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Copyright Infringement Litigation and the Exercise of Personal Jurisdiction Within Due Process Limits: Judicial Application of Purposeful Availment, Purposeful Direction, or Purposeful Effects Requirements to Finding that a Plaintiff Has Established a Defendant's Minimum Contacts Within the Forum State

by Daniel E. Wanat*

I. INTRODUCTION

An action for an infringement of a copyright secured under the United States Copyright Act may raise issues of copyright ownership, a defendant's access to a plaintiff's work, and substantial similarities

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between a plaintiff's work and a defendant's work.² When raised, the issues bear on the merits of a plaintiff's copyright claim against a defendant.³

Suppose, however, that a copyright owner brought suit in the forum state against a nonresident defendant.⁴ The defendant's first defense may be based on the state's lack of personal jurisdiction.⁵ This defense

². Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000) (holding that a plaintiff must prove ownership of the copyright and the defendant's copying of protected elements of copyrighted work, which, absent direct evidence, is shown through circumstances of access and substantial similarity).

³. Id. Section 501 of the 1976 Copyright Act provides for a copyright owner's action against an infringer of the copyright. 17 U.S.C. § 501.

⁴. This Article analyzes issues of the exercise of personal jurisdiction within copyright litigation in the nonresident defendant, non-in-state personal service context only. As an important aside, however, the state in which a civil suit was brought historically could secure jurisdiction over a defendant's person through service of process while the defendant was present within the state. Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (holding that the defendant's presence within the court's territorial jurisdiction is a prerequisite to the entry of a valid judgment).

A defendant's presence, plus proper in-state service, continues to result in a proper jurisdictional exercise. Id. In Burnham v. Superior Court, 495 U.S. 604 (1990), four United States Supreme Court Justices affirmed the exercise of personal jurisdiction in a presence-plus-service case. Id. at 628. Justice Scalia's opinion for the Court states that "the Due Process Clause does not prohibit the California courts from exercising jurisdiction over petitioner based on the fact of in-state service of process." Id.

Justice White, concurring in part and concurring in the judgment, wrote:

The rule allowing jurisdiction to be obtained over a nonresident by personal service in the forum State, without more, has been and is so widely accepted throughout this country that I could not possibly strike it down, either on its face or as applied in this case, on the ground that it denies due process of law guaranteed by the Fourteenth Amendment.

Id. (White, J., concurring).

Justice White also recognized that the Court could strike down this rule but was unprepared to do so because "there has been no showing here or elsewhere that as a general proposition the rule is so arbitrary and lacking in common sense in so many instances that it should be held violative of due process in every case." Id.

It is noteworthy that Justice Brennan, with whom three Justices joined, concurred in the Burnham Court's judgment and stated: "[T]he Due Process Clause of the Fourteenth Amendment generally permits a state court to exercise jurisdiction over a defendant if he is served with process while voluntarily present in the forum State." Id. at 628-29 (Brennan, J., concurring). Justice Brennan, however, refused to conclude that presence-plus-service "has been immemorially the actual law of the land." Id. at 629 (internal quotation marks omitted) (quoting Hurtado v. California, 110 U.S. 516, 528 (1884)). Justice Brennan, therefore, would examine the fairness of the forum state's presence-plus-service rule. Id. at 629-40.

⁵. Infra notes 81-171 and accompanying text (analyzing United States Courts of Appeals and district court caselaw). It must be noted that federal courts have exclusive subject matter jurisdiction over an action for copyright infringement. 28 U.S.C. § 1338(a)
implicates issues under the forum state's law and the Due Process Clause of the United States Constitution's Fifth Amendment.  

Resolution of the due process issue begins within the United States Supreme Court opinion in *International Shoe Co. v. Washington* and continues with that case's progeny. In general, when deciding if jurisdiction exists within due process limits, the Supreme Court asks whether a defendant's act purposefully establishes minimum contacts within the forum state.

Among the considerations of the minimum contacts inquiry, indeed touchstones of this due process question, are the following: (1) whether the defendant acted with a purpose to avail himself or herself of the benefits and protections of the forum so that the defendant may expect to be haled into court there; (2) whether the defendant acted purposeful-
ly, expressly aiming at causing effects (in other words, directing them) within the forum state; and (3) whether the defendant's purposeful availment, or aimed acts, caused harmful effects within the forum state.\textsuperscript{10}

If the plaintiff is unable to show prima facie that the defendant's acts resulted in forum state purposeful availment, direction, or effects, the plaintiff's copyright infringement action will be dismissed for lack of personal jurisdiction.\textsuperscript{11} Thereafter, the plaintiff is left to find a constitutionally permissible forum state in which to bring the infringement suit.\textsuperscript{12}

This Article examines copyright infringement cases in which federal courts have applied the jurisdictional due process concepts of purposeful availment, purposeful direction, and purposeful effects.\textsuperscript{13} Part III contains a general analysis of the copyright infringement and purposeful availment, direction, and effects case law.\textsuperscript{14} In Parts IV and V, two areas within the existing case law are treated discreetly. The first is purposeful availment, direction, and effects jurisprudence of federal courts within the Ninth Circuit.\textsuperscript{15} The second is a passive versus interactive analysis that federal courts apply to resolve purposeful availment, direction, or effects issues in copyright infringement cases concerning the Internet.\textsuperscript{16}


\textsuperscript{11} FED. R. CIV. P. 12(b)(2). The case law governing a copyright plaintiff's burden of proof on the personal jurisdiction issue indicates that a plaintiff must show prima facie that the exercise of personal jurisdiction over the defendant satisfies due process limits. See, e.g., Goldberg v. Cameron, 482 F. Supp. 2d 1136, 1144-45 (N.D. Cal. 2007). The prima facie proof rule allows a plaintiff to establish the propriety of the jurisdictional exercise without the need for a trial.

\textsuperscript{12} Goldberg, 482 F. Supp. 2d at 1144-45.

\textsuperscript{13} In this regard, the question whether the defendant has purposefully availed himself or herself of the forum state arises in cases where that state may have specific jurisdiction rather than general jurisdiction over the defendant. The substance of each basis for personal jurisdiction emerged from the opinion in International Shoe. Infra notes 23-26 and accompanying text (considering the defendant's activities unrelated to the plaintiff's cause of action as well as activities from which the action arose).

\textsuperscript{14} Infra notes 80-171 and accompanying text. Two authors argue for a unified test of personal jurisdiction applicable to all cases. C. Douglas Floyd & Shima Baradaran-Robison, Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects, 81 Ind. L.J. 601 (2006) (rejecting purpose or intent as flawed and favoring objectively foreseeable expectations).

\textsuperscript{15} The jurisdictional analysis of the federal courts of appeals provides a model for lower federal courts to follow. Infra notes 174-203 and accompanying text.

\textsuperscript{16} Infra notes 204-34 and accompanying text.
Finally, in Part VI of the Article, the Author makes conclusions and comments on the state of the purposeful availment, direction, and effects requirements in copyright infringement litigation. Before exploring the relevant copyright infringement caselaw, Part II provides a primer of the purposeful availment, purposeful direction, and purposeful effects tests within due process limits by briefly visiting the decisions of the United States Supreme Court, beginning with International Shoe.

II. AN OVERVIEW OF UNITED STATES SUPREME COURT JURISPRUDENCE: PERSONAL JURISDICTION; DUE PROCESS LIMITS; AND PURPOSEFUL AVAILMENT, PURPOSEFUL DIRECTION, OR PURPOSEFUL EFFECTS

A. International Shoe Co. v. Washington

In copyright litigation, when a federal court considers dismissing an infringement action for lack of personal jurisdiction over a nonresident defendant, its analysis begins with the Supreme Court's decision in International Shoe Co. v. Washington. In the Court's opinion, written by Chief Justice Stone, the question addressed was "whether, within the limitations of the due process clause of the Fourteenth Amendment . . . , a Delaware corporation . . . has by its activities in the [state] of Washington rendered itself amenable to proceedings in the courts of that state."

In analyzing the due process issue, the Court acknowledged that, historically, a defendant's "presence within the territorial jurisdiction of [a] court was prerequisite to its rendition of a judgment personally binding him." Presence as a necessary condition to personal jurisdiction, however, was discarded by the Court in International Shoe when Justice Stone added:

"Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with [the forum state] such..."

17. Infra notes 235-64 and accompanying text.
18. 326 U.S. 310 (1945). It is noteworthy that a copyright is an intangible right. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.01(C) (2007). It has no situs, as such, apart from its owner. Id. When the owner of a copyright brings an infringement action, personal jurisdiction must be exercised over the defendant. Id.
19. Int'l Shoe, 326 U.S. at 311. The suit against the corporation was brought under a Washington statute that required employers to contribute to a state unemployment compensation fund. Id.
20. Id. at 316 (citing Pennoyer v. Neff, 95 U.S. 714, 733 (1877)).
that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.\textsuperscript{21}

Following the decision in \textit{International Shoe}, presence within the forum state no longer marked due process limits. Rather, a court exercising jurisdiction over a defendant in personam may do so if the defendant's contacts with the forum state require that the defendant defend a suit there.\textsuperscript{22} When elaborating on its contacts framework, the Court emphasized those contacts that were "systematic and continuous."\textsuperscript{23} According to the Court, these contacts "justify suit . . . on causes of action arising from dealings entirely distinct from those activities."\textsuperscript{24}

The Court also recognized that a defendant exercising the "privilege" of acting within a state may incur obligations.\textsuperscript{25} The Court added, in substance, that so far as the defendant's obligations arise out of or are connected with its activities within the state, the defendant may be required to respond to the suit initiated to enforce those obligations.\textsuperscript{26}

\textbf{B. Hanson v. Denckla}

Thirteen years after the Court adopted the minimum contacts approach in \textit{International Shoe}, it returned to that subject in \textit{Hanson v. Denckla}.\textsuperscript{27} In \textit{Hanson} the issue was whether a Florida court erred in holding that the nonresident defendants were subject to personal jurisdiction.\textsuperscript{28}

When considering this issue, Chief Justice Warren wrote that although "progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome . . ., a defendant may not

\begin{itemize}
\item \textsuperscript{21} \textit{Id.} (emphasis added) (internal quotation marks omitted).
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id.} at 320.
\item \textsuperscript{24} \textit{Id.} at 318. The Supreme Court, subsequent to \textit{International Shoe}, continued to refine this jurisdictional basis, referring to it in short hand fashion as "general jurisdiction." \textit{See Helicopteros Nacionales de Colombia, S.A. v. Hall}, 466 U.S. 408, 415 n.9 (1984).
\item \textsuperscript{25} \textit{Int'l Shoe}, 326 U.S. at 319.
\item \textsuperscript{26} \textit{Id.} The Supreme Court, subsequent to \textit{International Shoe}, continued to refine this jurisdictional basis, characterizing it as "specific jurisdiction." \textit{See Helicopteros}, 466 U.S. at 414 n.8 (citing Arthur T. von Mehren & Donald T. Trautman, \textit{Jurisdiction to Adjudicate: A Suggested Analysis}, 79 HARV. L. REV. 1121, 1144-64 (1966)). In addition, the Court's "in-state activities" language hints at the notion that the defendant's acts through which she purposefully avails herself of the benefits and protections of the laws of the forum state justify the exercise of personal jurisdiction in a suit arising from or connected to those acts. \textit{See Int'l Shoe}, 326 U.S. at 320.
\item \textsuperscript{27} 357 U.S. 235 (1958).
\item \textsuperscript{28} \textit{Id.} at 243. The forum state's jurisdictional exercise was challenged under the Due Process Clause of the Fourteenth Amendment. \textit{Id.} at 245; \textit{U.S. CONST. amend. XIV}.
\end{itemize}
be called upon to do so unless he has had the ‘minimal contacts’ with that [s]tate that are a prerequisite to its exercise of power over him.”

