

ARIZONA STATE

L A W J O U R N A L

You Won't Be Back:
Making Sense of "Express Aiming" After
Schwarzenegger v. Fred Martin Motor Co.

Andrew F. Halaby



YOU *WON'T* BE BACK: Making Sense of “Express Aiming” After *Schwarzenegger v. Fred Martin Motor Co.*

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I. INTRODUCTION

The Ninth Circuit’s decision in *Schwarzenegger v. Fred Martin Motor Co.*¹ illuminates the need to clarify the “express aiming” element of the *Calder v. Jones*² “effects test” for specific personal jurisdiction. In *Schwarzenegger*, “an Ohio car dealership . . . [ran] a series of five full page color advertisements in . . . a locally-circulated Ohio newspaper. Each advertisement included a . . . photograph of Schwarzenegger, portrayed as the ‘Terminator,’ [with a bubble quotation] reading, ‘Arnold says: “Terminate EARLY at Fred Martin!””³ Fred Martin had neither sought nor obtained Schwarzenegger’s permission to use his name or image.⁴ Schwarzenegger sued in California for violation of his right of publicity.⁵

The Ninth Circuit held that the dealership was not subject to personal jurisdiction in California under the effects test.⁶ Under that test, specific jurisdiction under the purposeful availment prong exists when “defendant allegedly [has] (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.”⁷ The court held that Fred Martin’s ads—which appeared nowhere but Ohio—were “expressly aimed at Ohio rather than California.”⁸ The court observed that “[i]t may be true that Fred Martin’s intentional act eventually caused harm to Schwarzenegger in California, and

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1. 374 F.3d 797 (9th Cir. 2004).

2. 465 U.S. 783 (1984).

3. 374 F.3d at 799. “This part of the Advertisement refer[red] to a special offer from Fred Martin to customers, inviting them to close out their current leases before the expected termination date, and to buy or lease a new car from Fred Martin.” *Id.*

4. *Id.*

5. *Id.* at 807.

6. *Id.*

7. *Id.* at 803 (quoting *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)).

8. *Id.* at 807.

Fred Martin may have known that Schwarzenegger lived in California.”⁹ It held, however, that “this [harm] does not confer jurisdiction, for Fred Martin’s express aim was local.”¹⁰

At a practical level, this result is troubling. Surely Fred Martin’s decision to advertise using Schwarzenegger’s image was intentional. Moreover, Schwarzenegger probably suffered the harm in California, where he lives. Had Fred Martin—or its advertising agency—thought their actions through beforehand, they probably would have realized as much. Nevertheless, if Schwarzenegger now wants to assert his rights, he must litigate in Fred Martin’s home jurisdiction on the other side of the country.

The decision is also troubling at a theoretical level. The court explained that what it had previously referred to as “purposeful availment” actually included two different concepts, “purposeful availment” and “purposeful direction,” then essentially ignored that distinction in its express aiming analysis.¹¹ The court also asserted that “[t]he ‘express aiming’ analysis depends, to a significant degree, on the specific type of tort . . . at issue.”¹² The court then performed its express aiming analysis without any apparent regard to the particular tort at issue.¹³

For all that, *Schwarzenegger* may provide at least part of the basis on which to refine the express aiming element so that it may be applied in a more predictable, media-neutral, and tort-neutral way. Purposeful direction is different from purposeful availment. In purposeful direction cases, courts may benefit from recognizing two different types of express aiming. If the defendant commits an intentional act with the *purpose* to cause an effect on the plaintiff, either in the forum or knowing that the plaintiff resides in the forum, it can hardly be disputed that the defendant “aimed” its conduct there. This kind of aiming might be called “Type I express aiming.” Or, if the defendant *knew or should have known* that its conduct would affect the plaintiff, either in the forum or knowing that the plaintiff resides in the forum, and the defendant couples that putative awareness with *related forum contact*, then the defendant arguably may “reasonably anticipate being haled into court” in the forum.¹⁴ This kind of aiming might be called “Type II express aiming.”

Part II of this article describes the conventional framework for analyzing specific personal jurisdiction. It discusses the effects test presented in

9. *Id.*

10. *Id.*

11. *See id.* at 802; *see also infra* notes 184–200 and accompanying text.

12. *Schwarzenegger*, 374 F.3d at 807.

13. *See discussion infra* Part III. *See also infra* text accompanying notes 201–202.

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

Calder v. Jones and—in the context of the Ninth Circuit’s effects test jurisprudence—describes how *Calder* has been applied since the case was decided more than twenty years ago. Additionally, Part II demonstrates the difficulty the Ninth Circuit has encountered in its efforts to apply the express aiming element consistently and predictably across different intentional torts and different media. Part III provides the background information for *Schwarzenegger v. Fred Martin Motor Company*. Part IV argues that *Schwarzenegger* demonstrates the need for a clearer approach to express aiming and offers recognition of Type I and Type II express aiming as a possible approach. In addition, Part IV demonstrates that approach by applying it to the Ninth Circuit’s Internet effects test cases, and shows that this approach offers more clarity and predictability than that taken in those cases. Finally, Part V concludes by proposing that courts may want to consider explicitly adopting the Type I and Type II express aiming framework.

II. OVERVIEW OF PERSONAL JURISDICTION STANDARDS

A. Personal Jurisdiction Analytical Framework

The standards for constitutionally exercising personal jurisdiction over a nonresident defendant¹⁵ are familiar.¹⁶ There can be general jurisdiction or specific jurisdiction.¹⁷ “General jurisdiction” over a nonresident defendant is hard to come by because it requires that “the defendant [have]

15. This analysis assumes that the court deciding the jurisdictional issue has statutory authority to exercise jurisdiction over the nonresident defendant. Often, the statutory authority reaches to the limits of due process as guaranteed by the federal constitution, conflating the statutory and constitutional inquiries (and conflating the state and federal law inquiries). *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *Sher v. Johnson*, 911 F.2d 1357, 1360–61 (9th Cir. 1990).

16. *See, e.g., Patrick J. Borchers, Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473, 475 (2004):

The world is not in need of another summary of the development of United States jurisdictional principles from the common law through the more modern development of the “minimum contacts” doctrine, first announced in the Supreme Court’s 1945 decision in *International Shoe Co. v. Washington*. The interested reader is invited to consult one of the hundreds of available [résumés].

Id. (citations omitted).

17. *See, e.g., Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414–15 (1984).

‘continuous and systematic general business contacts’¹⁸ that “‘approximate physical presence’ in the forum state.”¹⁹ By definition, nonresident defendants typically lack those contacts, and judicial pronouncements to that effect are legion.²⁰

Specific jurisdiction requires that

(1) the non-resident defendant . . . purposefully direct his activities or consummate some transaction with the forum or [a forum resident]; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim . . . arise[] out of or relate[] to the defendant’s forum-related activities; and (3) the exercise of jurisdiction . . . be reasonable.²¹

This test is designed to ensure that the nonresident defendant has at least “minimum contacts” with the forum “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice,’”²² and that the jurisdictional inquiry “properly focuses on the ‘relationship among the defendant, the forum, and the litigation.’”²³

B. *Calder v. Jones*

In *Calder v. Jones*,²⁴ the Supreme Court considered whether a *National Enquirer* reporter (South) and editor (Calder), both Florida residents, were subject to personal jurisdiction in a California Superior Court libel suit by

18. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) (quoting *Helicopteros*, 466 U.S. at 416); *see also* *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445–46 (1952).

19. *Schwarzenegger*, 374 F.3d at 801 (quoting *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000)).

20. *E.g.*, *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995); *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851–52 & n.3 (9th Cir. 1993) (citing *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 380, 381 (9th Cir. 1990)); *Cabbage v. Merchant*, 744 F.2d 665, 667–68 (9th Cir. 1984); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1331 (9th Cir. 1984); *see generally* *Brand v. Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir. 1986).

21. *E.g.*, *Schwarzenegger*, 374 F.3d at 802 (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)).

22. *Int’l Shoe v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). *International Shoe* suggests that purposeful availment is *sufficient* to warrant exercise of personal jurisdiction over a nonresident defendant. *See id.* at 317, 319. Later cases interpreted that case as holding purposeful availment *necessary* for purposeful jurisdiction as well. *E.g.*, *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

23. *E.g.*, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

24. 465 U.S. 783 (1984).

actress Shirley Jones. Their story alleged that Jones "drank so heavily as to prevent her from fulfilling her professional obligations."²⁵ The trial court quashed service of process based on First Amendment considerations.²⁶ Then the California Court of Appeal reversed, rejecting those considerations and concluding "that a valid basis for jurisdiction existed on the theory that petitioners intended to, and did, cause tortious injury to [Jones] in California."²⁷ The California Supreme Court denied review,²⁸ and the United States Supreme Court affirmed.²⁹

Observing that it "approv[ed] of the 'effects' test employed by the California [appellate] court," the Supreme Court brushed aside as immaterial South's and Calder's individual contacts with California.³⁰ Invoking "the relationship among the defendant, the forum, and the litigation,"³¹ the Court observed:

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of [Jones]'s emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California.³²

South and Calder disclaimed responsibility for the *National Enquirer's* circulation, and the Court agreed "that their contacts with California are not to be judged according to their employer's activities there."³³ But as the Court observed, South and Calder were

25. *Id.* at 788 n.9.

26. *Id.* at 785.

27. *Id.* at 787.

28. *Id.*

29. *Id.* at 784–85.

30. *Id.* at 787 n.6. For example, "[t]he [trial court] found that South made at least one trip to California in connection with the article," but the Supreme Court did "not rely for [its] holding on the alleged visit . . ." *Id.* at 785 n.4. As another example, "[t]he [California] Court of Appeal . . . suggested that . . . South's investigative activities, including one visit and numerous phone calls to California, formed an independent basis for an assertion of jurisdiction . . ." *Id.* at 787 n.6. In fact, the Supreme Court found it "unnecessary to reach this alternative ground." *Id.*

31. *Id.* at 788 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

32. *Id.* at 788–89 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971)).

