.[85] The D.C. Circuit also rejected the premise that the commercial nature of the defendants' websites meant that the defendants were "transacting business" within the forum when residents used the sites.[86] Because users had free access to the sites, and the user and advertiser conducted business transactions directly, the court concluded that the defendants had not actually engaged in any business in the forum.[87] In its holding, the court expressed its concern that broadly applying *Zippo* would establish jurisdiction in almost all Internet jurisdiction cases, undermining the relevance of Due Process.[88] The D.C. Circuit specifically noted that it "d[id] not believe that the advent of advanced technology, say, as with the Internet, should vitiate long-held and inviolate principles of federal court jurisdiction."[89]

Similarly, a few district courts have moved away from *Zippo*, returning to non-Internet specific personal jurisdiction analyses. In *Winfield Collection, LTD v. McCauley*,[90] for example, the court found that a "special Internet-focused test" of personal jurisdiction was unnecessary because the minimum contacts analysis was sufficient.[91] Further, in *Millennium Enterprises, Inc. v. Millennium Music, LP*,[92] the court found that:

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82. *Id.*

83. GTE New Media Servs., Inc. v. Ameritech Corp., 21 F. Supp. 2d 27, 38-39 (D.D.C. 1998).

84. *See GTE New Media*, 199 F.3d at 1349-50.

85. *Id.*

86. *Id.* at 1350.

87. *Id.*

88. *Id.*

89. *Id.*

90. 105 F. Supp. 2d 746 (E.D. Mich. 2000).

91. *Id.* at 750.

92. 33 F. Supp. 2d 907 (D. Or. 1999)

> the middle interactive category of Internet contacts as described in *Zippo* needs further refinement to include the fundamental requirement of personal jurisdiction: "deliberate action" within the forum state in the form of transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state.[93]

In other words, the court held the *Zippo* framework inadequate in Internet jurisdiction cases because it failed to include the fundamental concept of "deliberate action."

Most recently, in *Digital Control Inc. v. Boretronics Inc.*,[94] a district court in Washington found the *Inset-Zippo* framework for personal jurisdiction over the Internet unsatisfactory in determining whether the forum state had personal jurisdiction over an alleged patent infringer who offered the accused product for sale on a website.[95] The *Digital Control* court held:

> until the advertiser is actually faced with and makes the choice to dive into a particular forum, the mere existence of a worldwide web site, regardless of whether the site is active or passive, is an insufficient basis on which to find that the advertiser has purposely directed its activities at residents of the forum state.[96]

Thus, the court in *Digital Control* rejected the *Inset-Zippo* test because it may grant personal jurisdiction too broadly, e.g., where the defendant has not chosen to interact with a particular forum.

These opinions indicate dissatisfaction with the *Zippo* framework and a return to traditional standards for personal jurisdiction which can be applied both in and out of the Internet context.[97] Notably, although these courts have returned to standard minimum contacts and effects analyses when discussing Internet-based jurisdiction, they have given short shrift to the reasonableness inquiry required by *Burger King*.

C. Personal Jurisdiction on the Internet—Inconsistency in Outcome

Reviewing the multitude of district court and appellate decisions on personal jurisdiction on the Internet, one is struck by their seeming incon-

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93. *Id.* at 921.

94. 161 F. Supp. 2d 1183 (W.D. Wash 2001).

95. *Id.* at 1186-87.

96. *Id.*

97. *See also* Michael Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345 (2001).

sistencies and apparently random outcomes.[98] These inconsistent outcomes have not gone unnoticed.[99]

1. Commerce on the Internet

The question of personal jurisdiction on the Internet is perhaps most relevant in the context of Internet commerce. As *Zippo* illustrates, courts assert personal jurisdiction most readily in cases where the defendant's website is both commercial and active—where the defendant offers products for sale. Nevertheless, courts do not assert jurisdiction in all such cases. The court in *Digital Control*, for example, held that personal jurisdiction was improper, even though the defendant had offered the allegedly infringing product for sale on his website.[100]

On rare occasions, courts have found online advertising sufficient for the court to assert personal jurisdiction over the defendant. The *Inset* court made such a determination because the defendant had continuously advertised on the Internet.[101] The court noted that the defendant's online advertisement constituted purposeful direction of its activity toward the forum state and indicated that the defendant should have reasonably anticipated being haled into court there.[102] Similarly, in *TELCO Communications v. An Apple a Day*,[103] the court found online advertising to be a "persistent course of conduct" under Virginia's long-arm statute.[104] The court subsequently held that Apple's activities were "sufficient to serve as an analogue for physical presence."[105]

More commonly, courts are unwilling to assert personal jurisdiction based upon online advertising. In *Grutkowski v. Steamboat Lake Guides &*

98. One commentator aptly notes that "[t]he current hodgepodge of case law is inconsistent, irrational, and irreconcilable." Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 939 (1998).