When it considered those contacts, the Court made clear that “[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum [s]tate.” Rather, “it is essential . . . that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum [s]tate, thus invoking the benefits and protections of its laws.”

The Court in *Hanson* recognized that the exercise of personal jurisdiction within due process limits required a finding that the defendant acted with a purpose to avail himself or herself of the forum state. The Court applied and refined *Hanson* on a number of occasions. The first of significance was *World-Wide Volkswagen Corp. v. Woodson.*

29. *Hanson*, 357 U.S. at 251. The Court in *Hanson* affirmed the rule in *International Shoe*, less burdensome circumstances notwithstanding. *Supra* note 21 and accompanying text (discussing the Court's announcement of minimum contacts as a basis for a constitutionally sound personal jurisdiction exercise in *International Shoe*).

30. 357 U.S. at 253.

31. *Id.* (emphasis added). The distinction that the Court made between the unilateral activity of a person other than a nonresident defendant and the activity of a nonresident who "purposefully avails itself" of a state's benefits is fundamental to the Court's jurisdictional analysis. *Id.* In this regard, the forum may be the "center of gravity" for choice of law purposes or may be the "most convenient location for litigation," but neither alone nor both together are enough for a court to exercise jurisdiction over a nonresident defendant. *Id.* at 254 (internal quotation marks omitted).

32. *Id.* at 253. As a historical note, Justice Black, with whom two Justices joined, wrote a dissenting opinion. *Id.* at 256-62 (Black, J., dissenting). Justice Black opined that the exercise of jurisdiction was constitutional, notwithstanding the absence of the nonresident defendant's acts that constitute purposeful availment of the forum state's benefits. *Id.*

33. 444 U.S. 286 (1980). It is worth noting that before the Court decided *World-Wide*, it affirmed *Hanson*'s purposeful availment rule in *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977). The Court in *Shaffer* did so in conclusory fashion because the nonresident defendants over whom jurisdiction was sought "simply had nothing to do with" the forum state. *Id.* Beyond that conclusion, the Court's opinion in *Shaffer* adds nothing to the purposeful availment discussion.

It is worth noting, however, that Justice Brennan, in his dissent, foresaw developments in the application of the purposeful availment requirement that took place in subsequent decisions of the Court. *Id.* at 219-28 (Brennan, J., concurring in part and dissenting in part). In this regard, Justice Brennan's opinion addressed the fairness to nonresident defendants of subjecting them to suit in the forum state: "The fact that the record does not reveal whether they 'set foot' or committed 'act[s] related to [the] cause of action' in [the forum state] is not decisive, for jurisdiction can be based strictly on out-of-state acts having foreseeable effects in the forum [s]tate." *Id.* at 226 (first and second brackets in original).
C. World-Wide Volkswagen Corp. v. Woodson

World-Wide, a Volkswagen distributor, and Seaway, a Volkswagen retail seller, were both sued in Oklahoma, although neither did business in that state, nor did either "ship[] or sell[] any products to or in that [s]tate." When the Court applied the principles of International Shoe and Hanson, it determined that neither the distributor nor the dealer availed itself "of the privileges and benefits of Oklahoma law." The Court also distinguished between circumstances that would show a nonresident defendant availed itself of the forum and those in which the defendant foresaw its product's use in the forum state. According to the Court, "that a product will find its way into the forum [s]tate" is not "the foreseeability that is critical to due process. . . . Rather, it is that the defendant's conduct and connection with the forum [s]tate are such that he should reasonably anticipate being haled into court there."

The Court added that a nonresident defendant "has clear notice that it is subject to suit there" when it "‘purposefully avails itself of the privilege of conducting activities within the forum [s]tate.'" For the

Essential to Justice Brennan's analysis was the nonresident defendants' volitional association with the forum that reflected an election "to assume powers and to undertake responsibilities wholly derived from that [s]tate's rules and regulations, and to become eligible for those benefits that [forum] law makes available." Id. at 228. For a discussion of what the future held for Justice Brennan's position, see infra notes 74-78 and accompanying text.

34. World-Wide, 444 U.S. at 289. The factual recitation concluded with the concession that "there was no showing that any automobile sold by [the distributor or seller] has ever entered Oklahoma with the single exception of the vehicle involved in the present case." Id. The action was one of products liability brought against the automobile's distributor and its retailer arising from an accident that occurred in Oklahoma. Id. at 288.

35. Id. at 295.

36. Id. The respondents (the plaintiffs to the tort action who commenced suit in Oklahoma) argued that "because an automobile is mobile by its very design and purpose," World-Wide and Seaway foresaw an Oklahoma injury. Id.

37. Id. at 297.

38. Id. (quoting Hanson, 357 U.S. at 253). In World-Wide had the distributor or the dealer-petitioners sold the subject vehicle in an effort, either directly or indirectly, to serve the Oklahoma market, both could be sued in that state. Id. at 298. In this regard, the Court's opinion suggested that an effort to serve a market within the forum state is manifested when the defendant "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum [s]tate." Id. It is noteworthy that Justice Brennan, in his dissent, concluded that "[t]he sale of an automobile does purposefully inject the vehicle into the stream of interstate commerce so that it can travel to distant [s]tates." Id. at 306 (Brennan, J., dissenting). Ultimately, the Court held that the jurisdictional exercise in Oklahoma did not satisfy due process limits. Id. at 299
Court, the result on the jurisdictional issue in *World-Wide* was clear because evidence on the purposeful availment requirement demonstrated that the jurisdictional exercise violated the nonresident defendants' due process rights.39

After *World-Wide*, the Court continued to focus on a nonresident defendant's purpose in conducting activities connected to the forum state.40 However, the Court expanded that purpose from one in which the defendant purposefully availed himself or herself of the forum state's benefits to one in which the defendant purposefully aimed or directed his or her activities toward the forum state.41 This distinction surfaced before the Court in two cases, both decided on the same day in 1984.42

**D. Keeton v. Hustler Magazine**

In the first case, *Keeton v. Hustler Magazine*,43 the Court concluded that the court of appeals erred in holding that there was a lack of personal jurisdiction.44 In doing so, the Court quoted, with approval, the district court's findings.45 According to the district court, Hustler Magazine, the nonresident defendant, had "purposefully directed" the circulation of its magazines to New Hampshire, the forum state.46 As a result, the district court found that it was "unquestionable that New Hampshire jurisdiction over a complaint based on those contacts would ordinarily satisfy the requirement of the Due Process Clause."47

The Supreme Court in *Hustler* did not use the phrase "purposefully directed" to characterize the reason for the constitutionality of the

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39. Five Justices reached this result. See *World-Wide*, 444 U.S. at 299. Separate dissents were authored by three Justices, with Justice Blackman joining in Justice Marshall's dissent. Id. at 313 (Marshall, J., dissenting).


41. See *Keeton*, 465 U.S. at 774; *Calder*, 465 U.S. at 789-90.


44. *Id.* at 772. Interestingly, the forum state, New Hampshire, was the only state in which the plaintiff's claim of libel, the basis of her suit, was not time-barred by a statute of limitations. *Id.* at 773.

45. *Id.* at 773-74.

46. *Id.* at 774.

47. *Id.* The requirement to which the district court referred was minimum contacts. *Id.*
forum’s jurisdictional exercise. That concept was expressed by the Court when it stated: “Where . . . Hustler Magazine, Inc., has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine.”

E. Calder v. Jones

The second decision in which the Supreme Court expanded the jurisdictional reach of the forum state over a nonresident defendant was Calder v. Jones. In this case concerning a suit in California against a Florida resident, the Court examined the defendants’ minimum contacts with California. In doing so, the Court focused on “the relationship among the defendant[s], the forum, and the litigation.”

In an opinion written by Chief Justice Rehnquist, the Court held that “California [was] the focal point both of the story and of the harm suffered. Jurisdiction [was] therefore proper in California based on the ‘effects’ of . . . Florida conduct in California.” When answering the defendants’ arguments that the California effects were merely foreseeable and the jurisdictional exercise was violative of their due process rights, the Court responded: “[The defendants] are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California.” The Court concluded that when these criteria were met, the defendants could

48. Id. at 781.
49. Id. The nonresident defendant’s continuous and deliberate exploitation of the market for its magazine in the forum state was not different in substance from that defendant’s purposefully directing the circulation of its magazine in the forum. See id. at 774, 781. It also is worth noting that the Supreme Court recognized that Hustler Magazine’s business in New Hampshire would “support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire.” Id. at 780. “[But the] activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities.” Id. at 779.
51. Id. at 785-86.
52. Id. at 788 (quoting Shaffer, 433 U.S. at 204).
53. Id. at 789 (emphasis added). The story was alleged to have libeled actress Shirley Jones (the mom of “The Partridge Family” and the Gary, Indiana librarian in the movie version of “The Music Man”) and concerned her activities in California as a California resident. The defendant-author and defendant-editor were Florida residents who researched and wrote the story in Florida and disseminated it from that state into California. Id. at 785-88.
54. Id. at 789 (emphasis added). Telling is the court’s determination that when the article was authored and edited, both of the defendants “knew [it] would have a potentially devastating impact” on its target, the California resident, given the publication’s large circulation in that state. Id. at 789-90.
“reasonably anticipate being haled into court” in California to answer the allegations that they committed an intentional tort.\(^5\)

In Calder the Court expanded the reach of due process by including within its scope the following: (1) the effects of nonforum state conduct in the forum state and (2) the effects of nonforum state activities that are intentional, tortious, and expressly aimed at the forum.\(^5\) Those analyses are encapsulated by phrases such as “purposeful effects” and “purposeful direction.”\(^6\)

From Hanson through Keeton and Calder, the Supreme Court wrote with approval of “purposeful availment,” “purposeful effects,” and “purposeful direction” as tests of a forum state’s jurisdictional exercise that satisfied due process.\(^5\) The Court continued its analysis of these threshold requirements in two additional cases—Burger King Corp. v. Rudzewicz\(^5\) and Asahi Metal Industry Co. v. Superior Court.\(^6\)

F. Burger King Corp. v. Rudzewicz

The opinion in Burger King embodies a synthesis of the Court’s earlier caselaw. First, in deciding whether a nonresident defendant has “purposefully established ‘minimum contacts’ in the forum [s]tate,”\(^6\) the Court defined the defendant’s relevant acts as those through which the defendant “‘purposefully avail[ed] himself of the privilege of conducting activities within the forum [s]tate, thus invoking the benefits and protections of its laws.’”\(^6\) Second, the Court held that a court may exercise “jurisdiction over a nonresident [defendant] who ‘purposefully

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55. Id. at 790 (quoting World-Wide, 444 U.S. at 297).
57. See id.; see also infra notes 172-203 and accompanying text (analyzing United States district court decisions within the Ninth Circuit).
58. Additional due process considerations may preclude the jurisdiction’s exercise under International Shoe’s “minimum contacts” approach. These due process boundaries are beyond the scope of this Article. They are discussed in Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985) (holding that the defendant’s burden of litigating in the forum, the forum’s interest in the litigation, the plaintiff’s interest in convenience and an effective remedy, and judicial efficiency, among other things, may be considered).
62. Id. (quoting Hanson, 357 U.S. at 253).
directs' his activities toward forum residents.” The Supreme Court also noted that it has “consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction” within the forum state.