33. *Id.* at 790.

not charged with mere untargeted negligence. Rather, their *intentional . . . actions* were *expressly aimed* at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they *knew that the brunt of that injury would be felt by respondent in the State* in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must “reasonably anticipate being haled into court there” to answer for the truth of the statements made in their article. An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.³⁴

Thus, concluded the Court, “petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis.”³⁵

Thus was born the *Calder* effects test, by which the purposeful availment (or purposeful direction³⁶) prong of the specific jurisdiction test might be satisfied.³⁷ There are three required elements. First, the nonresident defendant must commit an intentional act.³⁸ Second, the act must be expressly aimed at the forum.³⁹ And third, that act must cause harm to plaintiff, the “brunt” of which was borne, and which defendant knew was borne, in the forum.⁴⁰

The express aiming element was confusing from the start. The label was confusing; so far as the opinion reveals, *Calder* and *South* certainly did not

34. *Id.* at 789–90 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297) (emphasis added) (citations omitted).

35. *Id.* at 790.

36. As the court in *Schwarzenegger* observed, *see infra* notes 184–200 and accompanying text, the specific jurisdiction test’s first prong has often simply been called the “purposeful availment” prong even when it actually refers to purposeful direction. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (citing *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1130 (9th Cir. 2003) (citing *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986))). *See also* *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (“[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419–20 (9th Cir. 1997); *Sinatra v. Nat’l Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988); *Lake v. Lake*, 817 F.2d 1416, 1421–22 (9th Cir. 1987).

37. From early on, the Ninth Circuit applied the effects test to determine whether the purposeful availment or direction prong of the conventional, three-prong specific jurisdiction test was satisfied, not as an independent test for specific jurisdiction. *See, e.g., Lake*, 817 F.2d at 1422–23.

38. *Calder*, 465 U.S. at 790.

39. *Id.* at 788–89.

40. *Id.*

say they were aiming at California, making the adverb "expressly" surplusage. The court might simply have called the element "aiming" or "targeting."

Even more confusing was the element's genesis in a defamation case. In concluding that the defendants expressly aimed their actions at California, the Court found it significant that the defendants knew Jones lived in California and that they knew many *National Enquirers* would be sold there.⁴¹ The Supreme Court did not have to—nor did it—explain the relative weight to be accorded those two types of knowledge. Suppose all the same facts, including the suit's filing in California, except that the defendants thought Jones actually lived in, say, Montana.⁴² Alternatively, suppose all the same facts, including the lawsuit's filing in California, except that defendants believed the *National Enquirer* was not published or distributed in California. The opinion does not reveal whether the same "express aiming" result would obtain on those varied facts, let alone how it would apply to an intentional tort involving no publication at all.

Also confusing was the Court's disclaimer of any reliance on the defendants' "contacts" with the forum.⁴³ The publication of the defamatory material in California was itself a very real (albeit nonphysical) form of contact between the defendants and the forum. Indeed, it was that contact—with its "potentially devastating impact" on the defendant—on which the Court concluded that "[u]nder the circumstances, [Calder and South] must 'reasonably anticipate being haled into [a California] court . . .'"⁴⁴

Finally, the Court relied on what it apparently believed was the inherent wrongfulness of the defendants' conduct.⁴⁵ This approach suggests that if a defendant's conduct toward the plaintiff in the forum is "bad," the defendant becomes subject to jurisdiction, even if the conduct's wrongfulness has nothing to do with the alleged tort at issue, even if that wrongfulness has not yet been proved, and even if the defendant's conduct—regardless of how bad it is—does not satisfy traditional

41. See *id.* at 789–90; see also Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3, ¶ 30 (1997).

42. In the companion case of *Keeton v. Hustler Magazine, Inc.*, the Supreme Court held that New Hampshire *did* have jurisdiction over *Hustler Magazine* in the libel suit of Kathy Keeton, a New York resident, based on the magazine's distribution in New Hampshire. 465 U.S. 770, 772, 779–81 (1984). Obviously, on those facts, *Hustler* was not particularly targeting Keeton in New Hampshire.

43. See *supra* notes 7–11, 27–35 and accompanying text.

44. *Calder*, 465 U.S. at 790 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Kulko v. California Superior Court*, 436 U.S. 84, 97–98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977)).

45. See *id.* at 788–90.

jurisdiction standards. The Court thus invited personal jurisdiction determinations based on plaintiffs' self-serving allegations of nefarious conduct by defendant rather than through liability-neutral analyses.

C. *The Ninth Circuit Applies Calder*

From the beginning, then, the Ninth Circuit and other courts were left to struggle with fundamental questions as litigants invoked the effects test in new cases, including cases involving other intentional torts. Although the express aiming element did not ascend to its current place of acknowledged prominence in Ninth Circuit effects test analysis until its 2000 decision in *Bancroft & Masters, Inc. v. Augusta National, Inc.*,⁴⁶ the element's core concept—aiming or targeting at the forum—was accorded significance from early on.⁴⁷

1. The Early Cases Raise Substantial “Express Aiming” Questions

*Lake v. Lake*⁴⁸ involved a tort action filed against Taylor, a California attorney, arising out of an interstate child custody fight between the father in Idaho and the mother in California. The father alleged that Taylor fraudulently procured a California ex parte order on the mother's behalf, enabling her to obtain custody of the child in Idaho.⁴⁹ On appeal from the Idaho district court's order dismissing the case against Taylor for lack of personal jurisdiction, the Ninth Circuit observed that “[t]he Supreme Court in *Calder* [had] recently affirmed the assertion of jurisdiction over a defendant whose intentional conduct in a foreign state was *calculated to cause injury* to plaintiff in the forum state.”⁵⁰ Here, the father alleged that Taylor knew that the law barred use of an ex parte order under the circumstances.⁵¹ The father further alleged that Taylor misrepresented the circumstances to the California court to obtain the order and knew the father was in Idaho before obtaining the ex parte order. He also alleged that the attorney knew and intended that the order would be used in Idaho to obtain custody.⁵² Concluding that those allegations, if proven,⁵³ would “establish

46. 223 F.3d 1082 (9th Cir. 2000). *See infra* Part II.C.3.c.

47. *Bancroft & Masters, Inc.*, 223 F.3d at 1087.

48. 817 F.2d 1416 (9th Cir. 1987).

49. *Id.* at 1419.

50. *Id.* at 1422 (emphasis added).

51. *Id.* at 1423.

52. *Id.* at 1419.

53. “[T]he party seeking to invoke the jurisdiction of the federal court has the burden of establishing that jurisdiction exists.” *Data Disc, Inc. v. Sys. Tech. Assocs.*, 557 F.2d 1280, 1285

that Taylor took those actions 'for the very purpose of having their consequences felt in the forum state,'⁵⁴ the Ninth Circuit held the purposeful availment⁵⁵ or purposeful direction⁵⁶ prong satisfied. In so doing, the court cited *Calder* as supporting "the assertion of jurisdiction over a defendant whose efforts were 'intentionally directed' towards the forum state when there was no physical contact relating to the claim."⁵⁷

(9th Cir. 1977). A trial court can handle a motion to dismiss for lack of personal jurisdiction in different ways depending on the circumstances. The jurisdictional facts pleaded by the plaintiff must, unless challenged, be treated as true. See *Alexander v. Circus Circus Enters.*, 972 F.2d 261, 262 (9th Cir. 1992). If the defendant argues that the plaintiff's complaint fails to plead sufficient facts to establish personal jurisdiction, the court can resolve that argument without resorting to any extraneous information. See *Data Disc, Inc.*, 557 F.2d at 1285 (citing *Gibbs v. Buck*, 307 U.S. 66, 71-72 (1939)). If the defendant challenges the plaintiff's version of the jurisdictional facts, and accompanies the motion with affidavits or other materials that support the challenge and demonstrate the absence of jurisdiction, then the plaintiff may not rely on the complaint's allegations, but must instead offer affidavits or materials of its own. See *id.* at 1284. If those materials (assuming they are not "inherently incredible") "make . . . a prima facie showing of jurisdictional facts," then the motion to dismiss must be denied unless "the pleadings and other submitted materials raise issues of credibility or disputed questions of fact with regard to jurisdiction . . ." *Id.* at 1285. Under those circumstances, the court exercises its "discretion to take evidence at a preliminary hearing . . ." *Id.* In that event, the "plaintiff must establish the jurisdictional facts by a preponderance of the evidence, just as he would have to do at trial." *Id.*

Except where pertinent, this Article ignores, for brevity's sake, the personal jurisdiction issue's procedural posture in the cases discussed.

54. *Lake*, 817 F.2d at 1423 (quoting *Wright v. Yackley*, 459 F.2d 287, 290 (9th Cir. 1972)) (emphasis added).

55. See *id.* at 1422.

56. See *id.* at 1423 (quoting *Haisten v. Grass Valley Med. Reimbursement Fund*, 784 F.2d 1392, 1397 (9th Cir. 1986)). In *Haisten*, the court held that the Fund, a company formed by, and "provid[ing] self-funding indemnity insurance [to a group of California] doctors," was subject to personal jurisdiction in California in an action to collect on an unsatisfied malpractice judgment against one of the doctors. 784 F.2d at 1395-96. The doctors had bent over backward to form the Fund and structure its affairs to avoid the reach of California's laws. See *Lake*, 817 F.2d at 1395. But relying on *Calder v. Jones*, 465 U.S. 783, 789-90 (1984), as well as *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), the court easily concluded "that the Fund's outside activity was 'purposefully directed' toward participation in the California insurance market." *Haisten*, 784 F.2d at 1398. (In contrast, see *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 817 (9th Cir. 1988), in which the Ninth Circuit distinguished *Calder* and *Haisten* as tort rather than contract cases, and found the contract at issue in no way directed at California.) In reaching its conclusion, the *Haisten* court observed that the Fund's lack of physical contacts with California was irrelevant, and that the "fundamental issue" was whether the Fund's "conduct and connection with the forum state [were] such that [it] should reasonably anticipate being haled into court' [in California]." *Haisten*, 784 F.2d at 1397 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297). As such, although *Haisten* invoked *Calder*, it was not really an effects test case. See *supra* notes 30-40 and accompanying text and discussion *infra* Parts III & IV.

57. *Lake*, 817 F.2d at 1421 (quoting *Calder v. Jones*, 465 U.S. 783, 790 (1984)).