99. *See, e.g.*, Susan Nauss Exon, *A New Shoe is Needed to Walk Through Cyberspace Jurisdiction*, 11 ALB. L.J. SCI. & TECH. 1 (2000); Kevin R. Lyn, *Personal Jurisdiction And The Internet: Is A Home Page Enough To Satisfy Minimum Contacts?*, 22 CAMPBELL L. REV. 341 (2000); Sarah K. Jezairian, Note, *Lost in the Virtual Mall: Is Traditional Personal Jurisdiction Analysis Applicable to E-Commerce Cases?*, 42 ARIZ. L. REV. 965 (2000).

100. Digital Control Inc. v. Boretronics Inc., 161 F. Supp. 2d 1183 (W.D. Wash. 2001).

101. Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996).

102. *Id.*

103. 977 F. Supp. 404 (E.D. Va. 1997).

104. *Id.* at 406.

105. *Id.* at 406-08.

Outfitters, Inc.,[106] for example, a case arising out of a wrongful death action, the court found defendant's commercial, but passive, website insufficient to warrant an assertion of personal jurisdiction.[107] Similarly, in *McDonough v. Fallon McElligott*,[108] the court found the defendant's advertising in California insufficient to find personal jurisdiction because he had not actually placed any products into the stream of commerce.[109] Other courts have adopted similar approaches.[110]

2. Trademark Infringement and Dilution

In the context of trademark infringement and dilution on the Internet, the case law on personal jurisdiction is similarly inconsistent. As discussed above, the court in *Panavision* exercised personal jurisdiction over an alleged cybersquatter who registered domain names using over one hundred trademarks and then attempted to sell the trademark owners the domain names for a large profit.[111] Similarly, in *PurCo Fleet Services, Inc. v. Towers*,[112] the court found personal jurisdiction proper. Here, the defendant registered the plaintiff trademark holder's domain name and then set up a website under the name.[113] The defendant then attempted to extort money by selling rights in the domain name for a cash payment and solicited business from a forum resident through this website.[114]

Other courts, however, have come to different results in trademark infringement and dilution cases. In *Bensusan Restaurant Corporation v. King*,[115] a Missouri night club called The Blue Note posted monthly calendars of future events and the Missouri telephone number for its box of-

106. No. Civ. A. 98-1453, 1998 WL 962042 (E.D. Pa. Dec. 28, 1998).
107. *Id.* at *2-6.
108. 40 U.S.P.Q.2d (BNA) 1826 (S.D. Cal. 1996).
109. The court noted:

> While Fallon places advertisements and associates with businesses who sell products to Californians, Fallon itself has no significant California clients, and has not placed any products into the stream of commerce that have been purchased by Californians. As such, jurisdiction upon the basis of the California contacts of Fallon's business associates would be one-step removed. Personal jurisdiction cannot be so attenuated.

Id. at 1828-29.
110. *See, e.g.*, IDS Life Ins. Co. v. SunAmerica, Inc., 958 F. Supp. 1258 (N.D. Ill. 1997), *rev'd on other grounds*, 266 F.3d 645 (7th Cir. 2001).
111. Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998).
112. 38 F. Supp. 2d 1320 (D. Utah 1999).
113. *Id.* at 1323-24.
114. *Id.* at 1324.
115. 126 F.3d 25 (2d Cir. 1997)

fice on its website. It also posted a hypertext link to the plaintiff's website, www.bluenote.com, which contained information about the Blue Note jazz club in New York.[116] The court held that defendant's website did not have sufficient contacts with the forum state, New York, to warrant the exercise of personal jurisdiction.[117] In determining that jurisdiction was improper, the court looked to the New York long-arm statute, which required a defendant to either commit a tort while physically present in New York, or commit a tort outside the state, resulting in injury to person or property within the state.[118] The defendant did not satisfy the first provision because he was not physically present in New York.[119] The court found that the defendant did not fall under the second provision either, as the defendant did not reasonably expect the tortious act to have consequences within New York or derive substantial revenue from interstate commerce.[120] Similarly, the *Cybersell* court held that a Florida company's passive website, which included the service mark of an Arizona company, did not justify the exercise of jurisdiction by Arizona.[121] The defendant did not purposefully avail itself of the benefits and protections of Arizona law.[122]