The Court's decision in Burger King remains important. Within it, the Court continued to accept the purposeful availment test of minimum contacts. In addition, the Court's opinion reflected its approval of the purposeful direction test. One decision is left for examination.

G. Asahi Metal Industry Co. v. Superior Court

An examination of Asahi Metal Industry Co. v. Superior Court completes this overview and synthesis of the Supreme Court decisions addressing the relationship between personal jurisdiction and purposefully-established minimum contacts. Part II.A. of Justice O'Connor's opinion, which the Chief Justice, Justice Powell, and Justice Scalia joined, is significant in this case.

In Part II.A., Justice O'Connor acknowledged that the touchstone of whether a jurisdictional exercise falls within due process limits "remain[ed] whether the defendant purposefully established 'minimum contacts' in the forum [s]tate.” That touchstone, in turn, is satisfied

63. Id. at 473. One reason for this conclusion is the state's "manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." Id. It should be kept in mind that the forum state's interest also exists when a resident injury results from the defendant's out-of-state act. Here, effects in the forum state, if purposeful, would establish minimum contacts. Id.; see also supra notes 50-57 and accompanying text (discussing the Court's "effects" test from Calder).

The Court offered a second reason, namely, that when persons purposefully derive a benefit from interstate activity, "it may well be unfair to allow them to escape having to account in other [s]tates for consequences that arise proximately from such activities." Id. at 474. A nonresident defendant's volition or purpose and the benefit received in the forum state appear essential to this rationale for the purposeful direction test. Given this reason, the nonresident's act necessary for a state to exercise jurisdiction is apparently commercial in nature. Such was the case in Burger King. Id. at 480.

64. 471 U.S. at 476. The converse, however, is not true, at least if the contacts cause forum state effects. Supra notes 50-57 and accompanying text (discussing the Court's "effects" test from Calder).

65. See Burger King, 471 U.S. at 475.
66. See id. at 472-73.
68. Id. at 105. Although the Court was unanimous in holding that jurisdiction could not be founded upon an overseas sale in which the defendants were aware that some of their products would find their way into the forum state, the Court was divided evenly on the reasons for this result. Id.
69. Id. at 108-09 (quoting Burger King, 471 U.S. at 474). As an aside, Justice O'Connor and the three Justices who agreed with her returned to the Court's roots: the seminal
when the defendant acts to purposefully avail himself or herself of the forum state, "thus invoking the benefits and protections of its laws." 70 According to Justice O'Connor, the touchstone is also satisfied when a nonresident defendant's acts are "purposefully directed at the forum state." 71 Justice O'Connor's opinion made clear that minimum contacts are conditioned on the defendant's acting with a purpose related to the forum state. 72 Her opinion, therefore, followed the line of Supreme Court cases from Hanson through Burger King that focused on the defendant's acts, the defendant's purposes, and the relationship of both to the forum state. 73

Justice Brennan, joined by three other Justices, was opposed to Justice O'Connor's premise and reasoning in Part II.A. of her opinion. 74 Justice Brennan's premise was that if the defendant foresaw that its product would be swept into the forum, through the stream of commerce, then that foreseeability established "minimum contacts." 75 According to Justice Brennan, the stream of commerce is not "unpredictable currents or eddies, but [is] . . . the regular and anticipated flow of products from manufacture to distribution to retail sale." 76 Thus, according to Justice Brennan, the nonresident's purposeful activity was unnecessary to establish minimum contacts because he benefitted economically from a sale within the forum and from the forum state's "laws that regulate[d] and facilitate[d] commercial activity." 77 Justice Brennan's jurisdictional premise and reasoning was that of foreseeability decision in International Shoe. Id. at 113-14.

70. Id. at 109 (quoting Burger King, 471 U.S. at 475).
71. Id. at 110. The four Justices joining in Part II.A. of the opinion rejected the position that "mere foreseeability or awareness was a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce." Id. at 111. The Justices reasoned that placing a product into the stream of commerce is not equivalent to an act purposefully directed at the forum. Id. at 112. With respect to determining what conduct manifests an act purposefully directed at the forum, Justice O'Connor's opinion contained the following examples: (1) a product's design intended for the forum state market, (2) forum state advertising, (3) "establishing channels for providing regular advice" to forum consumers, and (4) marketing through a distributor serving as the defendant's forum sales agent. Id.
72. Id. at 112.
73. The effects test of Calder should be included within this mix of defendant's acts that are purposefully related to the forum state. Indeed, the test is applicable to copyright infringement cases. Infra notes 172-203 and accompanying text (discussing decisions of federal courts within the Ninth Circuit).
74. Asahi, 480 U.S. at 116 (Brennan, J., concurring in part and concurring in the judgment).
75. Id. at 116-17.
76. Id. at 117.
77. Id.
through the stream of commerce, not an act with a purpose in relation to the forum state, as it was for Justice O'Connor.\footnote{The United States Court of Appeals for the Fifth Circuit accepted Justice Brennan's foreseeability through the stream-of-commerce premise and reasoning within the copyright litigation setting. \textit{Infra} notes 116-24 and accompanying text.}

With Justice O'Connor's and Justice Brennan's opinions in \textit{Asahi} discussed, this primer of \textit{International Shoe} and its progeny is at an end. This Article now turns to the decisions of a number of federal courts of appeal and district courts in copyright infringement cases. These federal court opinions contain analysis of the jurisdictional teachings of the Supreme Court. Generally, the areas of interest are those of a nonresident defendant's act with a purpose to avail, to direct, or to cause effects within the forum state.\footnote{Because federal courts have exclusive subject matter jurisdiction over copyright infringement cases, this examination of personal jurisdiction within the limits of due process involves only those courts. \textit{See} 28 U.S.C. § 1338(a) (2000) (vesting in federal courts exclusive jurisdiction in copyright infringement cases); \textit{see also supra} note 5 (discussing the relationship between the federal court's subject matter jurisdiction over a copyright infringement claim and personal jurisdiction over a defendant-infringer).}

\section{Copyright Infringement Actions and Personal Jurisdiction: Acting with a Purpose to Avail Oneself of the Forum State; Acting with a Purpose to Direct Effects Within the Forum State; or Acting with a Purpose to and Causing Effects Within the Forum State—The Case Law}\footnote{As a reminder, the personal jurisdiction decisions of federal courts within the Ninth Circuit involving copyright infringement have been set aside for separate treatment, along with the decisions of federal courts in Internet cases. \textit{Infra} notes 172-234 and accompanying text.}

\subsection{Illustrative United States Courts of Appeals Decisions}

The United States Courts of Appeals for the Sixth Circuit and the Fifth Circuit have considered the relationship between a copyright infringement action and the constitutionally permissible exercise of personal jurisdiction over a nonresident defendant of the forum state. The position of the Sixth Circuit is found in \textit{Bridgeport Music, Inc. v. Still N the Water Publishing}.\footnote{327 F.3d 472 (6th Cir. 2003) (per curiam).}

\subsubsection{1. Bridgeport Music, Inc. v. Still N the Water Publishing.}

In \textit{Bridgeport Music}, Bridgeport brought copyright infringement actions in the United States District Court for the Middle District of Tennessee, alleging infringement of a number of sound recordings and musical
compositions through "sampling." The actions were brought against two music publishing companies; one was a Texas resident, and the other was a Florida resident. Bridgeport claimed that both defendants distributed the allegedly infringing copies in Tennessee.

On the defendants' motions, the district court dismissed the claims against each defendant because the court lacked personal jurisdiction. On Bridgeport's appeal, the Sixth Circuit considered "whether exercising personal jurisdiction over [the Texas and Florida defendants was] consistent with federal due process requirements."

When it analyzed the propriety of the jurisdictional exercise, the court in Bridgeport Music recognized that the threshold inquiry was whether "the defendant . . . purposefully avail[ed] himself of the privilege of acting in the forum state or caus[ed] a consequence in the forum state." Thereafter, the court elaborated on the meaning of purposeful availment. The following factors were important: (1) the defendant's "deliberate undertaking to do or cause an act or thing to be done in [the

82. Id. at 474. The court of appeals noted that "'sampling' is the process of copying portions of prior master sound recordings directly onto new sound recordings and then rapping on top of the new sound recording." Id. at 475 n.2. In addition, the court noted that the samples in this case were "used in rap records" and contained elements of the musical compositions or the sound recordings, or both that were at issue in the case. Id.

83. Id. at 476. N-the-Water Publishing, Inc. ("NTW") was a music publishing company "with its principal place of business in Texas." Id. In addition to Bridgeport's allegations of sampling against NTW, it claimed infringements through the licensing of the infringing works and the distribution of them. Id.

84. Id. The defendant, DM Records, Inc. ("DM"), was an independent record company. Bridgeport alleged that, in addition to sampling, DM infringed Bridgeport's copyright on some music and sound recordings when it distributed them both. Id. The United States Copyright Act grants to a copyright owner the exclusive right to distribute or authorize the distribution of the copyrighted work. 17 U.S.C. § 106(4) (2000).

85. Bridgeport Music, 327 F.3d at 476.

86. Id. at 477.

87. Id. To be valid, a federal court's exercise of personal jurisdiction over a nonresident defendant in a federal question case, such as copyright infringement, must (1) come within the terms of the "long-arm" statute of the state in which the court is sitting and (2) accord the defendant due process under the Fifth Amendment. Id. The court in Bridgeport Music faced only the due process issue. Id. In this regard, the Tennessee long-arm statute provides that courts in Tennessee can assert jurisdiction "on 'any basis not inconsistent with the constitution of this state or of the United States.'" Id. (quoting TENN. CODE ANN. § 20-2-214(a)(6) (1994 & Supp. 2007)). The statute's language has been construed to be "coterminous with" federal due process limits. Payne v. Motorists' Mut. Ins. Cos., 4 F.3d 452, 455 (6th Cir. 1993). Tennessee's long-arm statute's application is examined in LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE §§ 4:3-4:5 (Thompson West 2007).

88. Bridgeport Music, 327 F.3d at 477.

89. Id. at 478-79.
forum state]”,\(^{90}\) (2) the defendant's creation of a "'substantial connection' with the forum [s]tate”,\(^ {91}\) and (3) the defendant's "'overt actions connecting [him] with the forum state.”\(^ {92}\) The court concluded that when the plaintiff showed “purposeful availment, the absence of physical contacts with the forum state [would] not defeat personal jurisdiction over a non-resident defendant.”\(^ {93}\)

In addition to the court's description of purposeful availment, the court expressed its preference for, and analyzed the constitutionality of, the jurisdictional exercise under the premise adopted by Justice O'Connor in *Asahi Metal Industry Co. v. Superior Court.*\(^ {94}\) The court in *Bridgeport Music* characterized Justice O'Connor’s view of personal jurisdiction as "'stream-of-commerce-plus,'” with the “plus” being the defendant's purposeful availment of the forum state's benefits.\(^ {95}\)

Having adopted Justice O'Connor's approach, the court in *Bridgeport Music* also considered whether the plaintiff made a prima facie showing of purposeful availment.\(^ {96}\) It did so first with respect to the Texas defendant, N-the-Water Publishing, Inc. ("NTW").\(^ {97}\)

In this regard, the following activities were important: (1) licensing of the allegedly infringing musical compositions to a record company for

\(^{90}\) *Id.* at 478 (brackets in original) (internal quotation marks omitted) (quoting Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 891 (6th Cir. 2002)).

\(^{91}\) *Id.* (quoting CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1263 (6th Cir. 1996)).