The following year, the Ninth Circuit decided *Sinatra v. National Enquirer, Inc.*,⁵⁸ a misappropriation of name case⁵⁹ in which the court was called to determine whether a Swiss clinic (the "Clinic") was subject to personal jurisdiction in California for its role in the publication of a false *National Enquirer* story claiming that Sinatra had been treated at the Clinic.⁶⁰ The Clinic's United States agent, Van Vrooman, had engineered a deal in which the Clinic would feed false information to the tabloid and, in exchange, the tabloid would do a "full feature on the Clinic."⁶¹

[The agent] informed the Clinic of the Enquirer's circulation, its general readership, and of the fact that the Clinic could successfully solicit clients through an article published in the magazine. At the request of the Clinic's director, Van Vrooman attempted to contact Sinatra in California in order to solicit him to come to the Clinic.⁶²

The tabloid's reporter visited the Clinic in Switzerland, and the Clinic's employees supplied the reporter with false information regarding Sinatra's supposed stay at the Clinic.⁶³ For purposes of the appeal, at least, the Clinic knew Sinatra lived in California.⁶⁴

The Ninth Circuit examined the relationship between the Clinic and California.⁶⁵ It noted that "[t]he Clinic treated many California residents and . . . a significant percentage of the Clinic's United States clientele are California residents. . . . The Clinic [also] mounted significant advertising efforts in California by placing ads in San Diego Magazine, Town & Country, the Wall Street Journal, and elsewhere."⁶⁶

Thus, the court concluded, "the misappropriation [of Sinatra's name] is properly viewed as an event within a sequence of activities designed to use California markets for the [Clinic's] benefit."⁶⁷ The court went on to

58. 854 F.2d 1191 (9th Cir. 1988).

59. Sinatra sued under CAL. CIV. CODE § 3344 (West Supp. 1987), which provided, "Any person who knowingly uses another's name, voice, signature, photograph or likeness, in any manner, on or in products, merchandise, or [goods or services], without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof." *Sinatra*, 854 F.2d at 1192 & n.1.

60. *Id.* at 1192.

61. *Id.* at 1193.

62. *Id.*

63. *Id.*

64. *Id.* at 1195.

65. *See id.* at 1195-98.

66. *Id.* at 1196.

67. *Id.* at 1197.

The Clinic intentionally tried to benefit from the use of Sinatra's name in order to attract clients. The Clinic, through its affirmative and knowing

emphasize the harm done to Sinatra in California in view of the particular tort at issue:

[A]n essential element of the tort of misappropriation is the celebrity’s right to control the use of the publicity value of his or her name as she or he sees fit. Thus, the nature of the injury—using Sinatra’s name without compensation and potentially diluting the commercial value of the name—produces a situs of injury in California. Sinatra conducts his business from California, he licenses his name in California, and the center of his business is in California.⁶⁸

The court concluded that the Clinic had “sufficient minimum contacts with California to justify the district court’s exercise of jurisdiction over it.”⁶⁹ The Clinic distinguished the defendant’s conduct from that in *Benally v. Hundred Arrows Press, Inc.*,⁷⁰ a District of New Mexico misappropriation of likeness case involving a museum’s release of a photograph for publication, as “mere untargeted tortious conduct” over which “the Museum had effectively lost primary control”⁷¹ The Ninth Circuit also “adopt[ed] the reasoning” of the Central District of California in *California Software Inc. v. Reliability Research, Inc.*,⁷² in “exercis[ing] jurisdiction over a non-resident corporation for false statements made to third persons outside of California concerning a resident California corporation,” where “the statements were expressly calculated to cause injury in California, the defendants knew the plaintiff would feel the injury in California, and the defendants expected to benefit directly from the statements.”⁷³

In *Brainerd v. Governors of the University of Alberta*,⁷⁴ the court considered whether Meekison, a University of Alberta administrator, was subject to personal jurisdiction in Arizona for allegedly conveying negative information about Brainerd—a former University of Alberta professor—to Brainerd’s new employer, the University of Arizona.⁷⁵ Meekison’s forum-related contacts consisted of nothing more than receiving two phone calls

actions, tried to promote its services, which are used by a significant number of California residents, by misappropriating Sinatra’s name in a publication that received a majority of its sales from California.

Id.

68. *Id.* at 1197 (citation omitted).

69. *Id.* at 1198 (citation omitted).

70. 614 F. Supp. 969 (D.N.M. 1985).

71. *Sinatra*, 854 F.2d at 1198 n.6 (quoting *Benally*, 614 F. Supp. at 975).

72. 631 F. Supp. 1356 (C.D. Cal. 1986).

73. *Sinatra*, 854 F.2d at 1198 (citing *Cal. Software Inc.*, 631 F. Supp. at 1362).

74. 873 F.2d 1257 (9th Cir. 1989).

75. *Id.* at 1258–59.

and responding to a letter from a University of Arizona administrator regarding Brainerd.⁷⁶ Yet the Ninth Circuit had little trouble concluding that under *Calder*, Meekison had satisfied the purposeful availment prong:

Meekison is alleged to have committed intentional torts. His communications were directed to Arizona, even though he did not initiate the contact. Assuming the allegations in the complaint are true, Meekison knew the injury and harm stemming from his communications would occur in Arizona, where Brainerd planned to live and work. Those contacts with the forum support personal jurisdiction over Meekison in Arizona.⁷⁷

Similarly, the Ninth Circuit held in *Metropolitan Life Insurance Co. v. Neaves*⁷⁸ that Gambrell, an Alabama claimant to and recipient of insurance proceeds under a Metropolitan Life policy, satisfied the purposeful availment prong when she allegedly had mailed false claim information to Metropolitan Life in California where Neaves, the competing claimant, lived and worked.⁷⁹ “Gambrell both purposefully directed her actions into the forum state and knew the brunt of the injury would fall on Neaves When Gambrell addressed the envelope to Metropolitan, she was purposefully defrauding Neaves in California.”⁸⁰

These early cases settled the notion that the effects test applied to intentional torts other than defamation, including, in *Sinatra*, misappropriation of a name. The effects test’s express aiming requirement, however, remained turbid. The court repeatedly found effects jurisdiction where the defendant lacked any *physical* forum contact, but in each case, there arguably was *some* form of contact between the defendant and the forum: Taylor’s ex parte order was used in Idaho;⁸¹ the Clinic saw that its name was circulated in California;⁸² and Meekison communicated to Arizona,⁸³ as did Gambrell to California.⁸⁴ *Lake* held that where the defendant acted with the *purpose* of having impact in the forum, his actions were sufficiently targeted at the forum for effects test purposes.⁸⁵ On their facts, *Brainerd* and *Neaves* apparently would have permitted a similar

76. *Id.*

77. *Id.* at 1259.

78. 912 F.2d 1062 (9th Cir. 1990).

79. *Id.* at 1064–65.

80. *Id.* at 1065.

81. *See Lake v. Lake*, 817 F.2d 1416, 1423 (9th Cir. 1987).

82. *See Sinatra v. Nat’l Enquirer, Inc.*, 854 F.2d 1191, 1198 (9th Cir. 1988).

83. *See Brainerd v. Governors of the Univ. of Alta.*, 873 F.2d 1257, 1259–60 (9th Cir. 1989).

84. *See Metro. Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1065 (9th Cir. 1990).

85. *See Lake*, 817 F.2d at 1423.

holding, but the court in those cases instead spoke of the defendants’ *knowledge* of forum impact, rather than defendants’ purpose to cause forum impact.⁸⁶ *Sinatra*’s treatment of *Benally* and *California Software* left observers to wonder whether effects test jurisdiction required that the defendant “expressly calculate[] to cause injury in California,” or whether merely knowing of the harm would suffice.⁸⁷ The *Sinatra* court also invoked the language of purposeful availment by alluding to the “sequence of [Clinic] activities designed to use California markets for the [Clinic’s] benefit”⁸⁸ and relying on the Clinic’s contacts with California in the very way the *Calder* court had disclaimed.⁸⁹

2. More Defamation Cases; More Questions

The Ninth Circuit’s application of the effects test in three ensuing defamation cases injected additional uncertainty into express aiming analysis.

The Ninth Circuit significantly limited the effects test’s reach for the first time in *Casualty Assurance Risk Insurance Brokerage Co. v. Dillon*.⁹⁰ In that case, the Indiana Insurance Commissioner had sent letters disparaging Casualty Assurance Risk Insurance Brokerage Co. (“CARIB”), an insurance company, to various health care providers outside Guam.⁹¹ CARIB was incorporated in Guam and maintained its home office there.⁹² The court read *Calder and Keeton v. Hustler Magazine*⁹³ as establishing that in a defamation case, “circulation of the libel in the forum jurisdiction is a key factor in determining whether a nonresident defendant has sufficient contacts with the forum” to establish jurisdiction under the effects test.⁹⁴ Indeed, the court believed that “circulation of the defamatory material in the forum state is an important factor in the minimum contacts analysis for a defamation action,”⁹⁵ and distinguished *Sinatra*—which was not a

86. See *Brainerd*, 873 F.2d at 1259; *Neaves*, 912 F.2d at 1065.

87. See *Sinatra*, 854 F.2d at 1198.

88. *Id.* at 1197.

89. *Id.*; see *Calder v. Jones*, 465 U.S. 783, 789–90 (1984).

90. 976 F.2d 596 (9th Cir. 1992).

91. See *id.* at 598.

92. *Id.*

93. 465 U.S. 770 (1984).

94. *Dillon*, 976 F.2d at 600. Thus, in all practical effect, the court held *Calder and Keeton* to require circulation in the forum to establish jurisdiction when, in fact, they come closer to establishing that such circulation is *sufficient*.

95. *Id.* at 599.

defamation case—based on the “publication factor.”⁹⁶ Because “[t]here had been *no* distribution of the alleged libel in Guam,”⁹⁷ the court reasoned,

The only “effect” on Guam was that the business reputation of a Guam corporation was harmed in other jurisdictions. Because [plaintiff] has never sold any policies on Guam, does not derive any income from Guam, and the defamatory material was not directed at or circulated on Guam, it is difficult to see how the brunt of the effects could be felt on Guam.⁹⁸

In *Core-Vent Corp. v. Nobel Industries AB*,⁹⁹ the Ninth Circuit considered whether Swedish doctors were subject to personal jurisdiction in California in a libel suit based on their statements in international medical journals.¹⁰⁰ Core-Vent alleged that the doctors shared an affiliation with Nobelpharma, Core-Vent’s principal competitor in the dental implants industry.¹⁰¹ “[A]lthough the medical journals were circulated worldwide,” Core-Vent did not “allege[] that California was a primary audience for the medical journals or that the defendants knew that the journals would be circulated in that state.”¹⁰² The court ultimately “assume[d] [the] purposeful availment prong ha[d] been satisfied,”¹⁰³ but declined to “decide this issue definitively”¹⁰⁴ because it held the exercise of jurisdiction improper under the specific jurisdiction test’s reasonableness prong.