3. *Defamation and Libel*

Yet another area in which Internet jurisdiction jurisprudence has developed with great inconsistency is that of online defamation and libel. The court in *U-Haul International, Inc. v. Osborne*,[123] for example, held that the forum state did not have personal jurisdiction over the defendant in a libel action. U-Haul sued for libel and other causes of action in response to defendants' "U-Hell" website which posted their bad experience with U-Haul, and provided e-mail links that directed visitors to U-Haul's website.[124] The court characterized the website as passive and held that the defendants' Internet activities did not establish purposeful availment.[125]

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116. *Id.* at 27.
117. *Id.* at 29.
118. *Id.* at 27-29.
119. *Id.*
120. *Id.*
121. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418-19 (9th Cir. 1997).
122. *Id.*
123. No. CIV 98-0366-PHX-RGS, 1999 U.S. Dist. LEXIS 14466 (D. Ariz. Feb. 17, 1999).
124. *Id.* at *3.
125. *Id.* at *10-13.

Amway Corporation v. Procter & Gamble Company,[126] however, stands in opposition to *U-Haul*. In *Amway*, a disgruntled Amway employee residing in Oregon created an Internet website entitled "Amway: the Untold Story."[127] The website included allegedly defamatory statements about Amway and allowed viewers of the website to post responses.[128] The court held that the forum state had jurisdiction over the defendant, whom the court determined had committed an intentional tort, because he knew that the brunt of the harm would be felt in the forum state, Amway's principal place of business.[129] Similarly, the court in *Blumenthal v. Drudge*[130] held that the exercise of personal jurisdiction over defendant was appropriate. Matt Drudge allegedly posted libelous statements about a new White House aide on his website.[131] The court found that Drudge's maintenance of an interactive website, to which visitors could e-mail Drudge directly with gossip and request subscriptions to the "Drudge Report," in addition to his non-Internet contacts with the forum, were sufficient for a finding of personal jurisdiction.[132]

The inconsistent nature of decisions in Internet jurisdiction cases has led commentators to devote great amounts of ink and paper in analyzing the issue. Commentators have offered various explanations for the inconsistent case law[133] and have proposed their own solutions to this problem.[134] Arguably, these works have only added to the morass. While this

126. No. 1:98-CV-726, 2000 U.S. Dist. LEXIS 372 (W.D. Mich. Jan. 6, 2000).

127. *Id.* at *6-7.

128. *Id.*

129. *Id.* at *13-16.

130. 992 F. Supp. 44 (D. D.C. 1998).

131. *Id.* at 47-48.

132. *Id.* at 56-57.

133. *See, e.g.*, Jezairian, *supra* note 99 (finding that "[s]everal similar cases have produced utterly different results in terms of whether or not the court chose to assert personal jurisdiction"); Todd D. Leitstein, Comment, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565 (1999) (noting that "[p]redictable internet jurisdiction is becoming an oxymoron. In this quagmire of decisions, a few give the illusion of stability but rely on spurious differentiations for guidance" and attempting to explain inconsistencies by discussing three nominal categories of conduct on the Internet).

134. *See, e.g.*, Stephen Patrick Beatty, *Litigation in Cyberspace: The Current and Future State of Internet Jurisdiction*, 7 U. BALT. INTELL. PROP. J. 127, 136-39 (1999) (discussing alternate dispute resolution and cyberspace sovereignty as alternative schemes for internet jurisdiction); Mark C. Dearing, *Personal Jurisdiction and the Internet: Can the Traditional Principles and Landmark Cases Guide the Legal System into the 21st Century?*, 4 J. TECH. L. & POL'Y 4 (1999) (arguing that the *Zippo* and effects tests are best-suited to address Internet jurisdiction issues); Exon, *supra* note 99 (proposing two alternative solutions: system of registration and cybercourts); Stravitz, *supra* note 98 (suggesting an analysis that would emphasize the "fair play and substantial jus-

Note may suffer the same fate, it does so with the aim of simultaneously explaining and resolving the inconsistency in Internet jurisdiction jurisprudence.