\(^{92}\) *Id.* (quoting Dean v. Motel 6 Operating L.P., 134 F.3d 1269, 1274 (6th Cir. 1998)). In its explanation of the purposeful availment requirement, the court of appeals considered the issue of whether the jurisdictional exercise was reasonably foreseeable versus one based on “'random,' 'fortuitous,' or 'attenuated' contacts” or on the “'unilateral activity' of another.” *Id.* at 478 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 463, 475 (1985)); see also *supra* notes 61-64 and accompanying text (discussing the purposefulness consideration in *Burger King*).

\(^{93}\) *Bridgeport Music,* 327 F.3d at 479. It is worth recalling that the United States Supreme Court, when deciding *International Shoe,* eschewed physical presence alone as a jurisdictional basis for minimum contacts. *Supra* note 21 and accompanying text.

\(^{94}\) 480 U.S. 102 (1987); *Bridgeport Music,* 327 F.3d at 479-80. For the discussion of Justice O'Connor's *Asahi* analysis, see *supra* notes 67-73 and accompanying text. By implication, it appears the Court in *Bridgeport* rejected the premise put forth by Justice Brennan and the Justices who joined in his opinion. *Bridgeport Music,* 327 F.3d at 479-80. For a discussion of Justice Brennan's opinion, see *supra* notes 74-78 and accompanying text. Finally, the Sixth Circuit applied a purposeful availment test rather than focusing on the reasonableness and fairness of the exercise of personal jurisdiction alone, as was done in *Asahi* by Justice Stevens with two Justices joining. *Bridgeport Music,* 327 F.3d at 479-80; see *Asahi,* 480 U.S. at 121-22 (Stevens, J., concurring) (concluding that the exercise of jurisdiction may be unreasonable and therefore unconstitutional even though the defendant acted purposefully with respect to the forum state).

\(^{95}\) *Bridgeport Music,* 327 F.3d at 480.

\(^{96}\) *Id.*

\(^{97}\) *Id.* at 480-81.
marketing of recordings nationwide; (2) nationally advertising and marketing the allegedly infringing musical compositions; (3) affiliating with two performing rights societies—Broadcast Music, Inc. ("BMI") and the Association of Composers, Authors, and Publishers ("ASCAP"); and (4) selling the compositions at issue through the Internet. 98

With respect to nationwide licensing of the musical compositions, the court in Bridgeport Music held that NTW's knowledge that its licensee "was likely to distribute NTW's compositions nationally, coupled with [NTW's] lack of objection to Tennessee sales, if such sales were ever to occur, [was] insufficient conduct upon which to predicate purposeful availment." 99 The court reached a similar result with respect to distribution and sale in Tennessee via the license. 100 According to the court, "[T]hese contacts [were] too random, fortuitous, and attenuated for a finding of purposeful availment." 101

Bridgeport fared no better when the court examined NTW's advertising and marketing activities. 102 In this regard, the plaintiff argued that there was national advertising through "television and radio spots, and in . . . magazines." 103 The court of appeals acknowledged that advertising reached out to residents of the forum state, but determined there was a lack of "evidence of advertising directly targeting or even actually reaching Tennessee." 104

98. Id. at 480-83.
99. Id. at 480. The court of appeals suggested that had the nationwide licensing agreement required Tennessee sales, the result would have been different. See id. In this regard, "required sales" provided the purposeful element, not awareness of likely marketing within the forum state alone. Id.
100. Id. at 480-81.
101. Id. at 481. The court added that NTW took no action "to direct the compositions to Tennessee." Id. at 480. Had NTW done so, Bridgeport's distribution and sale in the forum state would have provided a basis for finding purposeful availment. See id.
102. Id.
103. Id. In its deposition, NTW's CEO stated: "[w]e attempt to market nationally." Id. (brackets in original).
104. Id. Had there been evidence sufficient to demonstrate that advertising reached Tennessee, the result need not have been that the copyright infringer purposefully availed itself of that forum state. Id. at 481 n.10. Within footnote ten of the case, the court took no position on these facts, but cited to three circuits in which the United States Courts of Appeals held national advertising alone insufficient to manifest purposeful availment. Id. (citing SEC v. Carrillo, 115 F.3d 1540, 1545 (11th Cir. 1997); Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Coop., 17 F.3d 1302, 1305 (10th Cir. 1994); Singletary v. B.R.X., Inc., 828 F.2d 1135, 1136 (5th Cir. 1987)). None of the noted cases arose in the copyright infringement context. It is submitted that a like result would be reached in a copyright case absent the alleged infringer's deliberate effort to induce forum residents to acquire or use the infringing copies. The court in Bridgeport Music suggested as much. Id.
As to NTW's affiliations with BMI and ASCAP, the court held for the defendant.\textsuperscript{105} Although the relationships had a Tennessee connection, the court of appeals held that the nexus did not result in purposeful availment.\textsuperscript{106} Rather, the court opined that evidence must be offered showing that a performing rights society had an "affirmative duty to license or market the subject compositions specifically in Tennessee."\textsuperscript{107}

NTW offered no evidence of purposeful availment of the forum state, Tennessee.\textsuperscript{108} As a result, the court of appeals affirmed the district court's dismissal on lack of jurisdiction grounds.\textsuperscript{109} The court of appeals then turned its attention to the Florida defendant, DM Records, Inc. ("DM").\textsuperscript{110}

The court held that DM had purposefully availed itself of the privilege of acting in Tennessee.\textsuperscript{111} Specifically, DM entered into a distribution agreement in which its distributor was obligated to distribute the allegedly infringing recordings in Tennessee as well as the other forty-nine states.\textsuperscript{112} The result was that once DM benefited from the distributor's fulfillment of its obligation to distribute the recordings, DM had purposefully availed itself of the Tennessee forum.\textsuperscript{113}

Given prima facie evidence of purposeful availment, the court in \textit{Bridgeport Music} reversed the district court's dismissal with respect to the defendant, DM.\textsuperscript{114} The case, however, was remanded so the

\begin{thebibliography}{114}
\bibitem{105} Id. at 483.
\bibitem{106} Id. at 482-83.
\bibitem{107} Id. at 482. The Sixth Circuit also held that NTW's Internet sale of the infringing songs was not prima facie evidence of purposeful availment. \textit{Id.} at 483. In this regard, the court indicated that evidence of a "sufficiently interactive" website was necessary to satisfy this requirement. \textit{Id.; see also infra} notes 204-34 and accompanying text (discussing the special manner in which purposeful availment intersects with copyright infringement and the Internet context).
\bibitem{108} \textit{Bridgeport Music}, 327 F.3d at 483.
\bibitem{109} Id.
\bibitem{110} Id.
\bibitem{111} Id. at 484.
\bibitem{112} Id. Of significance to the court was Bridgeport's evidence demonstrating that DM's president understood that the contract required distribution "in all 50 states." \textit{Id.}
\bibitem{113} Id. The opinion also indicated that through its website, DM purposefully availed itself of Tennessee's benefits. \textit{Id.} In this regard, the website's users could "access DM's catalog and purchase DM's records." \textit{Id.} Bridgeport's evidence showed thirty-six of two "allegedly infringing albums" were sold through the website. \textit{Id.; see also infra} notes 204-34 and accompanying text (Part V and the special manner in which purposeful availment intersects with copyright infringement and the Internet).
\bibitem{114} \textit{Bridgeport Music}, 327 F.3d at 485.
\end{thebibliography}
district court could consider jurisdictional matters in addition to purposeful availment. 115

2. Luv N' Care, Ltd. v. Insta-Mix, Inc. The Fifth Circuit had occasion to apply the purposeful availment requirement to a copyright infringement case in Luv N' Care, Ltd. v. Insta-Mix, Inc. 116 The decision in Luv N' Care, however, was strikingly different from that of the Sixth Circuit in Bridgeport Music.

In Luv N' Care, the court of appeals rejected the rule that "placing a product into the stream of commerce, . . . where the defendant knows the product will ultimately reach the forum state, does not rise to the level of 'purposeful availment.'"117 In doing so, the Fifth Circuit declined to follow Justice O'Connor's plurality opinion in Asahi. 118

The purposeful availment test adopted by the Fifth Circuit in Luv N' Care follows: "'mere foreseeability or awareness [is] a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce.'"119

115. Id. Significantly, the absence of the defendant's purpose to avail itself of the forum state's benefits results in a dismissal on jurisdictional grounds, but its presence may remove only that jurisdictional obstacle. For example, in Bridgeport Music, the following questions remained in the case: (1) whether DM's acts by which it purposefully availed itself of the forum gave rise to the cause of action and (2) whether the exercise of jurisdiction over DM was reasonable. As to both issues, the court of appeals recognized the need for factual analysis not present in the record on appeal. Id.

116. 438 F.3d 465 (5th Cir. 2006).
117. Id. at 470 (emphasis added).
118. Id. Judge DeMoss specially concurred. Id. at 474 (DeMoss, J., specially concurring). Although he joined his colleagues on the three-judge panel in the result, Judge DeMoss wrote separately, applying Justice O'Connor's stream-of-commerce-plus premise. Id. at 474-75. This Article analyzes Judge DeMoss's opinion following the discussion of the two judges who rejected the O'Connor approach. Infra notes 125-30 and accompanying text. For an examination of Justice O'Connor's opinion in Asahi, see supra notes 67-73 and accompanying text.

119. 438 F.3d at 470 (brackets in original) (quoting Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 419 (5th Cir. 1993)). Prior to Luv N' Care, decisions of the Fifth Circuit in the products liability context adopted the "mere foreseeability" approach to resolving the personal jurisdiction question. See Ruston, 9 F.3d at 419; Bean Dredging Corp. v. Dredge Tech. Corp., 744 F.2d 1081 (5th Cir. 1984). The United States Court of Appeals for the Seventh Circuit also adopted the theory within the products liability context. Nelson v. Park Indus., Inc., 717 F.2d 1120 (7th Cir. 1983) (stating that the defendants knew they were sending the subject product into the stream of commerce toward the forum). Stream of commerce was also the constitutional premise that Justice Brennan advocated in Asahi. Supra notes 74-78 and accompanying text.

In Luv N' Care, the court of appeals concluded that the circuit adopted this test to remain faithful to the holding of the United States Supreme Court in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). Luv N' Care, 438 F.3d at 470. The
Having adopted a stream-of-commerce premise, the court in *Luv N' Care* turned to the purposeful availment test's application against Insta-Mix.\(^{120}\) Thus, the court needed to determine whether there had been an act through which Insta-Mix "‘purposefully avail[ed] itself of the privilege of conducting activities [in Louisiana], thus invoking the benefits and protections of its laws.’”\(^{121}\)

After considering the acts of Insta-Mix, the court held the following: (1) the defendant's allegedly infringing bottle (the cap's design) entered the forum state, Louisiana, as a result of purchase orders that Insta-Mix filled and confirmed with its distributor-retailer; (2) Insta-Mix's sales invoices indicated that the bottle as designed would reach Louisiana; (3) "Insta-Mix derived substantial revenue (about 4.5% of its total distribution) from its sale of thousands of units" of the bottle at issue within the forum state; and (4) Insta-Mix's contract with its distributor-retailer, through which it sought to shift title to the allegedly infringing materials before they left Insta-Mix's home state, did not preclude the forum state, Louisiana, from exercising jurisdiction.\(^{122}\)
According to the court of appeals, Insta-Mix acted with a purpose to avail itself of Louisiana for the distribution and sale of the capped bottles that allegedly infringed Luv N' Care's design. As such, the court held the defendant had "minimum contacts" with Louisiana.