In *Gordy v. Daily News, L.P.*,¹⁰⁵ Berry Gordy filed suit in California Superior Court against the (New York) *Daily News* and Rush, a *Daily News* columnist who had written an unflattering piece about Gordy.¹⁰⁶ The defendants removed the case and obtained dismissal for lack of personal jurisdiction.¹⁰⁷ Addressing what it called “the recurring question of where a newspaper and its writer can be sued for the alleged publication of a libel,”¹⁰⁸ the Ninth Circuit reversed.¹⁰⁹ The defendants argued that the *Daily News*’s circulation in California—only 13 daily and 18 Sunday

96. *Id.* at 600–01.

97. *Gordy v. Daily News, L.P.*, 95 F.3d 829, 833 (9th Cir. 1996) (discussing *Dillon*, 976 F.2d at 599).

98. *Dillon*, 976 F.2d at 599.

99. 11 F.3d 1482 (9th Cir. 1993).

100. *Id.* at 1483.

101. *Id.* at 1483–84.

102. *Id.* at 1486.

103. *Id.* at 1487.

104. *Id.*

105. 95 F.3d 829 (9th Cir. 1996).

106. *Id.* at 831.

107. *Id.* at 830–31.

108. *Id.* at 830.

109. *Id.* at 836.

newspapers—was insufficient under *Calder*.¹¹⁰ The court disagreed.¹¹¹ The court also distinguished *Dillon* because in that case, *none* of the allegedly defamatory material was circulated in the forum.¹¹²

Dillon, *Core-Vent*, and *Gordy* injected further confusion into the effects test’s express aiming element. The *Dillon* court tacitly intertwined that component with the effects test’s “harm in forum” element—the Indiana Insurance Commissioner’s letters almost certainly were sent with the purpose to impact CARIB, and the commissioner knew CARIB was a Guam corporation.¹¹³ The court held the absence of publication in the forum dispositive.¹¹⁴ *Dillon* thus left observers to continue wondering whether the meaning of express aiming, as the Supreme Court used that term in *Calder*, varies depending on whether defamation is the tort at issue. The *Core-Vent* court, in contrast, “assume[d] [the] purposeful availment prong ha[d] been satisfied,”¹¹⁵ even though there was no showing “that California was a primary audience for the medical journals or that the defendants knew that the journals would be circulated in that state.”¹¹⁶ Moreover, *Gordy* isolated the circulation of a publication in the forum as the only variable distinguishing its result (finding jurisdiction) from *Dillon*’s (finding no jurisdiction).¹¹⁷

3. A New Medium: The Effects Test in Internet Cases

The Internet’s emergence led the Ninth Circuit to apply the effects test to different intentional torts: trademark infringement, trademark dilution, and domain name piracy. In so doing, the court elevated express aiming’s importance in effects test analysis.

a. *Cybersell, Inc. v. Cybersell, Inc.*

In *Cybersell*,¹¹⁸ an Arizona company “provid[ing] Internet and web advertising and marketing services”¹¹⁹ called *Cybersell, Inc.* (“*Cybersell AZ*”) sued two Florida residents and *their* company, also called *Cybersell, Inc.* (“*Cybersell FL*”), an Internet company “provid[ing] business

110. *Id.* at 833.

111. *Id.*

112. *Id.*

113. *See* 976 F.2d at 598.

114. *Id.* at 600–01.

115. 11 F.3d 1482, 1487 (9th Cir. 1993).

116. *Id.* at 1486.

117. *Gordy*, 95 F.3d at 833.

118. 130 F.3d 414 (9th Cir. 1997).

119. *Id.* at 415.

consulting services,”¹²⁰ for trademark infringement and related claims arising from the defendants’ use of the name “Cybersell” on their Internet website.¹²¹ Cybersell AZ had been formed in May 1994, and had procured a federal service mark registration for the name “Cybersell” in late October 1995.¹²² Cybersell FL had been formed in the summer of 1995, and posted a “passive”¹²³ website accessible at www.cybsell.com which, among other things, proclaimed, “Welcome to CyberSell!”¹²⁴

Cybersell AZ learned of this website and, in late November 1995, informed Cybersell FL of Cybersell AZ’s service mark.¹²⁵ Cybersell FL responded by changing its name to “WebHorizons, Inc.” and changing its website logo to reflect the new name.¹²⁶ The website still proclaimed “Welcome to CyberSell!” however, leading Cybersell AZ to file suit in the District of Arizona in January 1996.¹²⁷

In response to Cybersell FL’s motion to dismiss, Cybersell AZ argued that it had satisfied the test for specific jurisdiction “because trademark infringement occurs when the passing off of the mark occurs, which in this case, it submit[ted], happened when the name ‘Cybersell’ was used on the Internet in connection with advertising.”¹²⁸ The court reviewed cases from other courts addressing what then was the novel medium of the Internet, as well as cases offered by Cybersell AZ for the proposition that “mere advertisement or solicitation for sale of goods and services on the Internet gives rise to specific jurisdiction in the plaintiff’s forum.”¹²⁹ The court rejected that proposition, asserting that on those cases’ facts, “there ha[d] been ‘*something more*’ to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum

120. *Id.*

121. *Id.*

122. *Id.*

123. The “passive” terminology comes from *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). It is used here only because the Ninth Circuit used it in *Cybersell*; however, the passive-active distinction is not an especially accurate or helpful one. Many commentators have observed the flaws in *Zippo*’s “sliding scale” rule: “that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.” *Id.* at 1124. See, e.g., Borchers, *supra* note 16, at 479–81; Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1371–80 (2001).

124. *Cybersell*, 130 F.3d at 415.

125. *Id.* at 416.

126. *Id.*

127. *Id.* “[T]he same day[,] Cybersell FL filed suit [in Florida] for declaratory relief [regarding] use of the name ‘Cybersell,’ . . . but that action was transferred to the District of Arizona and consolidated with the Cybersell AZ action.” *Id.*

128. *Id.*

129. *Id.* at 418.

state.”¹³⁰ Observing that “Cybersell FL [had] conducted no commercial activity over the Internet in Arizona”¹³¹ and had done “nothing to encourage people in Arizona to access its site,”¹³² the Court held “that Cybersell FL’s contacts [we]re insufficient to establish ‘purposeful availment.’”¹³³

The Ninth Circuit then turned to *Calder*’s effects test—and gave it short shrift:

[W]e don’t see this as a *Calder* case. Because Shirley Jones was who she was (a famous entertainer who lived and worked in California) and was libeled by a story in the National Enquirer, which was published in Florida but had a nationwide circulation with a large audience in California, the Court could easily hold that California was the “focal point both of the story and of the harm suffered” and so jurisdiction in California based on the “effects” of the defendants’ Florida conduct was proper. There is nothing comparable about Cybersell FL’s web page.¹³⁴

“Cybersell FL’s web page,” the court concluded, “was not *aimed intentionally* at Arizona knowing that harm was likely to be caused there to Cybersell AZ.”¹³⁵

b. Panavision International, L.P., v. Toeppen

In *Panavision*,¹³⁶ on the other hand, the Ninth Circuit easily concluded that notorious cybersquatter Dennis Toeppen had targeted his domain name extortion scheme at Panavision, a motion picture equipment company in California.¹³⁷ Toeppen had registered Panavision’s “Panavision” mark as an Internet domain name, “panavision.com,” and in response to Panavision’s demand that he stop using the domain name, offered to release it for \$13,000.¹³⁸ After Panavision rejected that offer, Toeppen registered Panavision’s “Panaflex” mark as the domain name “panaflex.com.”¹³⁹ Panavision sued Toeppen for trademark dilution in California, and ultimately won on summary judgment.¹⁴⁰

130. *Id.* (emphasis added).

131. *Id.* at 419.

132. *Id.*

133. *Id.* at 419–20.

134. *Id.* at 420 (citations omitted).

135. *Id.* (emphasis added).

136. 141 F.3d 1316 (9th Cir. 1998).

137. *Id.* at 1318.

138. *Id.* at 1319.

139. *Id.*

140. *Id.*

On Toeppen's appeal of the jurisdictional issue, the Ninth Circuit distinguished *Cybersell* without explanation, observing simply that the effects test "was not applicable in [that] case."¹⁴¹ This case, the court thought,

[was] akin to a tort case. . . . Toeppen purposefully registered Panavision's trademarks as his domain names on the Internet to force Panavision to pay him money. The brunt of the harm to Panavision was felt in California. Toeppen knew Panavision would likely suffer harm there because, although at all relevant times Panavision was a Delaware limited partnership, its principal place of business was in California, and the heart of the theatrical motion picture and television industry is located there.¹⁴²

The court went on to liken "[t]he harm to Panavision"¹⁴³ to that inflicted on the Indianapolis Colts professional football team in *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd.*,¹⁴⁴ a 1994 case in which

[t]he Seventh Circuit held that [a new team], the Baltimore CFL Colts, . . . was subject to personal jurisdiction in Indiana even though its only activity directed toward Indiana was the broadcast of its games on nationwide cable television. Because the Indianapolis Colts used their trademarks in Indiana, any infringement of those marks would create an injury which would be felt mainly in Indiana, and this, coupled with the defendant's "entry" into the state by the television broadcasts, was sufficient for the exercise of personal jurisdiction.¹⁴⁵

c. *Bancroft & Masters, Inc. v. Augusta National, Inc.*

In *Bancroft & Masters*,¹⁴⁶ Augusta National, Inc. ("ANI") disputed ownership of the domain name "masters.com," registered by Bancroft and Masters, Inc. ("B & M"), a California computer services corporation.¹⁴⁷ ANI sent a letter to domain name registrar Network Solutions, Inc. ("NSI") in Virginia, challenging B & M's use of "masters.com" and triggering the NSI dispute resolution process.¹⁴⁸ That action "forced B & M to bring suit or

141. *Id.* at 1321.

142. *Id.* (citations omitted).

143. *Id.* at 1321–22.

144. 34 F.3d 410 (7th Cir. 1994).

145. *Panavision*, 141 F.3d at 1322 (citations omitted).

146. 223 F.3d 1082 (9th Cir. 2000).

147. *Id.* at 1084–85.