III. DISCUSSION

This Note attempts to explain the underlying considerations that may lend some consistency to Internet jurisdiction jurisprudence. In doing so, it proposes a *complete* return to general jurisdictional standards with a particular emphasis on the oft-forgotten reasonableness analysis. Part III.A discusses the hidden 'bad faith' analysis which brings some coherence to the Internet jurisdiction jurisprudence. Part III.B proposes a formalization of this 'bad faith' analysis through a return to the long-standing reasonableness inquiry. Finally, Part III.C applies this new standard—or more accurately, old standard applied in a new way—to the case of Matthew Pavlovich.

A. Explaining the Inconsistency—The Hidden 'Bad Faith' Analysis

How does one explain the inconsistency in Internet jurisdiction cases? One explanation—which finds support in the case law surrounding Internet jurisdiction—is that the application of traditional personal jurisdiction analysis to specific situations leads to differing outcomes.[135]

While courts have consistently applied the traditional personal jurisdiction standards to Internet jurisdiction cases, some courts have given increasingly short shrift to the reasonableness analysis. Though the court in *GTE New Media* expressed its concern that the overly broad Internet-specific *Zippo* sliding scale may undermine the due process elements of personal jurisdiction, for example, it did not even address the reasonable-

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tice" requirement and a focus on due process); Note, Bensusan Restaurant Corp. v. King, *An Erroneous Application of Personal Jurisdiction Law to Internet-based Contacts (Using the Reasonableness Test to Ensure Fair Assertions of Personal Jurisdiction Based on Cyberspace Contacts)* [hereinafter *Bensusan* Note], 19 Pace L. Rev. 149 (1998) (arguing for greater emphasis on the reasonableness analysis in Internet jurisdiction cases); J. Christopher Gooch, Note, *The Internet, Personal Jurisdiction, and the Federal Long-Arm Statute*, 15 ARIZ. J. INT'L & COMP. LAW 635 (1998) (proposing a test that focuses on "fair play and substantial justice" instead of minimum contacts); Jezairian, *supra* note 99 (addressing several possible internet jurisdiction analyses, including federal regulation, state regulation, self-regulation and judicial intervention); Leitsen, *supra* note 133 (proposing a three-prong test for personal jurisdiction on the internet, the factors of which are: (1) volition; (2) harm caused in the forum state; and (3) foreseeability of harm caused).

135. Exon, *supra* note 99, at 7-8.

ness inquiry or the general standard that the exercise of personal jurisdiction comport with traditional notions of fair play and substantial justice.[136] Similarly, in *Pavlovich*, the court mentioned a few of the reasonableness factors, but devoted very little of its substantive discussion to this inquiry.[137]

As noted above, various courts applying minimum contacts and effects analyses have come to inconsistent outcomes though faced with similar factual circumstances.[138] In attempting to explain these inconsistent outcomes, there appears to be a common thread: the nonresident defendant's bad faith.

In the context of online trademark disputes, for example, the presence of "bad faith" may distinguish the decisions in *Panavision* and *PurCo Fleet* from that in *Bensusan*. If one were only to look at the defendants' minimum contacts with and effects in the forum states, the distinction would not be completely clear. In each case, the defendant's URL was identical to the plaintiff's trademark.[139] What might distinguish *Bensusan* from the cybersquatting cases, therefore, is the lack of "bad faith" on the defendant's part. In fact, the defendant in *Bensusan* encouraged visitors to his site to visit the plaintiff's establishment when they found themselves in New York.[140]

The importance of bad faith becomes even more relevant in the context of online libel and defamation. In *Amway* and *Blumenthal*, the defendants' actions were indicative of "bad faith." There, the defendants' allegedly defamatory statements were aimed at interfering with the plaintiffs' business or destroying the plaintiffs' personal reputation, respectively.[141] On the contrary, the defendants in *U-Haul*—though they posted defamatory material on the Internet—did not seem to possess the same level of "bad faith" as those in *Amway* or *Blumenthal*. While the *U-Haul* defendants' website *U-Hell* did post negative information about the plaintiff, the defendants used the website to relay their own negative experiences with

136. GTE New Media Servs. Inc. v. BellSouth Corp, 199 F.3d 1343, 1350 (D.C. Cir. 2000).

137. Pavlovich v. Super. Ct. of Santa Clara County, 109 Cal. Rptr. 2d 909, 917-18 (Ct. App. 2001), *hearing granted*, No. S100809 (Cal. Dec. 12, 2001).