Judge DeMoss, a member of the judicial panel that decided Luv N' Care, was obligated under existing Fifth Circuit precedent to concur with his colleagues' use of the stream-of-commerce premise to answer whether Insta-Mix had made minimum contacts with the forum state. Judge DeMoss, nevertheless, wrote a separate opinion in which he demonstrated the difference between a stream-of-commerce-based analysis and Justice O'Connor's analytical framework in Asahi, stream-of-commerce-plus.

In this regard, Judge DeMoss pointed out that Insta-Mix did not design and designate the bottle "for the Louisiana market." The Judge added that "Insta-Mix did not advertise in Louisiana." Moreover, the alleged infringer established no channels for providing regular advice to customers in the forum, nor did it market the product through a distributor or sales agent in that state. The absence of these elements, which are essential to both Justice O'Connor's stream-of-commerce-plus analysis and the purposeful availment test, led Judge DeMoss to conclude that the federal district court in Louisiana lacked jurisdiction over Insta-Mix in the copyright infringement action.

The decisions of the Sixth Circuit in Bridgeport Music and the Fifth Circuit in Luv N' Care are vivid illustrations of different results on the personal jurisdiction issue in copyright infringement cases. Although both courts applied a purposeful availment test for establishing minimum contacts, the court in Bridgeport Music did so from a stream-of-commerce-plus premise, while the court in Luv N' Care did so from a
stream-of-commerce premise only. In addition to decisions of the United States Courts of Appeals, several opinions of federal district courts illuminate the application of the purposeful availment requirement to a copyright infringement action against a nonresident defendant.

B. Copyright Infringement Actions—United States District Courts Apply the Purposeful Availment, Direction, and Effects Tests

1. KnowledgeAZ, Inc. v. Jim Walter Resources, Inc. In KnowledgeAZ, Inc. v. Jim Walter Resources, Inc., the plaintiff brought an infringement action in Indiana, the plaintiff's principal place of business, against the defendant, Jim Walter Resources, Inc. ("JWR"), an Alabama corporation, and others. The plaintiff claimed that JWR infringed its copyright on some computer software, which violated the parties' licensing agreement by "making and retaining unauthorized copies of [the plaintiff's] eWarehouse software."

JWR moved to dismiss the action for lack of personal jurisdiction. When ruling upon the motion, the district court acknowledged that "due process require[d] that [JWR] must have established contacts with the forum state by purposefully availing itself of the privilege of conducting business there."

The court then decided whether there were contacts rising to the level of purposeful availment. In this regard, the court made two signifi-

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131. Bridgeport, 327 F.3d 472; Luv N' Care, 438 F.3d 465. The results indicate that absent stream-of-commerce-plus considerations, a defendant that is an alleged copyright infringer may more readily be subject to forum state jurisdiction than a defendant whose acts must measure up to those considerations, notwithstanding the application of the purposeful-availment test in both cases. Judge DeMoss's specially concurring opinion in Luv N' Care demonstrates as much. Supra notes 125-30 and accompanying text.


133. Id. at 887.

134. Id.

135. Id. at 892. As a preliminary matter, the district court's opinion provided its readers with a reminder. Id. Although federal question jurisdiction exists under the copyright law, "[t]he Copyright Act does not provide for nationwide service of process, so personal jurisdiction is governed by the law of the forum state, Indiana." Id.; see also supra note 5 and accompanying text (discussing Fed. R. Civ. P. 4(k)(1)(A)).

According to the court in KnowledgeAZ, under Indiana law, courts of the "state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States." 452 F. Supp. 2d at 872 (quoting IND. TRIAL P. R. 4.4A). Indiana's rule narrowed the plaintiff's proof to a showing that the jurisdictional exercise was within federal due process limits. Id.


137. Id.
cants points at the outset of its analysis: (1) a nonresident of the forum who contracts with a forum resident does not necessarily establish a minimum forum contact and (2) the entirety of the transaction must be examined, including the negotiations, consequences, terms, and actual course of dealing.\(^{136}\)

After examining the entire relationship between the plaintiff and JWR, the district court found it to be continuous in nature and, most importantly, one that JWR "deliberately entered into" with the plaintiff, an Indiana corporation.\(^{139}\) The court concluded the deliberate conduct was such that JWR "purposefully availed itself of the privilege of conducting business in Indiana."\(^{140}\) Thereafter, the district court denied JWR's motion to dismiss for lack of personal jurisdiction.\(^{141}\)

2. Barrow Industries, Inc. v. JST America, Inc. A second illustrative district court opinion applying purposeful-based tests is Barrow Industries, Inc. v. JST America, Inc.\(^{142}\) In this case, Barrow, a fabric designer, brought a copyright infringement action before a federal district court sitting in Massachusetts against JST, a fabric designer, alleging that JST's fabric design, "Classique Persian," infringed upon its "M 4760" copyrighted design.\(^{143}\) Because the suit was brought in a Massachusetts district court, JST, a Florida corporation, made a motion to dismiss for lack of personal jurisdiction.\(^{144}\) When considering JST's motion, the district court examined whether the exercise of personal jurisdiction would offend due process.\(^{145}\) The focus of that

138. Id. at 896.
139. Id.
140. Id.
141. Id. at 899.
143. Id. at *3-4.
144. Id. at *1. The parties' arguments and the district court's analysis of them address a number of issues other than whether JST purposefully availed itself of the forum, Massachusetts. One part of this discussion is worthy of note. The Massachusetts long-arm statute provided, in effect, that before a court could exercise personal jurisdiction over JST, it would have had to cause a "tortious injury" in the state. Id. at *17. The statute limited the district court's exercise of personal jurisdiction in the copyright infringement case to a tortious injury within the forum. Id. Barrow, therefore, had the burden to make a prima facie showing of such an in-state injury. Id. Absent the injury, the court could dispose of the jurisdictional motion as a matter of Massachusetts statutory law. Id. The court in Barrow found that Barrow did not meet its statutory burden. Id. The court, nevertheless, analyzed federal due process limits as well. Id. at *18-27.
145. Id. at *16-27. Under the existing precedent of the First Circuit, a court must analyze the defendant's contacts, if any, to determine if the defendant "'purposefully availed' [itself of] the benefits and protections" of the forum state. Id. at *16 (citing United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 620-21 (1st Cir. 2001)).
examination was both the purposeful availment and the purposeful direction requirements of the minimum contacts analysis.\footnote{\textit{Id.} at \#16-27.} According to the court in \textit{Barrow}, these jurisdictional limits compel a court to distinguish between a defendant's "intent" concerning its forum contacts and those contacts resulting from "happenstance."\footnote{\textit{Id.} at \#22.} The court indicated that the single contact was "happenstance," not "intended," because "nothing in that advertisement [bore] any of the hallmarks suggesting that JST was targeting Massachusetts' consumers."\footnote{\textit{Id.} at \#22-23. The court was of the opinion that a defendant \textit{intended} to purposefully avail itself of the forum's privileges through a single magazine advertisement generally circulated if that defendant targeted Massachusetts consumers (solicitation of new customers through name recognition). \textit{Id.} at \#21 (citing Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34, 40-42, 44 (D. Mass. 1997)).} The result was that \textit{Barrow} had not satisfied the purposeful direction requirement of due process.\footnote{\textit{Id.} at \#22.}

The federal district courts in both \textit{KnowledgeAZ} and \textit{Barrow} shared a common conclusion with respect to the due process tests of purposeful availment and purposeful direction. Namely, to apply either, the defendant's forum contacts must be intentional or deliberate in nature. The intended or deliberate contact elements of both purposeful availment and purposeful direction were taken a significant step further in \textit{Dakcoll Inc. v. Grand Central Graphics, Inc.} The court in \textit{Dakcoll} did so by applying them in copyright litigation to the effects test of minimum contacts sanctioned by the Supreme Court in \textit{Calder v. Jones}.\footnote{\textit{Id.} at 998; 465 U.S. 783 (1984). For the discussion of \textit{Calder}, see supra notes 50-57 and accompanying text.}

3. \textit{Dakcoll Inc. v. Grand Central Graphics, Inc.} In \textit{Dakcoll} the plaintiff, a North Dakota corporation, owned valid copyrights in artwork "consisting of designs and patterns used for embroidery purposes."\footnote{352 F. Supp. 2d 992 (D.N.D. 2005).} The defendants (the court referred to both as Grand Central Graphics) were Minnesota corporations.\footnote{\textit{Id.} at 993.}

In its complaint against Grand Central Graphics, the plaintiff claimed an infringement of its artwork copyrights "by copying, distributing,
marketing, and/or causing, facilitating, and otherwise contributing to the copying, distributing, and marketing of [the plaintiff's] embroidery designs." In response to the plaintiff's complaint, Grand Central Graphics moved to dismiss for lack of personal jurisdiction. In analyzing the jurisdictional issue, the district court stated: "minimum contacts require some act by which the defendant purposely avails himself or herself of the privilege of conducting activities within the forum state."

When it applied the purposeful availment test to Grand Central Graphics' acts, the district court found catalog distribution and sales of the allegedly infringing designs in North Dakota. According to the court, the effects test from Calder was the applicable rule to that catalog distribution and sale. Under that test, the forum state court must examine the impact on or harm to the plaintiff in the forum that arose from the defendant's actions intended to cause the effects within the forum state. When the court in Dakcoll considered the intended effects within the forum state, it found that "there [was] evidence to support the Plaintiff's assertion that Grand Central Graphics 'knowingly and intentionally infringed on the [copyrights]." The court reached this holding for a number of reasons: (1) the plaintiff gave Grand Central Graphics "ample warning" of the alleged infringement, yet Grand Central Graphics refused "to cease and desist"; (2) once Grand Central Graphics received the written warning, its acts thereafter were knowing ones; (3) because the warning informed Grand Central Graphics that the plaintiff was a North Dakota company, Grand


To be held liable, a defendant to a copyright infringement action need not be the actual infringer. A defendant who contributes to the infringement also establishes liability. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435-42 (1984) (claiming the makers of videotape recorders contributed to infringement of copyrights by users).

156. *Dakcoll*, 352 F. Supp. 2d at 993. North Dakota's long-arm statute has been interpreted to authorize that state's "courts to exercise jurisdiction over nonresident defendants to the fullest extent permitted by due process." *Id.* at 994 (internal quotation marks omitted) (quoting *Hansen v. Scott*, 645 N.W.2d 223, 230 (N.D. 2002)). The court in *Dakcoll*, therefore, recognized that the only jurisdictional issue before it was whether its exercise would satisfy federal due process limits. *Id.*

157. *Id.* at 995.

158. *Id.* at 997.

159. *Id.*

160. *Id.*

161. *Id.* at 999 (second brackets in original) (quoting *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1391 (8th Cir. 1991)).
Central Graphics "knew the brunt of the injury would be felt in North Dakota"; (4) Grand Central Graphics distributed catalogs and allegedly infringed embroidery designs in North Dakota; and (5) because the plaintiff's warnings informed Grand Central Graphics that the plaintiff would sue for copyright infringement, "Grand Central Graphics must reasonably anticipate being haled into court in North Dakota."

According to the court in Dakcoll, the Calder effects test was satisfied when the requisite intention was met, and Grand Central Graphics purposely availed itself of the forum, North Dakota.

Having discussed Dakcoll and its effect on the analysis of acting with a purpose to avail, direct, or effect, this Article's examination of those due process minimum contacts limitations among federal courts is at an end. In sum, Bridgeport Music and Luv N' Care demonstrated the differences that United States Courts of Appeals took toward application of the purposeful availment test pursuant to the opinion in Asahi.