148. *Id.* at 1085.

lose control of its website.”¹⁴⁹ B & M chose to file a declaratory judgment action in California, and the trial court granted ANI’s ensuing motion to dismiss for lack of personal jurisdiction.¹⁵⁰

Applying the *Calder* effects test, the Ninth Circuit reversed. The court acknowledged:

Subsequent cases have struggled somewhat with *Calder*’s import, recognizing that the case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction. We have said that there must be “something more,” but have not spelled out what that something more must be.¹⁵¹

“[T]hat ‘something more,’” the court went on to announce, “is what the Supreme Court described as ‘express aiming’ at the forum state. Express aiming,” it continued, “is a concept that in the jurisdictional context hardly defines itself. From the available cases, we deduce that the requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.”¹⁵² The court cited *Lake, Neaves, Brainerd, Gordy, and Panavision*, as well as *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*,¹⁵³ as cases involving such “individual[] targeting”¹⁵⁴ It distinguished *Cybersell*, however, because (it asserted) “there was no showing [in that case] that the defendants even knew of the existence of the plaintiffs, let alone targeted them individually.”¹⁵⁵ The court concluded,

B & M has demonstrated purposeful availment by ANI under the *Calder* effects test. ANI acted intentionally when it sent its letter to NSI. The letter was expressly aimed at California because it individually targeted B&M, a California corporation doing business almost exclusively in California. Finally, the effects of the letter were primarily felt, as ANI knew they would be, in California.¹⁵⁶

149. *Id.* at 1087.

150. *Id.* at 1085.

151. *Id.* at 1087 (citing *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998)).

152. *Id.* (citations omitted).

153. 784 F.2d 1392 (9th Cir. 1986). *See supra* note 56 for a discussion of *Haisten*.

154. *Bancroft & Masters*, 223 F.3d at 1086–87.

155. *Id.* at 1087–88.

156. *Id.* at 1088.

Despite the announcement that “something more” had been found,¹⁵⁷ *Cybersell*, *Panavision*, and *Bancroft & Masters* still left substantial questions about express aiming. *Cybersell* was fraught with difficulties. The case arose from a new medium, the Internet, as to which the Court had never before considered personal jurisdiction.¹⁵⁸ Plaintiff had taken the aggressive position that “mere advertisement or solicitation . . . on the Internet gives rise to specific jurisdiction in the plaintiff’s forum.”¹⁵⁹ The court distinguished *Calder* based on its “focal point” concept¹⁶⁰—something the Ninth Circuit had never before done in its effects test cases, which might have led to different results if it had,¹⁶¹ and was half defamation-specific to boot.¹⁶² The court also ignored the fact that, even after *Cybersell* FL had learned of *Cybersell* AZ’s “*Cybersell*” service mark, *Cybersell* FL continued to use the slogan “Welcome to *CyberSell!*” on its website.¹⁶³ The “express aiming” results in *Panavision* and *Bancroft & Masters* were not terribly troubling; particularly in *Panavision*, one could scarcely avoid the visceral reaction that Toeppen targeted *Panavision* in California. Yet the Ninth Circuit reached the result in *Panavision* in substantial reliance on the Seventh Circuit’s decision in *Indianapolis Colts*—which factually was far closer to *Cybersell*.¹⁶⁴ And although *Bancroft & Masters*’s attempt at clarification was laudable, that attempt failed because it defined express aiming as “targeting” coupled with knowledge that plaintiff resides in the forum.¹⁶⁵ “Aiming” and “targeting” mean essentially the same thing, making the definition circular. Observers were left to reasonably conclude that, notwithstanding *Cybersell*, and whatever “express aiming” actually meant, a credible targeting argument would go far to establish personal

157. *Id.* at 1087.

158. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 417 (9th Cir. 1997). Yet, the court knew enough about the Internet to note that plaintiffs were famous spammers. *Id.* at 415 & n.1. It is unclear whether the court meant that term in its current pejorative sense, and what impact, if any, the court’s view had on its decision.

159. *Id.* at 418.

160. *Id.* at 420; see *Calder v. Jones*, 465 U.S. 783, 789 (1984).

161. In *Lake v. Lake*, for example, the “focal point” of attorney Taylor’s conduct may well have been California rather than Idaho, see 817 F.2d 1416, 1421 (9th Cir. 1987), and in *Core-Vent*, the “focal point” of the Swedish doctors’ articles may well not have been California, see 11 F.3d 1482, 1485 (9th Cir. 1993).

162. In *Calder*, the “focal point” analysis related to “the story”—a defamation-specific feature—as well as “the harm suffered.” 465 U.S. at 789.

163. *Cybersell*, 130 F.3d at 415–16.

164. *Cybersell* and *Indianapolis Colts* both involved trademark infringement claims against nonresident defendants who had nonphysical contacts with the forum—a website in *Cybersell* and cable broadcasts in *Indianapolis Colts*.

165. See *Bancroft & Masters*, 223 F.3d 1082, 1087 (9th Cir. 2000).

jurisdiction—at least at the motion to dismiss stage and thus, as a practical matter, perhaps for good.¹⁶⁶

d. Recent Cases

The Ninth Circuit’s subsequent decisions seemed to support a broad reading of the effects test’s express aiming requirement. In *Myers v. Bennett Law Offices*,¹⁶⁷ the court held that the defendants’ requests for the plaintiffs’ credit reports, allegedly improper under the federal Fair Credit Reporting Act, were “‘expressly aimed’ at the forum state,” Nevada, where plaintiffs lived.¹⁶⁸ The Ninth Circuit likened the case to an invasion of privacy case, observed that the primary damage in such cases is mental distress, and further observed “[t]hat [the] mental distress can only be felt where Plaintiffs’ ‘sensibilities’ reside—that is, Nevada.”¹⁶⁹ In *Rio Properties, Inc. v. Rio International Interlink*,¹⁷⁰ the Ninth Circuit “ha[d] no problem”¹⁷¹ concluding that the defendant’s registration and use of domain names incorporating plaintiff’s RIO marks were expressly aimed at Nevada—plaintiff’s “principal place of business and the capital of the gambling industry”¹⁷²—where the defendant advertised by radio and print. Rejecting the defendant’s *Cybersell* argument, and citing *Panavision*, the court observed that “operating even a passive website in conjunction with ‘something more’—conduct directly targeting the forum—is sufficient to confer personal jurisdiction.”¹⁷³ And in *Dole Food Co. v. Watts*,¹⁷⁴ the Ninth

166. See *supra* note 37. Having lost a motion to dismiss for lack of personal jurisdiction, the defendant retains the ability—theoretical, if not necessarily practical—to resuscitate the argument later in the case. See, e.g., *Lake*, 817 F.2d at 1420; *Data Disc, Inc. v. Sys. Tech. Assoc.*, 557 F.2d 1280, 1285 n.2 (9th Cir. 1977). Should the merits develop favorably, the defendant may have little incentive to readdress the jurisdictional issue. See *Vorhees v. Jackson*, 35 U.S. 449, 467–68 (1836):

[T]he court is prohibited from rendering judgment until certain pre-requisites have been complied with, the judgment is not merely voidable, but a nullity, unless these pre-requisites, being matters proper for the record, shall . . . appear to have been performed: most certainly is . . . that [of] jurisdiction or power is not acquired over the rights of a person

Id. Should the merits develop unfavorably, the defendant may be unwilling to incur the substantial additional cost that may be involved in re-litigating the case (in another jurisdiction) should the court later accept the jurisdictional argument.

167. 238 F.3d 1068 (9th Cir. 2001).

168. *Id.* at 1073–74.

169. *Id.* at 1074.

170. 284 F.3d 1007 (9th Cir. 2002).

171. *Id.* at 1020–21.

172. *Id.* at 1020.

173. *Id.* (citing *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998)).

174. 303 F.3d 1104 (9th Cir. 2002).

Circuit held that two Europeans accused of fraud had expressly aimed their actions at California where they allegedly “knew that Dole’s principal place of business was in California, knew that the decisionmakers for Dole were located in California, and communicated directly with those California decisionmakers . . . with the specific intent to cause injury . . . by means of those very communications.”¹⁷⁵

III. *SCHWARZENEGGER V. FRED MARTIN MOTOR CO.*

In light of what then appeared to be the effects test’s expanding reach, the Ninth Circuit’s June 30, 2004 decision in *Schwarzenegger v. Fred Martin Motor Co.*¹⁷⁶ came as somewhat of a surprise. Fred Martin, an Ohio car dealership, had run a series of “fullpage [sic] color advertisements in the *Akron Beacon Journal*, a locally-circulated Ohio newspaper,”¹⁷⁷ in April 2002. “Each ad included a . . . photograph of Schwarzenegger, portrayed as the ‘Terminator,’ [with a bubble quotation] reading, ‘Arnold says: ‘Terminate EARLY at Fred Martin!’”¹⁷⁸

At the time, Schwarzenegger was not the Governor of California, but “an internationally-known movie star”¹⁷⁹ who was “best known for his roles as a muscle-bound hero of action films and distinctive Austrian accent.”¹⁸⁰ The Fred Martin newspaper ads referred, of course, to Schwarzenegger’s memorable lead character in the 1984 movie *The Terminator*—an image the Ninth Circuit characterized as “highly distinctive and immediately recognizable by much of the public.”¹⁸¹ Fred Martin had neither sought nor obtained Schwarzenegger’s permission to use his name or image, so Schwarzenegger sued Fred Martin and its ad agency “in Los Angeles County Superior Court, alleging six state law causes of action arising out of the unauthorized use of his image.”¹⁸²

Schwarzenegger alleged that, had Fred Martin sought authorization, he would have refused.¹⁸³ He claimed that Fred Martin’s conduct “diminishe[d] his hard earned reputation as a major motion picture star, and risks the potential for overexposure of his image to the public, thereby potentially

175. *Id.* at 1112.

176. 374 F.3d 797 (9th Cir. 2004).

177. *Id.* at 799.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 799–800.

183. *Id.* at 799.

diminishing the compensation he would otherwise garner from his career as a major motion picture star."¹⁸⁴ Schwarzenegger further alleged that

his compensation as the lead actor in star-driven films was based on his ability to draw crowds to the box office, [which in turn] depended in part on the scarcity of his image. According to his complaint, if Schwarzenegger's image were to become ubiquitous—in advertisements and on television, for example—the movie-going public would be less likely to spend their money to see his films, and his compensation would diminish accordingly.¹⁸⁵

For that reason, Schwarzenegger alleged, "he ha[d] steadfastly refused to endorse any products in the United States, despite being offered substantial sums to do so Defendants removed the action to federal district court in California, and Fred Martin moved to dismiss . . . for lack of personal jurisdiction."¹⁸⁶ The trial court granted that motion and Schwarzenegger appealed.¹⁸⁷

On review, after rejecting Schwarzenegger's "implausibl[e]" general jurisdiction argument,¹⁸⁸ the Ninth Circuit considered whether the trial court could properly subject Fred Martin to specific jurisdiction.¹⁸⁹ The court began by citing *Lake v. Lake*'s¹⁹⁰ articulation of the "three-prong test for analyzing a claim of specific personal jurisdiction."¹⁹¹

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
- (3) the exercise of jurisdiction . . . must be reasonable.¹⁹²

The Ninth Circuit started with the first prong, which required that "Fred Martin [have] either purposefully availed itself of the privilege of

184. *Id.* at 800 (internal quotations omitted).