138. *See supra* Part II.C.

139. Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1319 (9th Cir. 1998); PurCo Fleet Servs., Inc. v. Towers, 38 F. Supp. 2d 1320, 1321-22 (D. Utah 1999); Bensusan Restaurant Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997).

140. *Bensusan*, 126 F.3d at 27.

141. Amway Corp v. Procter & Gamble Co., No. 1:98-CV-726, 2000 U.S. Dist. LEXIS 372 (W.D. Mich. Jan. 6, 2000); Blumenthal v. Drudge, 992 F. Supp. 44 (D. D.C. 1998).

the plaintiff and allow others to contact the plaintiff with their own concerns.[142] Though the distinction between good and bad faith is finer in the context of defamation and libel than in trademark disputes, there seems to be a qualitative difference in the actions of the *U-Haul* and *Amway/Blumenthal* defendants.

While the defendants' "bad faith" seems to play some role in Internet jurisdiction cases, it does so in a subtle way. If defendants' bad faith influences the eventual outcome of Internet jurisdiction cases, it is important that the role of this factor be brought to light.

B. Return to Reasonableness—Bringing Bad Faith out of the Shadows

In bringing the bad faith inquiry out of the shadows, courts may also find occasion to resolve another issue inherent in recent Internet jurisdiction jurisprudence: the short shrift given to the reasonableness inquiry. This cursory analysis of reasonableness is questionable because courts seem to have given undue weight to the first part of the general jurisdictional analysis. If a court is going to apply minimum contacts and effects-based analyses to Internet jurisdiction cases, it must also apply the corresponding reasonableness inquiry.

In order to formalize their bad faith analyses, courts should give greater weight to the reasonableness factors, particularly factors one and four. Factor one allows the court to consider the extent of the defendant's purposeful interjection into the forum.[143] Factor four allows the court to consider the forum state's interest in adjudicating the dispute.[144] In cases where there is bad faith on the part of the defendant, both of these factors would weigh in favor of personal jurisdiction. A defendant who acts with bad faith has likely purposefully interjected himself into a forum.[145] Similarly, the forum state will have a substantial interest in adjudicating the dispute in order to address the defendant's actions.

Giving greater weight to the reasonableness inquiry will also serve other purposes. In minimizing the import of due process and reasonableness considerations, the courts currently discount one of the major dangers

142. U-Haul Int'l, Inc. v. Osborne, No. CIV 98-0366-PHX-RGS, 1999 U.S. Dist. LEXIS 14466 (D. Ariz. Feb. 17, 1999).

143. *See supra* note 33 and accompanying text; *Burger King*, 471 U.S. at 476-77.

144. *Id.*

145. *See, e.g.*, Pavlovich v. Super. Ct. of Santa Clara County, 109 Cal. Rptr. 2d 909, 916 (Cal. Ct. App. 2001), *hearing granted*, No. S100809 (Cal. Dec. 12, 2001).

of the Internet—the potential for overbroad personal jurisdiction.[146] As the court in *GTE New Media* noted, however, the advent of the Internet is no reason to abandon long-held principles of federal court jurisdiction or notions of due process.[147] The potential for overbroad personal jurisdiction standards on the Internet is significant. As courts continue to apply increasingly expansive definitions of "minimum contacts," "purposeful direction," and "direct effects," and continue to apply increasingly cursory due process and reasonableness analyses, the dangers of overbroad jurisdiction grow. Overbroad personal jurisdiction will have a chilling effect on both commerce and speech on the Internet. If one fears being haled into court all over the United States, and potentially all over the world, one is less likely to engage in otherwise lawful activities.