If, as in Bridgeport Music, a federal court adopts Justice O'Connor's stream-of-commerce-plus premise to purposeful availment, the plaintiff makes its prima facie jurisdictional showing under the following circumstances: (1) when the defendant acts with a purpose to avail himself or herself of the forum state or (2) when the defendant acts with the intention or aim of reaching forum residents. On the other hand, should a federal court accept Justice Brennan's stream-of-commerce premise, as did the court in Luv N' Care, the defendant's awareness that the infringing copies were marketed in the forum state satisfies the purposeful availment requirement. The distinction between Bridgeport Music and Luv N' Care may be one determinative of the jurisdictional issue.

For example, a defendant may be aware of the marketing of infringing copies in a forum state, yet the defendant may not have acted deliberately to cause that marketing. In this event, under Bridgeport Music, the plaintiff has not made a prima facie showing of purposeful availment.

162. Id.

163. Id. The district court found that the jurisdictional exercise over Grand Central Graphics satisfied due process and did "not offend traditional notions of fair play and substantial justice." Id. at 1000.

164. Interestingly, the court in Dakcoll viewed forum-state-intended effects as an example of purposeful availment. Id. at 997-1000. It may be well for a court to recognize that consideration of forum-state-intended "effects" stands independently of availment when addressing the minimum contacts issue.

165. Supra notes 88-95 and accompanying text (discussing the stream-of-commerce-plus analysis in Bridgeport Music).

166. Supra notes 117-24 and accompanying text.
The result is that the case would be dismissed for lack of personal jurisdiction.

If *Luv N' Care* applies, the defendant’s awareness or the foreseeability of infringing copies being marketed within the forum state satisfies the purposeful availment test. After that requirement has been met, the plaintiff’s case moves to other issues.

Given the diverse views of purposeful availment, the opinions of the federal district courts sampled reflect distinctions made when applying that requirement. In this regard, the hallmark of the caselaw is that the defendant acts with the intent to avail, direct, or cause effects in the forum state.

With the decisional law among federal courts of appeals and district courts in hand, this Article turns to the following: (1) application of the purposeful availment, direction, or effects jurisprudence in copyright infringement litigation within the United States Court of Appeals for the Ninth Circuit and (2) application of the purposeful availment, direction, or effects tests in copyright infringement litigation in the Internet context.

IV. SPECIAL CASE ONE: PURPOSEFUL AVAILMENT, PURPOSEFUL DIRECTION, OR PURPOSEFUL EFFECTS AND JUDICIAL DECISIONS WITHIN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN COPYRIGHT INFRINGEMENT LITIGATION

A number of federal district courts sitting in states within the Ninth Circuit have developed a body of law in copyright infringement cases, in which the purposeful availment, purposeful direction, or purposeful effects requirements of minimum contacts were applied. This

167. Judge DeMoss’s specially concurring opinion in *Luv N' Care* also illustrates that adopting stream-of-commerce-plus versus stream-of-commerce may lead to different results. 438 F.3d at 474-76 (DeMoss, J., specially concurring); *supra* notes 125-30 and accompanying text.

168. The failure to satisfy other due process jurisdictional requirements may support a dismissal. *Supra* note 115 and accompanying text.

169. *Supra* notes 132-63 and accompanying text.

170. *Infra* notes 174-203 and accompanying text.

171. *Infra* notes 204-34 and accompanying text.

172. *Infra* notes 174-203 and accompanying text. There also is an unreported opinion of the Ninth Circuit arising from the copyright infringement setting. N. Coast Indus. v. K-Mart Corp., No. 89-16179, 1990 U.S. App. LEXIS 21074 (9th Cir. Nov. 5, 1990). In that case, the appeals court affirmed a dismissal for lack of jurisdiction because the contact with the forum state (shipment of the allegedly infringing material) resulted from conduct by someone other than that of the defendant. *Id.* at *1. As a result, the contact was "fortuitous and [was] due to the unilateral activity of a third party." *Id.*
caselaw serves as a template for each requirement’s application that other federal courts may desire to follow.173

A. Precision Craft Log Structures, Inc. v. Cabin Kit Co.

In Precision Craft Log Structures, Inc. v. Cabin Kit Co.,174 the plaintiff (“Precision Craft”), an Idaho corporation, brought a copyright infringement action against the defendant (“Cabin Kit”), a Nevada corporation.175 Precision Craft alleged that Cabin Kit copied Precision Craft’s copyrighted architectural plans and log cabin models.176

In response to Precision Craft’s complaint, Cabin Kit filed a motion to dismiss, contending that its contacts with Idaho, the forum state, were “virtually non-existent” and that it did “nothing to ‘purposefully direct’ its business activities to Idaho residents.”177 In reply, Precision Craft averred that Cabin Kit, by infringing Precision Craft’s copyrighted plans and models, committed a tort in Idaho and therefore submitted to that state’s jurisdiction.178

In reviewing Cabin Kit’s motion and Precision Craft’s response, the district court acknowledged that the first question concerning the proper exercise of jurisdiction was whether Cabin Kit acted purposefully within Idaho.179 That condition, if proven, would assure Cabin Kit was not in an Idaho court because of “random, fortuitous, or attenuated contacts or

173. Infra notes 174-203 and accompanying text. In general, the due process limitations on personal jurisdiction issue are complicated by the evenly divided Supreme Court in Asahi Metal Industry Co. v. California, 480 U.S. 102 (1987). Supra notes 67-78 and accompanying text. In the final analysis, it will take a clear message from the Supreme Court before lower federal courts can settle the broad issue of the proper exercise of personal jurisdiction within constitutional limits. Congress, however, may choose to address the relationship between copyright infringement and personal jurisdiction. As of the date of this Article, Congress has not done so.


175. Id. at *1.

176. Id. Precision Craft mailed a cease and desist letter to Cabin Kit and offered it a license to use Precision Craft’s plans and models, but Cabin Kit refused the offer. Id.

177. Id. Cabin Kit had no business presence in Idaho, nor did it have employees there. Id. In addition, “it ha[d] no dealers... in Idaho, [did] not own real property in Idaho, and [did] not maintain bank accounts in Idaho.” Id.

178. Id. at *2. Under the Idaho long-arm statute, a court may exercise personal jurisdiction “when a tortious act is committed within the state.” Id. at *3 (citing IDAHO CODE ANN. § 5-514 (2004)). This language was construed to extend the jurisdiction of courts in Idaho to the due process limits of the United States Constitution. Id.

179. Id. at *4.
on account of the unilateral activity of third parties." The court added that sufficient assurance of an act's purposefulness existed if Cabin Kit aimed or directed an act that had an effect on Precision Craft in Idaho.

When it examined whether Cabin Kit directed an act that caused an effect in Idaho, the district court pointed to the following circumstances: (1) Cabin Kit's knowledge that Precision Craft was an Idaho company; (2) Cabin Kit's capacity to deliver and the actual delivery of its catalog to Idaho customers; (3) Cabin Kit's sale of Precision Craft's copyrighted plans and other materials to Idaho customers; (4) Cabin Kit's knowledge that Precision Craft owned copyrights in the plans and drawings that Cabin Kit reproduced and distributed; and (5) Cabin Kit's willful use of Precision Craft's copyrighted works. These allegations, in turn, led the court to conclude that "Cabin Kit's conduct and connection with Idaho were such that [it] should have reasonably anticipated being sued in Idaho."

In addition to Precision Craft, decisions of two other federal district courts sitting in California provide insight into the following: (1) a defendant's act with a purpose to aim or direct effects into the forum state and (2) a defendant's act with a purpose that causes an effect within the forum state.

B. Silverlit Toys Manufactory, Ltd., v. Absolute Toy Marketing, Inc.

In Silverlit Toys Manufactory, Ltd. v. Absolute Toy Marketing, Inc., Silverlit, a California toymaker, copyrighted its design for a miniature remote control helicopter called the "Picoo Z". Absolute Toy Marketing, Inc. ("Absolute") was a toy retailer selling an alleged

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180. Id. Third party activities were integral to the Court's decision in Hanson v. Denckla, 357 U.S. 235 (1958). Supra notes 30-31 and accompanying text.
182. Id. at *7. The court added that Cabin Kit, by selling Precision Craft's copyrighted plans throughout the United States necessarily caused Precision Craft an injury in Idaho. Id. Indeed, in the court's view, "Cabin Kit's alleged intentional actions were expressly aimed or directed at [Idaho] and caused harm which [Cabin Kit] knew would be suffered in [Idaho] where Precision Craft had its principal place of business." Id.
183. Id. On a motion to dismiss, the court took Precision Craft's allegations as true. Id.
186. Id. at *1.
exact copy of the Picoo Z. When Absolute failed to answer Silverlit's cease-and-desist letters, Silverlit brought suit in California claiming copyright infringement. Absolute met that claim and Silverlit's motion for a preliminary injunction with a motion to dismiss for lack of personal jurisdiction.

When addressing the motion, the district court recognized that in order for its jurisdictional exercise over Absolute to satisfy due process, Absolute must have acted with a purpose to avail itself of California's benefits, or it must have directed an act toward or executed a transaction within California or with a California resident. Under this approach, Absolute's sale of copies of Silverlit's copyrighted Picoo Z subjected it to jurisdiction in California. In this regard, through its California sales, Absolute was acting within and so availing itself of the forum state's benefits. It was also causing in-state effects, namely the harm to Silverlit, with each purchase of an infringing copy in California.

187. Id. at *2. Sales were made through Absolute's website. Id. For the discussion of purposeful availment and the Internet, see infra notes 204-34 and accompanying text.
189. Id. at *4. According to the court, acting with a purpose to avail is proven when (1) a nonresident defendant executed or performed a contract in California or (2) when a defendant acted with a purpose to direct those acts toward California. Id. For example, if a nonresident defendant distributes materials in California that originated elsewhere or knowingly causes harm in California through its act intentionally aimed at the state, the defendant purposefully avails itself of that state. Id.

The court in Goldberg also confirmed that the purposeful availment, direction, or effects analyses are essential to deciding whether the exercise of jurisdiction is constitutional. 482 F. Supp. 2d at 1144. Each, however, is a part of the due process inquiry only. A federal court must also consider whether the plaintiff's claim arises out of the defendant's "forum acts" as well as whether the jurisdictional exercise is reasonable. Silverlit, 2007 WL 521239, at *4 (citing Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987)).
191. Id.
192. Id. Absolute conceded personal jurisdiction. That defendant, however, contested jurisdiction with respect to two employees. The first was a manager with the capacity to control sales. Id. at *8. The court concluded that the manager was subject to jurisdiction in California as a "moving, active conscious force behind the infringing activity." Id. (quoting Babbit Elecs., Inc. v. Dynascan Corp., 828 F. Supp. 944 (S.D. Fla. 1993), aff'd 38 F.3d 1161 (11th Cir. 1994)).

The second employee was Absolute's president. He also was found subject to jurisdiction in California because he knowingly made misleading statements concerning the sale of infringing copies of Silverlit's toy helicopter. Id. at *9. According to the district court, once Absolute's president made the statements, he "was a moving active force behind the alleged infringement." Id.

It is noteworthy that the court focused on the defendants' acts or activities and the connections between them and the forum state when deciding that both of the individual
C. Goldberg v. Cameron

In Goldberg v. Cameron, the plaintiff, a copyright owner of a movie script, sued the defendant, Cameron, and others in California for infringement of the plaintiff's copyright on the movie trilogy that began with The Terminator. The defendant made a motion to dismiss the plaintiff's complaint, which gave rise to the district court's personal jurisdiction analysis.