185. *Id.* This is an interesting hypothesis in view of Schwarzenegger's subsequent (successful) run for California's governorship and well-publicized participation in President George W. Bush's 2004 reelection campaign.

186. *Id.*

187. *Id.*

188. *Id.* at 801; *see supra* Part I.A.

189. *Id.* at 802–07.

190. 817 F.2d 1416 (9th Cir. 1987).

191. *Schwarzenegger*, 374 F.3d at 802.

192. *Id.* at 802 (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)).

conducting activities in California, or purposefully directed its activities toward California.”¹⁹³ The court observed, “We often use the phrase ‘purposeful availment,’ in shorthand fashion, to include both purposeful availment and purposeful direction, but availment and direction are, in fact, two distinct concepts. A purposeful availment analysis is most often used in suits sounding in contract.”¹⁹⁴ The evidence in such cases, the court asserted, “typically consists of evidence of the defendant’s actions in the forum, such as executing or performing a contract there.”¹⁹⁵ The court explained that “[b]y taking such actions, a defendant ‘purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’ In return for these ‘benefits and protections,’ a defendant must—as a quid pro quo—‘submit to the burdens of litigation in that forum.’”¹⁹⁶ In contrast, the “purposeful direction analysis . . . is most often used in suits sounding in tort.”¹⁹⁷ And the evidence in such cases, the court asserted, “usually consists of evidence of the defendant’s actions outside the forum state that are directed at the forum, such as the distribution in the forum state of goods originating elsewhere.”¹⁹⁸ “[E]ven in the ‘absence of physical contacts’ with the forum,”¹⁹⁹ the court acknowledged, “due process permits the exercise of personal jurisdiction over a defendant who ‘purposefully direct[s]’ his activities at residents of a forum”²⁰⁰

The Ninth Circuit characterized the case as involving purposeful direction rather than purposeful availment.²⁰¹ It observed that Schwarzenegger had not alleged

any conduct by Fred Martin in California . . . that would be readily susceptible to a purposeful availment analysis. Rather, the conduct of which Schwarzenegger complains . . . took place in Ohio, not California. Fred Martin received no benefit, privilege, or protection from California in connection with the Advertisement, and the traditional quid pro quo justification for finding purposeful availment thus does not apply. Therefore, to the extent that Fred Martin’s conduct might justify the exercise of personal jurisdiction

193. *Id.*

194. *Id.* (citations omitted).

195. *Id.*

196. *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (citations omitted)).

197. *Id.*

198. *Id.* at 803 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774–75 (1984)).

199. *Id.* (quoting *Burger King Corp.*, 471 U.S. at 476).

200. *Id.* (quoting *Burger King Corp.*, 471 U.S. at 476).

201. *Id.* at 803–04.

in California, that conduct must have been purposefully directed at California.²⁰²

Put another way, the court concluded, whether Fred Martin had availed himself of the privilege of doing business in California was irrelevant.

The Ninth Circuit then announced, “We evaluate purposeful direction under the three-part ‘effects’ test traceable to the Supreme Court’s decision in *Calder v. Jones*.”²⁰³ The court began by addressing *Sinatra* and *Bancroft & Masters*, on which (with *Calder*) it asserted “Schwarzenegger particularly relie[d].”²⁰⁴ Oddly, the court chose to distinguish *Sinatra* on the basis that there, “[making the statements was] ‘an event within a sequence of activities designed to use California markets for the [clinic’s] benefit’”²⁰⁵—the very quid pro quo analysis with which the court earlier had distinguished the purposeful availment construct (which it was not applying) from the purposeful direction construct (which it said it was). In support of that distinction, but on the same rationale, the court cited *Rio*, “where defendant ‘specifically targeted consumers in Nevada by running radio and print advertisements in Las Vegas.’”²⁰⁶ As for *Bancroft & Masters*, the court reiterated its observation from that case that “*Calder* ‘cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific [personal] jurisdiction,’”²⁰⁷ and that “something more”²⁰⁸ is required. The court distinguished *Bancroft & Masters* on the basis that in that case, the letter sent to Virginia by August National was “expressly aimed . . . at California . . . ‘because it *individually targeted* [Bancroft & Masters],”²⁰⁹ a California corporation doing business almost exclusively in California. This distinction begged the question—“individual targeting” did not help define “express aiming.”

202. *Id.* at 803.

203. *Id.* (citation omitted).

204. *Id.*

205. *Id.* at 804 (quoting *Sinatra v. Nat’l Enquirer, Inc.*, 854 F.2d 1191, 1197 (9th Cir. 1988)).

206. *Id.* (quoting *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1020 (9th Cir. 2002)).

207. *Id.* (quoting *Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000)).

208. *Id.* at 805 (quoting *Bancroft & Masters*, 223 F.3d at 1087).

209. *Id.* The court also addressed *Panavision* and *Cybersell*, concluding that in *Panavision*, defendant “Toeppen’s ‘deliberate choice of the plaintiff’s trademark, and his subsequent attempts to extort compensation for [the] domain name, targeted [the] individual plaintiff . . .’” *Id.* at 807. The court distinguished *Panavision* from *Cybersell* on the basis that “while both involved a passive Internet website, the latter lacked a proactive extortion scheme.” *Id.* at 805.

On the express aiming element, the Ninth Circuit asserted that “[t]he ‘express aiming’ analysis depends, to a significant degree, on the specific type of tort . . . at issue.”²¹⁰ But the court offered no explanation as to how, if at all, the alleged torts in Schwarzenegger’s case differed from the alleged defamation in *Calder*. Instead, the court asserted that “the *Calder* defendants’ actions in writing and publishing a false and injurious article about Jones’s alleged drinking problem constituted intentional behavior directed at Jones in California.”²¹¹ This distinction also begged the question—“directed” did not help define “express aiming” either.

Having earlier explained that “‘intent’ in the context of the ‘intentional act’” element of the effects test “refers to an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act,”²¹² the court held that Schwarzenegger had not satisfied the express aiming element because “Fred Martin’s intentional act—the creation and publication of the Advertisement—was expressly aimed at Ohio rather than California.”²¹³ In so holding, the court carefully considered Fred Martin’s state of mind as to the effect of its intentional act, as well as the lack of connection between that act and the forum:

The *purpose* of the Advertisement was to entice Ohioans to buy or lease cars from Fred Martin and, in particular, to “terminate” their current car leases. The Advertisement was never circulated in California, and Fred Martin had *no reason to believe* that any Californians would see it and pay a visit to the dealership. Fred Martin certainly had *no reason to believe* that a Californian had a current car lease with Fred Martin that could be “terminated” as recommended in the Advertisement.²¹⁴

“It may be true,” the court concluded, “that Fred Martin’s intentional act eventually caused harm to Schwarzenegger in California, and Fred Martin may have known that Schwarzenegger lived in California. But this does not confer jurisdiction, for Fred Martin’s express aim was local.”²¹⁵

IV. ANALYSIS

The *Calder* effects test is troubling. It may well be inconsistent with Supreme Court precedent quantifying the requisite minimum contacts for

210. *Id.* at 807.

211. *Id.*

212. *Id.* at 806.

213. *Id.* at 807.

214. *Id.* (emphasis added).

215. *Id.*

the constitutional exercise of personal jurisdiction as requiring purposeful availment, not just purposeful direction.²¹⁶ And the test is demonstrably difficult to apply from first principles. But it is the law of the land, and lower courts must follow it.²¹⁷

A. *Schwarzenegger Indirectly Suggests the Basis for a Clearer Approach to “Express Aiming.”*

The effects test’s application in *Schwarzenegger* also suffers from flaws—particularly the bases offered for distinguishing between purposeful direction and purposeful availment, and the uncomfortable result that the victim must vindicate his rights in the perpetrator’s home jurisdiction.²¹⁸ Also, the Ninth Circuit could have reached the same result, and even proffered the same purposeful direction analysis, yet—as it did in *Core-Vent*—decided the case based on the reasonableness prong.

Nevertheless, reading *Schwarzenegger* together with other Ninth Circuit cases applying the effects test (including cases the *Schwarzenegger* court did not address) shows that *Schwarzenegger* contains the seeds of a tort-neutral, media-neutral express aiming test that provides more consistent, predictable results. The Ninth Circuit’s recent application of the express aiming element in *Myers v. Bennett Law Offices* provides that showing’s starting point.²¹⁹

216. *E.g.*, Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and Nature of Constitutional Evolution*, 38 JURIMETRICS J. 575, 603 (1998) (“No principled basis reconciles *Calder*’s use of a focal point analysis for intentional torts with the theoretical or pragmatic contours of the purposeful availment test.”) (italics not in original).

217. *E.g.*, *id.* at 598 (“Perhaps the arguable logical, doctrinal, and theoretical deficiencies in *Calder* should be of no concern to the lower courts, who are bound by *Calder*’s directives in any event.”) (italics not in original).

218. Indeed, in *Calder*, the Supreme Court had held, “An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.” 465 U.S. 783, 790 (1984); *see also, e.g.*, *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957):

It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable.

Id.

219. 238 F.3d 1068 (9th Cir. 2001).

1. Type I Express Aiming: Defendant Commits Its Intentional Act with the *Purpose* to Affect Plaintiff, Either in or Known to Reside in the Forum.