Courts can try to counteract the dangers of overbreadth by giving due process and reasonableness considerations greater weight when addressing personal jurisdiction. By considering whether the exercise of jurisdiction comports with notions of fair play and substantial justice, courts can limit the fora in which a defendant might have to defend himself. The seven reasonableness factors may aid in this analysis. For instance, if a court were to consider the burden on the defendant in defending in the forum, it may well consider the possibility that defendant will be defending himself in several fora. Additionally, the most efficient judicial resolution of the controversy and existence of alternative fora factors may also work to limit the breadth of personal jurisdiction on the Internet.

Therefore, courts should give greater weight to the reasonableness analysis. In doing so, courts will bring more formality to the hidden bad faith analysis which seems to underlie Internet jurisdiction jurisprudence. Additionally, courts will begin to define limitations of Internet jurisdiction.

C. Reasonableness in *Pavlovich*

Though a return to general reasonableness analyses will serve the development of a consistent Internet jurisdiction jurisprudence, it likely would not change the outcome in the *Pavlovich* case.

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146. *See Bensusan* Note, *supra* note 116 ("Greater focus on the reasonableness test and acceptance of an Internet contact as constitutionally valid, will satisfy several issues. First, it will allay fears that world-wide jurisdiction will necessarily result.").

147. *See supra* note 89 and accompanying text.

The reasonableness inquiry in *Pavlovich* was cursory at best.[148] With regard to factor one, the court noted that "Pavlovich knew that his Web site allowed the illegal publishing and distribution of DVDs."[149] The defendant also knew that the motion picture, computer and telecommunications industries all had substantial presence in California.[150] With regard to factor four, the court merely noted that "[f]actors 4 through 6 clearly favor California."[151]

In applying a more rigorous reasonableness analysis, the court would likely have come to the same result because defendant Pavlovich acted with bad faith. In considering factor one, the court should give great weight to the fact that Pavlovich knowingly posted misappropriated trade secrets on his website. In doing so, Pavlovich affected several industries with a substantial presence in California. As the court noted in its purposeful availment analysis, Pavlovich "knew that California is commonly known as the center of the motion picture industry and that the computer industry holds a commanding presence in the state."[152] Furthermore, the court found that Pavolovich "knew, or should have known, that the DVD republishing and distribution activities he was illegally doing and allowing to be done through the use of his Web site, while benefiting him, were injuriously affecting the motion picture and computer industries in Cali-

148. Pavlovich v. Super. Ct. of Santa Clara County, 109 Cal. Rptr. 2d 909, 917-18 (Ct. App. 2001), *hearing granted*, No. S100809 (Cal. Dec. 12, 2001).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 915. The court also quoted a portion of Pavlovich's deposition testimony related to his understanding of the motion picture industry's presence in California. When asked if he had any understanding of where the major motion picture studios are located, Pavlovich responded, "[y]eah, they make a lot of movies in California, Hollywood, yeah." *Id.* With regard to California's dominance in the computer industry, Pavlovich testified:

> Q: Do you have any understanding of whether or not a significant number of hardware manufacturers are located in California?
>
> A: I believe . . . there is a lot of technology companies out in California . . .
>
> Q: And as far as—for lack of a better term, hot spot of technology, is Silicon Valley—its your understanding that Silicon Valley is such a hot spot for technology with respect to hardware or software and programmers? . . . [I]s that correct?
>
> A. Yeah.

Id. at 915-16.

fornia."[153] These acts indicate bad faith on the part of Pavlovich; in fact, the court explicitly noted that "Pavlovich cannot claim innocent intent."[154] Instead of restricting application of Pavlovich's bad faith to the purposeful availment analysis, therefore, the court should consider intent or bad faith in its reasonableness analysis, as well.

Factor four also weighs in favor of a finding of personal jurisdiction in this reasonableness analysis. The fact that Pavlovich directly affected California industry creates a significant interest in adjudication of the dispute in California. When a defendant acts with bad faith, the forum state has a strong interest in adjudicating the dispute in order to address the injury.

IV. CONCLUSION

By giving more attention to the reasonableness prong of the personal jurisdiction analysis, courts can formalize the underlying bad faith analysis which appears to explain, at least to a certain degree, the inconsistent outcomes in Internet jurisdiction case law. When the California Supreme Court decides the fate of Matthew Pavlovich this year, its decision will likely consider (whether explicitly or implicitly) his "bad faith" in posting the DeCSS on the Internet. In doing so, the California Supreme Court should strongly consider the reasonableness prong of the personal jurisdiction analysis.

153. *Id.* at 916.
154. *Id.*