The court in Goldberg began its consideration of the jurisdictional issue by reviewing the purposeful availment, purposeful direction, and purposeful effects concepts. The court's position on purposeful availment was important. In this regard, the court stated that the "test was satisfied by the fact that the defendant had willfully infringed copyrights owned by the plaintiff, which, as the defendant knew, had its principal place of business in the forum district." When the district court applied the purposeful availment test, it found for the plaintiff for two reasons. First, Goldberg "made a prima facie showing" that Cameron and the other defendants willfully infringed Goldberg's copyright. Second, the defendants acted with the intent to produce movies for worldwide distribution, including, therefore, all federal districts within the forum state, California. As a result, the defendants knew that their actions had an effect in California. They defendants were subject to jurisdiction in California. At bottom, therefore, the analysis is akin to acting with a purpose to avail, a purpose to direct, or a purpose to cause effects within the forum state.

193. 482 F. Supp. 2d 1136 (N.D. Cal. 2007).
194. Id. at 1141; THE TERMINATOR (Hemdale Film Corp. 1984).
195. Goldberg, 482 F. Supp. at 1142. It should be noted that the defendant contested venue versus personal jurisdiction. Id. The venue statute in copyright cases states that "[c]ivil actions, suits, or proceedings arising under any Act of Congress relating to copyrights . . . may be instituted in the district in which the defendant or his agent resides or may be found." Id. at 1143 (quoting 28 U.S.C. § 1400(a) (2000)) (brackets in original). According to the court in Goldberg, that statute has been construed within the Ninth Circuit to equate venue with personal jurisdiction. Id. If, therefore, the defendant is subject to personal jurisdiction before a district court sitting within a given state, venue is proper before that court as well. Id.
196. Id. at 1143-44.
197. Id. at 1144.
198. Id. at 1144-45 (emphasis added).
199. Id. at 1145.
200. Id.
201. Id. at 1146.
also knew of the adverse effects on the value of the plaintiff's copyright within the federal district in which the plaintiff sued the defendants.\textsuperscript{202} The review of \textit{Precision Craft}, Silverlit, and \textit{Goldberg} reveals a constitutionally sound jurisdictional approach. Its contours are marked by the following questions for copyright infringement litigants and federal courts to consider: (1) did the alleged infringer act purposefully or willfully within the forum state; (2) did he or she act purposefully or willfully with the aim or direction of causing an effect in a forum state; and (3) did he or she act knowing that she was causing the copyright owner adverse effects in the forum state? Affirmative answers to one or more of these questions prima facie proves the jurisdictional exercise complies with due process. A negative response to these questions requires a dismissal on lack of personal jurisdiction grounds.

The Ninth Circuit caselaw sharpened the edge of the purposeful availment, direction, and effects tests for non-Internet copyright infringement claims.\textsuperscript{203} Copyright infringement via the Internet, as well as the application of the appropriate tests, are the subject matter of the next part of this Article.

\textsuperscript{202} \textit{Id.} Ultimately, the court denied the defendants' improper venue (personal jurisdiction) motion. \textit{Id.}

\textsuperscript{203} Additional district court decisions within the Ninth Circuit further explore this issue. See Goodwin v. Best Plan, Int'l, Ltd., No. C-04-2219EDL, 2004 WL 1924147 (N.D. Cal. Aug. 30, 2004) (holding that customers purchasing allegedly infringing copies of copyrighted material within the forum state district may be sufficient to demonstrate that the defendant purposefully availed itself of that forum district); Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 269 F. Supp. 2d 1213 (C.D. Cal. 2003) (holding that a website with a significant number of forum state users alleged to be copyright infringers purposefully availed itself of the forum state); Overton v. Vanzant, No. CV 01-624-AS, 2001 WL 1911359 (D. Or. Dec. 13, 2001) (holding that an alleged copyright infringer did not purposefully avail herself of the forum state's benefits when appearing on a national television talk show program); AdVideo, Inc. v. Kimel Broad. Group, Inc., 727 F. Supp. 1337 (N.D. Cal. 1989) (holding that contract negotiations, execution, and "choice of forum" provisions all concerning copyrighted materials were sufficient to show the defendant purposefully availed itself of the forum state's benefits); Microsoft Corp. v. Very Competitive Computer Prods. Corp., 671 F. Supp. 1250, 1255 (N.D. Cal. 1987) (holding that companies deliberately directing allegedly infringing computer programs into the forum state purposefully availed themselves of the state's benefits and protections); Holder Corp. v. Main St. Distrib., Inc., No. CIV 86-1285 PHX RCB, 1987 WL 14340 (D. Ariz. Apr. 21, 1987) (holding that shipping allegedly infringing copies into the forum state manifested deliberate acts by which the defendant purposefully availed itself of that state).
V. SPECIAL CASE TWO: PURPOSEFUL AVAILMENT, PURPOSEFUL DIRECTION, OR PURPOSEFUL EFFECTS AND JUDICIAL DECISIONS CONCERNING COPYRIGHT INFRINGEMENT VIA THE INTERNET

A number of lower federal courts have applied the purposeful availment requirement to the personal jurisdiction issue in copyright infringement claims arising from Internet activities. Alleged infringement via the Internet, however, has posed personal jurisdiction problems unique to that communications medium. The decision in *Mink v. AAAA Development LLC* exemplifies the United States Court of Appeals for the Fifth Circuit's solution to those problems.

A. *Mink v. AAAA Development LLC*

In *Mink v. AAAA Development LLC*, the plaintiff, a Texas resident, was the author of a computer program that the plaintiff claimed the defendants conspired to copy. The plaintiff brought a copyright infringement action before a federal district court in Texas against the defendants, who were nonresidents of that state. Following a dismissal for lack of personal jurisdiction, the plaintiff asked the court to reconsider its decision on the basis that one of the defendants, AAAA, maintained a "World Wide Website" that was "accessible by Texas residents." When it addressed the jurisdictional issue on appeal, the Fifth Circuit recognized that the purposeful availment test must be satisfied in order for the exercise of personal jurisdiction to comport with due process. Although unclear from the opinion, it appears that deciding whether a nonresident purposefully availed itself of the forum state's benefits through its website turns on the character of that website. If the website was passive, then the defendant has not acted with a purpose to avail. According to the court in *Mink*, indicia of passivity includ-
ed merely posting information, providing printable mail-in forms, and providing a toll-free phone number, mailing address, or email address.\(^{210}\)

Distinguishable from a passive website—one in which the copyright-infringing defendant had not acted with a purpose to avail itself of the forum state—is an interactive website.\(^{211}\) With interactivity comes an exchange of information between the nonresident defendant who maintains the website and the forum state residents.\(^{212}\) The most important aspect of such an exchange, for jurisdictional purposes, is the forum state resident’s ability to buy the defendant’s goods or services “on-line.”\(^{213}\)

When the Fifth Circuit reviewed the AAAA website, it concluded that the website was passive, not interactive.\(^{214}\) Indeed, “potential customers [were] instructed by the website to remit any completed order forms by regular mail or fax.”\(^{215}\)

The distinction that the court in *Mink* drew when deciding the jurisdictional questions of passive versus interactive websites was the foundation on which a number of district courts similarly built their analyses in copyright infringement cases. In this regard, the opinions in *Images of the World, Inc. v. Continental American Industries, Inc.*\(^{216}\) and *Columbia Pictures Industries, Inc. v. Fysh*\(^{217}\) are instructive.\(^{218}\)

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\(^{210}\) Id. at 337. The court suggested that a website is not passive if customers may place orders for goods or services through it. *Id.*


\(^{212}\) Id. at 336.

\(^{213}\) Id. Although unstated by the court in *Mink*, it appears that a nonresident defendant who maintains such a website is directing its commercial activities to forum state residents. To the extent that those residents could buy “on-line,” the defendant also is acting deliberately to cause effects within the forum state. Purposeful direction or purposeful effects amply support the conclusion that the defendant acted with a purpose to avail itself of the forum state or may stand alone to support the constitutionality of a jurisdictional exercise.

\(^{214}\) Id.

\(^{215}\) Id. As a consequence, the court of appeals affirmed the dismissal of *Mink’s* claim for lack of personal jurisdiction. *Id.*


\(^{218}\) These are just samples of relevant caselaw. Many other examples exist. See *Action Tapes, Inc. v. Weaver*, No. Civ. 3:05-CV-1693-H, 2005 WL 3199706 (N.D. Tex. Nov. 23, 2005) (holding that a copyright infringing transaction via the eBay website is not a purposeful act demonstrating the purposeful availment needed for jurisdiction); *Global 360,

In Images of the World, Inc. v. Continental American Industries, Inc., the plaintiff was the copyright owner of four motion picture films that the defendants were selling over the Internet. Following the defendants' failure to cease and desist the use of the copyrighted movies, the plaintiff brought an infringement action. In response, the defendants moved to dismiss for lack of personal jurisdiction.

When addressing that motion, a federal district court sitting in Illinois focused on "[t]he types of contacts that constitute fair warning" to the defendants—"those that are purposefully directed to the forum state to establish minimum contacts." In examining the contacts, the court in Images applied the following three-step analysis that emphasized the interactivity of Continental's website: (1) doing Internet business with forum state residents, (2) using its website to exchange information with them, and (3) allowing online buying of allegedly infringing materials.

The court in Images added: "[I]f a defendant has purposefully established minimum contacts with the forum state, the nature of the contacts are considered to determine whether assertion of jurisdiction would comport with fair play and substantial justice." (first brackets in original) (quoting Int'l Star Registry of Ill. v. Bowman-Haight Ventures, Inc., No. 98 C 6823, 1999 U.S. Dist. LEXIS 7009, at *10 (N.D. Ill. May 4, 1999)).
potential customers, and (3) maintaining a website devoid of communication between the defendants and users. 222

Next, the court in Images focused on the application of the analysis. 223 Doing so led the court to a number of findings. 224 The most important of these was that the defendants profited when forum state residents purchased the alleged infringing movies through the defendants' website. 225 According to the court in Images, "[t]hat benefit confirms that [the] defendants purposefully directed its [sic] business activities to the State of Illinois." 226

Like the district court in Images, other courts have also found that a copyright infringer demonstrated purposeful availment when it profited from purchases made by forum state residents on its website. A similar result was reached in Columbia Pictures Industries, Inc. v. Fysh. 227

C. Columbia Pictures Industries, Inc. v. Fysh

In Columbia Pictures Industries, Inc. v. Fysh, 228 the defendant allegedly infringed the plaintiff's copyright on movies and television programs through the defendant's website that enabled "users to download indexed hash files which corresponded to [the] copyrighted

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222. Id. This analysis was first adopted in Zippo, 952 F. Supp. at 1124. According to the court in Zippo, "[T]he 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." Id. The decision in Zippo and its "sliding scale" analysis may be deficient. Lora M. Jennings, Finding Legal Certainty for E-Commerce: Traditional Personal Jurisdiction Analysis and the Scope of the Zippo Sliding Scale, 44 WASHBURN L.J. 381, 381-411 (2005) (concluding that contacts with the forum state, resulting from a website, should be considered in addition to the website's passivity or interactivity).

223. Images, 205 WL 2171193, at *4-5.

224. Id. at *4-9.

225. Id. at *4. Additional findings included the following: (1) the operation of a website that enabled customers to browse the defendant's catalog and to place Internet orders; (2) a business that neither targeted nor tailored the online enterprise to a particular geographic area; and (3) forum state customers who were allowed to buy the allegedly infringing films. Id.