Myers arose from an earlier state court action in which Barber, one of Bennett's employees, sued the Myerses' company "for unlawful debt collection practices."²²⁰ During that earlier action, Barber (and thus Bennett) ordered credit reports on the Myerses.²²¹ Based on that conduct, the Myerses sued Bennett in Nevada federal court for violating the federal Fair Credit Reporting Act.²²² "Bennett [was] a Utah corporation with its principal place of business in Utah."²²³ So far as the opinion reveals, Bennett had no contact with Nevada.²²⁴

The district court granted Bennett's motion to dismiss for lack of personal jurisdiction.²²⁵ Analyzing jurisdiction under the *Calder* effects test, the Ninth Circuit reversed.²²⁶ In fact, "[t]he district court [had] refused to place the locus of the injury in Nevada because it found that the 'event complained of does not exist in Nevada.' Instead, the district court found that the injury occurred wherever one would access Plaintiffs' credit reports."²²⁷ The Ninth Circuit reversed, holding that the Myerses had, in fact, been harmed in the forum.²²⁸

Myers is not noteworthy for the court's treatment of express aiming.²²⁹ What is noteworthy is that, as in *Schwarzenegger*, the defendant had absolutely no contact with the forum. Yet the Ninth Circuit held the effects test satisfied in *Myers*, but not in *Schwarzenegger*.

One way to reconcile these cases is to recognize two distinct types of express aiming. In cases like *Myers*, the nonresident defendant commits its intentional act with the *purpose* to affect the plaintiff, either in the forum or knowing plaintiff resides in the forum. Assuming resulting significant harm

220. *Id.* at 1071.

221. *Id.*

222. *Id.*

223. *Id.*

224. *See id.*

225. *Id.*

226. *Id.* at 1076.

227. *Id.* at 1074.

228. *Id.* at 1074–76.

229. The Ninth Circuit characterized the credit request as "expressly aimed at [Nevada] because it individually targeted" the Myerses, whom Bennett knew were Nevada residents, *id.* at 1073, and found "that Bennett's retrieval of Plaintiffs' credit report indicates '[t]he presence of individualized targeting [which] . . . separates th[is case] from others in which we have found the effects test unsatisfied.'" *Id.* at 1074–75 (quoting *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000)). *See supra* Part II.C.

to plaintiff in the forum,²³⁰ that "purposeful" mental state, by itself, ought to satisfy the express aiming requirement. This category might be called "Type I Express Aiming."

This approach reconciles the express aiming results in several earlier Ninth Circuit effects test cases—involving different media and different torts—in which contacts between the nonresident defendant(s) and the forum were lacking, or nearly so, yet the court found jurisdiction. In *Core-Vent*, for example, the court struggled with whether "the acts in question"—publication of allegedly libelous statements in international medical journals—"were 'expressly directed' at California."²³¹ The court noted the absence of any allegation "that the defendants knew that the journals would be circulated in that state,"²³² yet "assume[d] [the] purposeful availment prong ha[d] been satisfied."²³³ A "purposeful effect" analysis justifies that result: the California plaintiff's allegation that the defendant "doctors wrote the articles with the express purpose of driving Core-Vent out of business"²³⁴ meant that the defendants had intentionally written the articles with the purpose of affecting Core-Vent, because they allegedly knew about its "California affiliation."²³⁵

Similarly, the defendant in *Lake* allegedly had procured the California ex parte custody order for the very purpose of having it used against plaintiffs in Idaho.²³⁶ In *Neaves*, the Alabama defendant allegedly mailed her insurance claim to California with the intent to defraud Neaves, whom she knew lived and worked there.²³⁷ And in *Dole*, the defendant Europeans committed their alleged fraud against Dole knowing "that Dole's principal place of business was in California, kn[ow]ing] that the decisionmakers for Dole were located in California, and [by] communicat[ing] directly with those California decisionmakers."²³⁸ The Ninth Circuit held the exercise of personal jurisdiction proper under the effects test in each of those cases.²³⁹

230. See *Dole Food Co. v. Watts*, 303 F.3d 1104, 1112–13 (9th Cir. 2002), for an interesting discussion of whether "the effects test requires that the brunt of the harm have occurred within the forum state, or merely that some significant amount of harm have occurred there."

231. *Core-Vent*, 11 F.3d 1482, 1486 (9th Cir. 1993).

232. *Id.*

233. *Id.* at 1487.

234. *Id.*

235. *Id.*

236. 817 F.2d 1416, 1423 (9th Cir. 1987).

237. 912 F.2d 1062, 1064–65 (9th Cir. 1990).

238. 303 F.3d 1104, 1112 (9th Cir. 2002).

239. On its facts, *Casualty Assurance Risk Insurance Brokerage Co. v. Dillon* presents the greatest impediment to recognizing Type I express aiming as such, because on the facts, the insurance commissioner's letters were almost certainly sent with the purpose to impact CARIB,

Schwarzenegger buttresses the case for recognizing Type I express aiming.²⁴⁰ The Ninth Circuit explicitly distinguished purposeful direction from purposeful availment, and recognized purposeful availment's underlying quid pro quo principle.²⁴¹ Each of the cases cited by the court in distinguishing purposeful availment from purposeful direction were, in fact, quid pro quo cases, rendering the distinction susceptible to the same criticisms commentators have made of *Calder* in light of the Supreme Court's earlier personal jurisdiction cases.²⁴² Nevertheless, the Supreme Court decided *Calder* the way it did, and the Ninth Circuit's recognition of purposeful direction as a separate jurisdictional concept may make sense in light of the result in *Calder*.²⁴³ If purposeful direction is jurisdictionally significant independent of any quid pro quo, then it probably (and perhaps necessarily) follows that if the defendant *intends* his intentional act to cause an effect upon plaintiff, either in the forum or knowing that plaintiff resides in the forum, then the defendant may reasonably and fairly be held to

and the insurance commissioner knew CARIB was a Guam corporation. 976 F.2d 596, 598 (9th Cir. 1992). *Dillon*, however, might be best understood as turning not on the absence of express aiming, but on the absence of the "harm in forum" element of the effects test—because CARIB's business activities were focused in Washington, D.C.—or on the unreasonableness of Guam's exercising personal jurisdiction over the Indiana Insurance Commissioner, whom the Ninth Circuit observed would have "to travel over 7,000 miles" to Guam to litigate the case. *Id.* at 600. Moreover, CARIB tried to prove too much: that "minimum contacts exist because damage to a Guam business was a foreseeable effect of the allegedly libelous letter," and "that jurisdiction exists wherever the effects of libel are felt." *Id.* at 599.

240. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004).

241. *Id.* at 803.

242. See Redish, *supra* note 216, at 598; see also, e.g., Laura S. Ferster, Griffis v. Luban: *A Red Herring in the High Seas of Personal Jurisdiction*, 29 WM. MITCHELL L. REV. 343, 355–56 (2002) ("It is important to recognize that *Calder* is somewhat of an anomaly in Supreme Court personal jurisdiction jurisprudence, as that decision has resulted in a myriad of different interpretations and applications in state and federal courts across the country."); Howard B. Stravitz, *Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Superior Court*, 39 S.C. L. REV. 729, 766 (1988):

It is difficult to distill any coherent theme from either [*Keeton* or *Calder*]. Both seem to mix *International Shoe - Hanson* purposeful availment theory with *McGee* multi-interest balancing analysis, but not in any meaningful or organized manner. Moreover, neither opinion used the fairness branch factors as collectively articulated in *World-Wide*.

Id.

243. See also *Rush v. Savchuk*, 444 U.S. 320, 329 (1980) (rejecting plaintiff's bid for jurisdiction where "it cannot be said that the defendant engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable") (emphasis in original and added); cf. Redish, *supra* note 216, at 585 (noting, in 1998, that "[u]nder current jurisdictional standards, the task facing the lower courts is to synthesize the purposeful availment requirement and a defendant's use of the Internet to cause an effect within a state") (footnote omitted); *id.* at 596.

account in the forum.²⁴⁴ With or without purposeful availment, "defendant's conduct and connection with the forum State" under those circumstances may well be "such that he should reasonably anticipate being haled into court there."²⁴⁵ Moreover, by definition, the defendant under those circumstances has chosen to structure his conduct in a manner that might render him liable to suit in the forum.²⁴⁶

In *Schwarzenegger*, of course, there was no showing that Fred Martin meant to cause any impact on Schwarzenegger at all.²⁴⁷ *Schwarzenegger* is consistent with the proposition, however, that even without any contact between the defendant and the forum, the defendant satisfies the express aiming requirement if it *intends* its intentional act to cause an effect upon plaintiff, either in the forum or knowing that plaintiff resides in the forum.²⁴⁸

2. Type II Express Aiming: Defendant Knows or Should Know Its Intentional Act Will Affect Plaintiff, Either in or Known to Reside in the Forum, and Couples That Putative Awareness With Related Forum Contact.

What if the defendant does not intend to cause an effect on the plaintiff in the forum, but merely knows or should know its intentional act will do so? It is well established that the mere foreseeability of an effect in the forum is insufficient to confer jurisdiction.²⁴⁹ But if the defendant couples such putative knowledge with related forum contact (whether or not physical), then in case after case, the exercise of personal jurisdiction under the effects test has been held appropriate.

244. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) ("Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities." (citations omitted)); see also *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) ("[A]n essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State.").

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

246. See *id.*

247. *Schwarzenegger*, 374 F.3d at 807.

248. Nothing about the court's treatment of the separate "intentional act" element, see *supra* Part II, precludes consideration of the defendant's purpose in connection with the express aiming element. Nor does the court's observation in *dicta* that "[t]he result or consequence of the act is relevant, but with respect to the third part of the *Calder* test—'harm suffered in the forum.'" *Schwarzenegger*, 374 F.3d at 806.

249. E.g., *World-Wide Volkswagen Corp.*, 444 U.S. at 295; *Cas. Assurance Risk Ins. Brokerage Co. v. Dillon*, 976 F.2d 596, 599 (9th Cir. 1992).

Calder itself, for example, is best understood as such a “Type II express aiming” case. Whatever the Supreme Court’s gloss, nothing in the opinion suggests that *Calder* and *South* set out to impact Jones—indeed, economically, it likely didn’t matter to them whether the story affected her or not. But the defendants knew or should have known their actions would have an effect on her, and the publication of the alleged libel in California supplied the requisite related forum contact.