226. Id. (emphasis added). That the defendants acted purposefully toward Illinois, the forum state, was manifested by their "repeated and conscious choice to process orders" of forum residents, as well as the defendants' knowledge that they would fill those orders by forwarding the allegedly infringing films into the forum state. Id. In addition, the quality of the defendants' acts purposefully directed toward the forum state (repetitive, conscious, and knowing) supported the jurisdictional exercise, even though the number of acts was small. Id. Finally, the court in Images subscribed to the proposition that a single forum contact can justify the exercise of personal jurisdiction. Id.


movies or television programs. When Fysh failed to respond to Columbia's complaint, he was subject to a default judgment, but only if the district court had personal jurisdiction over him.

After the court considered the jurisdictional issue, it concluded that the defendant's website may have "constitute[d] the purposeful availment of the privilege of acting in a forum state . . . 'if the website [was] interactive to a degree that reveal[ed] specifically intended interaction with the residents of the state." When it examined the degree to which the defendant's website was interactive, the court considered: (1) the profit made from the website's operation, (2) the users' ability to download files of the allegedly infringing materials, (3) the users' ability to post their own files on the website, (4) the users' ability to acquire log-in names, (5) the defendant's server's location in the forum state, and (6) the number of forum state residents downloading the copyrighted movies and television programs. Upon considering the degree of interactivity, the court in Fysh held "it [was] clear [the defendant] specifically intended interaction with Michigan residents." As a consequence, the court had jurisdiction over the defendant.

After examining the Images and Fysh analyses of purposeful availment, direction, and effects in copyright infringement via the Internet cases, it is clear that the degree of interactivity between the defendant's website and forum state residents is determinative of the jurisdiction exercise. Because matters of degree make up the bulk of this analysis, judicial decision-making in this area will inevitably be ad hoc.

VI. CONCLUSIONS AND COMMENTARY

A number of federal courts have applied the purposeful availment, direction, or effects tests of minimum contacts to the exercise of personal jurisdiction within copyright infringement cases. In doing so, the courts...
followed the line of United States Supreme Court decisions beginning with *Hanson v. Denckla* and ending with *Asahi Metal Industry Co. v. Superior Court*.

In *Asahi* four Justices adopted a stream-of-commerce-plus premise to determine if the exercise of personal jurisdiction complied with due process, while four other Justices adopted a stream-of-commerce premise. As a consequence, lower federal courts in copyright litigation must choose which premise to follow. This choice may affect the outcome of the purposeful availment test's application. The Sixth Circuit's decision in *Bridgeport Music v. Still N' the Water Publishing* and the Fifth Circuit's decision in *Luv N' Care, Ltd. v. Insta-Mix, Inc.* illustrates the outcome-determinative nature of a federal court's choice of premise.

In *Bridgeport Music*, the court of appeals adopted the stream-of-commerce-plus premise. The court, therefore, considered the acts of the defendants, NTW and DM, looking for each defendant's purpose to avail or the "plus" within the stream of commerce. With respect to NTW, the court held that engaging in national licensing, advertising, and marketing, and affiliating with two national performance rights societies did not satisfy the purposeful availment or the stream-of-commerce-plus tests. Unlike NTW, however, DM targeted the forum state for distribution of allegedly infringing copies of Bridgeport's music. DM did so by obliging its record distributor to disseminate the copies within the forum state. This demand that a distributor supply copies within the forum state made the act one with a purpose to avail, and it

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236. 480 U.S. 102 (1987); see also supra notes 27-78 and accompanying text. As a reminder, neither the courts of appeals nor the district courts distinguish between the Fourteenth Amendment due process limits and the Fifth Amendment due process limits. Rather, lower federal courts simply apply, without explanation, the United States Supreme Court's Fourteenth Amendment analysis in the federal-question-copyright case to the issue of personal jurisdiction within due process limits.
238. Supra notes 69-78 and accompanying text (analyzing the opinions of Justices O'Connor and Brennan setting out the opposing premises).
239. 327 F.3d 472 (6th Cir. 2003) (per curiam).
240. 438 F.3d 465 (5th Cir. 2006).
241. Supra notes 81-130 and accompanying text.
242. 327 F.3d at 479-80; supra notes 94-95 and accompanying text.
243. *Bridgeport Music*, 327 F.3d at 478-79; supra notes 98-113 and accompanying text.
244. *Bridgeport Music*, 327 F.3d at 479-83; supra notes 98-110 and accompanying text.

NTW's website also did not provide the purpose or "plus." Supra note 113.
satisfied the stream-of-commerce-plus requirement for the proper exercise of personal jurisdiction. 245

In Luv N' Care, the Fifth Circuit judicial panel adopted a stream-of-commerce premise to establish minimum contacts. 246 With commerce as its focus, the court, in effect, concluded that if Insta-Mix foresaw or was aware of marketing infringing copies in the forum state, it purposefully availed itself of that state's benefits. 247 The court's examination of Insta-Mix's acts, therefore, was directed to foreseeability or awareness. 248 Given the defendant's awareness of marketing infringing copies in the forum state and the revenues derived from that activity, the court held the defendant met the purposeful availment requirement. 249

For the court in Luv N' Care, foreseeability of forum state contacts was sufficient to satisfy the purposeful availment test. Bridgeport Music, however, is qualitatively different from Luv N' Care. In Bridgeport Music, the Sixth Circuit identified purposeful availment only when a defendant acted deliberately to obligate its record distributor to sell infringing copies within the forum state. 250

In addition to the different results under the purposeful availment test of minimum contacts, given the different premises, it is important for litigants and federal courts to consider the breadth of that test. In this regard, federal courts distinguish among circumstances manifesting purposeful availment, direction, or effects. 251

The decision of the district court in KnowledgeAZ, Inc. v. Jim Walter Resources, Inc. 252 exemplifies purposeful availment. There, the defendant, JWR, deliberately entered into a continuing relationship with

245. Bridgeport Music, 327 F.3d at 483-85; supra notes 112-13 and accompanying text. DM's website also provided that purpose or plus. Supra note 113.
246. 438 F.3d at 469-70; supra notes 116-24 and accompanying text.
247. Luv N' Care, 438 F.3d at 469-70; supra note 122 and accompanying text (discussing the holdings of the court of appeals).
248. Luv N' Care, 438 F.3d at 469-70.
249. Id. at 471-72; supra notes 122-24 and accompanying text (discussing the holdings and conclusions of the court). It is curious at the very least that Insta-Mix, through its distribution contract, purposefully acted to preclude the jurisdictional exercise. The contract failed to do so. Luv N' Care, 438 F.3d at 475-76; supra note 122 and accompanying text.
250. 327 F.3d at 480; supra notes 111-13 and accompanying text. Judge DeMoss's specially concurring opinion in Luv N' Care also distinguished between purposeful availment under the stream-of-commerce-plus premise versus the commerce alone premise to establish minimum contacts. 438 F.3d at 474-76 (DeMoss, J., specially concurring); supra notes 125-30 and accompanying text.
251. Supra notes 132-63 and accompanying text.
the plaintiff, a forum state resident. That relationship resulted in the purposeful availment necessary for the court to exercise personal jurisdiction over the defendant.\textsuperscript{253}

The decision in \textit{Barrow Industries, Inc. v. JST America, Inc.}\textsuperscript{254} aids in isolating the analysis of purposeful direction. Purposeful direction is manifested when a nonresident defendant deliberately targets infringing copies of copyrighted materials toward forum state residents.\textsuperscript{255} The defendant, however, has not \textit{intentionally} targeted these copies if advertising is the only forum contact; consequently, the result is a lack of purposeful direction, and thus a lack of jurisdiction.\textsuperscript{256}

Finally, the court in \textit{Goldberg v. Cameron}\textsuperscript{257} applied the purposeful effects test of minimum contacts.\textsuperscript{258} In doing so, the two main factors upon which the court's opinion focuses are especially notable: (1) the nonresident defendant's deliberate attempt to distribute the allegedly infringing movie within the forum state; and (2) the nonresident defendant's actual distribution of the film in that state.\textsuperscript{259} The purposeful effects test of minimum contacts, therefore, contemplates not only a copyright infringer who caused effects within the forum state but also one who had the intention to do so.

To date, federal courts most often apply the purposeful availment, direction, or effects tests of minimum contacts to copyright infringement litigation in the non-Internet context. There is, however, a growing body of Internet caselaw in which these tests are applied.\textsuperscript{250} That caselaw

\begin{itemize}
\item \textsuperscript{253} \textit{Id.} at 887, 896. The district court made a point of examining the entirety of the transaction between the nonresident defendant and the forum state resident, the plaintiff, including negotiations, consequences, terms, and actual course of dealing before finding: (1) that JWR acted deliberately and (2) that there was a continuing relationship. \textit{Id.} at 895-99; \textit{supra} notes 138-40 and accompanying text.
\item \textsuperscript{254} No. 01-11619, 2002 U.S. Dist. LEXIS 7490 (D. Mass. Apr. 9, 2002).
\item \textsuperscript{255} \textit{Id.} at *21-23; \textit{supra} note 149 and accompanying text.
\item \textsuperscript{256} \textit{Barrow Indus.}, 2002 U.S. Dist LEXIS 7490, at *22-24; \textit{supra} note 149 and accompanying text. It is also noteworthy that the nonresident defendant may target forum state consumers for the infringing copies, but the consumers need not buy those copies. If, in addition to targeting the forum state, the defendant hits that mark by selling infringing copies there, the copyright owner can establish purposeful availment as well as direction. Therefore, the two tests of minimum contacts are not mutually exclusive.
\item \textsuperscript{257} 482 F. Supp. 2d 1136 (N.D. Cal. 2007).
\item \textsuperscript{259} \textit{Goldberg}, 482 F. Supp. 2d at 1145-46; \textit{supra} notes 193-202 and accompanying text.
\item \textsuperscript{260} \textit{Supra} notes 204-34 and accompanying text.
\end{itemize}
indicates the tests are generally applicable to copyright infringement actions. Whether one of the tests is met turns on the nature of the defendant's website. If the website is passive, the defendant has not purposefully availed itself of the forum state's benefits, nor has it directed activities toward that state or caused any effect there. If the website is interactive, however, one or more of the minimum-contacts-purpose-based tests may be met. The lack of a clear line between the passive versus interactive dichotomy is problematic. In fact, the decisional law suggests that a sliding scale is used to decide when a defendant's site moves from passive to interactive, which provides little guidance to district courts facing this issue.

In conclusion, the purposeful availment, purposeful direction, and purposeful effects tests of personal jurisdiction due process limits are firmly rooted in copyright litigation. Under a stream-of-commerce-plus premise, the tests ensure that the defendant acted with the intent to avail itself of the forum state, aim its acts explicitly at that state, or cause forum state consequences. When the defendant's intentions circumscribe a copyright owner's suit within a given forum, the action in that state is predictable and certain. As such, the defendant understandably may be "haled into court" there.

A copyright infringement action within a given state is neither predictable nor certain, however, when a federal court accepts the use of the stream-of-commerce premise to establish minimum contacts. In this regard, foreseeability is the hallmark of the premise. Infringing copies that are foreseen to enter a given state may include those randomly present or those present as a result of the activities of others than the defendant.

Given the opposing results of competing minimum contacts premises, it is submitted that the defendants to copyright litigation must be afforded predictable and certain due process protection. As such, federal courts should apply the purposeful availment, purposeful direction, and purposeful effects tests. Only then can federal courts avoid jurisdictional exercises in copyright litigation that may arise from random acts, happenstance, or acts other than the defendant's.

261. Supra notes 204-34 and accompanying text.
262. Supra note 215 and accompanying text.
263. Supra notes 222-26 and accompanying text (discussing the opinion in Images).
264. Supra note 222 and accompanying text.