Type II express aiming also explains the effects test’s result in a variety of Ninth Circuit cases involving different torts and different media. In *Sinatra* and *Gordy*, as in *Calder*, the facts suggest that the defendants knew or should have known that their false statements would impact the respective plaintiffs in their home jurisdictions, and the defendants combined that putative knowledge with publication of the statements in those jurisdictions.²⁵⁰ In *Brainerd*, the Canadian administrator knew or should have known that his alleged comments would impact the plaintiff in Arizona, and the administrator combined that putative awareness with two phone conferences with and a letter to the University of Arizona.²⁵¹ And in *Rio*, the offshore gambling outfit knew or should have known of its use of domain names incorporating plaintiff’s RIO mark, and coupled that putative awareness with print advertising and promotion in Nevada.²⁵²

On its facts, *Schwarzenegger* did not involve Type II express aiming either. There, the court observed, “Fred Martin had no reason to believe that any Californians would see [the advertisement] and pay a visit to the dealership. Fred Martin certainly had no reason to believe that a Californian had a current car lease with Fred Martin that could be ‘terminated’ as recommended in the Advertisement.”²⁵³ For those reasons, coupled with the fact that “the Advertisement was never circulated in California”²⁵⁴ (so there was no forum contact either), the Ninth Circuit held “that the advertisement was not expressly aimed at California.”²⁵⁵

B. Virtues of the Type I and Type II Express Aiming Approach

Explicitly recognizing and applying express aiming by the Type I and Type II approach does not solve every problem associated with the effects

250. See *supra* notes 24–45 (*Calder*), 58–73 (*Sinatra*), 105–112 (*Gordy*), and accompanying text.

251. See *supra* notes 74–77 and accompanying text.

252. See *supra* notes 170–173 and accompanying text.

253. *Schwarzenegger*, 374 F.3d at 807.

254. *Id.*

255. *Id.*

test. It does not, for example, resolve the recurring issue of whether a corporation's harm and an individual's harm should receive the same treatment under the effects test.²⁵⁶ It does not resolve "whether the effects test requires that the brunt of the harm have occurred within the forum state, or merely that some significant amount of harm have occurred there."²⁵⁷ And it does not obviate what may be the most problematic aspect of the effects test—at least if summary determinations of jurisdiction are desired—yet one dictated by *Calder* itself: the need to rely on the defendant's mental state.²⁵⁸

Nevertheless, explicit recognition of Type I and Type II express aiming offers advantages over the status quo. First, this approach is more logical. Any approach that defines express aiming as "targeting" is circular.²⁵⁹ The Type I and Type II express aiming approach, on the other hand, turns on independent variables: the defendant's state of mind as it relates to the plaintiff and the forum and the defendant's contacts with the forum.

Second, this approach might provide more predictable results. One reason is that it is tort-neutral. At least for express aiming purposes, the court need not concern itself with the "specific tort at issue"²⁶⁰ because the

256. The issue of where a corporation suffers harm, for purposes of the effects test, lurked in *Dillon*, because CARIB was incorporated in Guam but did essentially no business there. 976 F.2d 596, 599 (9th Cir. 1992); see *supra* Part II.C.2. The Ninth Circuit first dealt with the issue explicitly in *Core-Vent*, where it asserted that "[a] corporation does not suffer harm in a particular geographic location in the same sense that an individual does," 11 F.3d 1482, 1486 (9th Cir. 1993), yet rejected the argument that "*Calder* does not apply to any case in which the plaintiff is a corporation." *Id.* at 1487. Later, invoking *Core-Vent*, the court in *Cybersell* asserted, "Nor does the 'effects' test apply with the same force to *Cybersell* AZ as it would to an individual, because a corporation 'does not suffer harm in a particular geographic location in the same sense that an individual does.'" 130 F.3d 414, 420 (9th Cir. 1997) (quoting *Core-Vent*, 11 F.3d at 1486). That assertion was incorrect given the court's actual treatment of the issue in *Core-Vent*. In *Panavision*, the court summarily rejected Toeppen's argument "that a large organization such as Panavision does not suffer injury in one location." 141 F.3d 1316, 1322 n.2 (9th Cir. 1998). "[T]he brunt of the harm suffered by Panavision," the court reasoned, "was in the state where it maintained its principal place of business, California." *Id.* The *Dole* court dealt at length with "the somewhat metaphysical question of where a corporation suffers economic harm," 303 F.3d 1104, 1113 (9th Cir. 2002), and acknowledged that "in appropriate circumstances a corporation can suffer economic harm both where the bad acts occurred and where the corporation has its principal place of business." *Id.*

257. See *Dole*, 303 F.3d at 1112–13. Indeed, in its explicit reliance on defendant's state of mind, this approach may call for the third element of the effects test to reduce to merely "harm in the forum." *Id.* at 1113.

258. See *Calder*, 465 U.S. at 789–90.

259. See, e.g., Andrea M. Matwyshyn, *Of Nodes and Power Laws: A Network Theory Approach to Internet Jurisdiction Through Data Privacy*, 98 NW. U. L. REV. 493, 517–18 (2004).

260. The *Schwarzenegger* court said its analysis was tort-specific, but did not explain the basis for its conclusion. 374 F.3d at 807. Nor did the court decide the case based on any

independent variables on which the approach relies have no necessary relation to any specific tort. Tort-neutrality avoids unnecessarily complicating the jurisdictional inquiry²⁶¹ and supplies more precedent from which to draw. Another reason is that it does not rely on the purported “wrongfulness” of defendant’s conduct. Whether defendant’s conduct was wrongful is, or ought to be, an issue for the merits, not for determining whether the forum may properly exert power over the defendant.²⁶² Relying

difference between the right of publicity violation alleged in that case and the defamation at issue in *Calder*.

261. In *Calder* itself, the Court rejected defendants’ invitation to inject “First Amendment concerns . . . into the jurisdictional analysis” because “[t]he infusion of such considerations would needlessly complicate an already imprecise inquiry.” 465 U.S. 783, 790 (1984). Similarly, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 n.11 (1980), the Court rejected the notion that automobiles’ treatment as “dangerous instrumentalit[ies]” under some prior personal jurisdiction cases had any continuing relevance. “The ‘dangerous instrumentality’ concept apparently was never used to support personal jurisdiction; and to the extent it has relevance today it bears not on jurisdiction but on the possible desirability of imposing substantive principles of tort law such as strict liability.” *Cf. Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984) (“[A]ny potential unfairness in applying New Hampshire’s statute of limitations to all aspects of this nationwide suit has nothing to do with the jurisdiction of the court to adjudicate the claims.”).

262. Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT’L LAW 1167, 1190 (1998) (“The problem is that we only know after an adjudication whether the defendant in fact engaged in tortious behavior.”) (citation omitted).

In *Yahoo! Inc. v. La Ligue Contre le Racisme et L’Antisemitisme*, 379 F.3d 1120 (9th Cir. 2004), two French entities had obtained French court orders barring Yahoo! from displaying Nazi-related content and auction items on its Internet website. Yahoo! sought a declaratory judgment in the United States District Court for the Northern District of California that the orders were not recognizable or enforceable in the United States. *Id.* at 1122. On appeal from the trial court’s entry of summary judgment in Yahoo!’s favor, a divided panel of the Ninth Circuit held that the French entities were not, under the effects test, subject to personal jurisdiction. *Id.* at 1125, 1127. The court reasoned that for the entities’ “litigation efforts against Yahoo! to amount to ‘express aiming,’ those efforts must qualify as wrongful conduct targeted at Yahoo!,” and concluded that they were not wrongful. *Id.* at 1125. Judge Brunetti, in dissent, argued that the “‘express aiming’ test may be met by a defendant’s intentional targeting of his actions at the plaintiff in the forum state” even if they are not wrongful. *Id.* at 1127.

The notion that the French entities had not aimed their litigation at Yahoo! in California is peculiar. As the court noted, they “were aware that Yahoo! was based in California when they took legal action against it,” *id.* at 1126 n.3, wrote “a cease-and-desist letter to Yahoo!” in California, *id.* at 1122, served Yahoo! with their French complaints through the United States Marshals service, and requested that the French court order Yahoo! to perform certain acts in California. *Id.* at 1124. The court might have reached the same result under the specific jurisdiction test’s “arises out of or relates to” prong, for it is at least somewhat questionable whether Yahoo!’s declaratory judgment claim would exist “but for” the French entities’ forum-related conduct. *See Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1131–32 (9th Cir. 2003). Or, as in *Core-Vent*, the court might have reached that result under the specific jurisdiction test’s reasonableness prong. *See Core-Vent*, 11 F.3d at 1485–87, 1490.

on independent variables rather than (presupposed) attributions of nefarious intent, which may lend themselves to result-oriented application, would likely make the test’s application in any given case more predictable. Finally, this approach may apply more easily to new media. The defendant’s state of mind, i.e., whether defendant had purpose to cause or putative knowledge of an impact on plaintiff, in or known to reside in the forum, transcends the particular medium involved, whether the tabloid in *Calder*, the international medical journals in *Core-Vent*, the broadcasts in *Indianapolis Colts*, the website in *Panavision*, or the letter in *Bancroft & Masters*. The approach does not prevent new media from having any impact on jurisdictional analyses—at a minimum, the medium might bear upon the “related forum contact” aspect of Type II express aiming. But it would insulate the mechanics of those new media from the essential targeting component of the element.

Third, but not least, the approach is more consistent with the Supreme Court’s due process jurisprudence, focusing on whether “maintenance of the suit . . . offend[s] ‘traditional notions of fair play and substantial justice.’”²⁶³ If the defendant set about to impact the plaintiff, either in the forum or knowing the plaintiff resides there, then it is not difficult to conclude that “the defendant’s conduct . . . [was] such that [the defendant] should reasonably anticipate being haled into court there.”²⁶⁴ Or, if the defendant only knows or should know that it will impact the plaintiff in the forum, that putative awareness of forum impact may not, by itself, be sufficient for jurisdiction.²⁶⁵ But if the defendant couples that putative awareness with related forum contact, there is at least some argument that a sufficient relationship between “the defendant, the forum, and the litigation”²⁶⁶ exists to justify jurisdiction under *Calder*’s effects theory.²⁶⁷

In any event, outside the declaratory judgment context, there are practical difficulties with deciding personal jurisdiction based on the presence or absence of “wrongfulness.” See *supra* notes 260–261 and accompanying text.

263. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

264. *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

265. See *supra* notes 192–202.

266. *Calder*, 465 U.S. at 788.

267. See *World-Wide Volkswagen Corp.*, 444 U.S. at 297:

This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

C. Application: The Internet Cases Revisited

The Ninth Circuit's Internet cases provide means to test whether the Type I and Type II express aiming approach provides logical, predictable, and sound personal jurisdiction results regardless of the tort and media involved.

First, consider *Cybersell*: "Cybersell FL ha[d] done no act and ha[d] consummated no transaction, nor ha[d] it performed any act by which it purposefully availed itself of the privilege of conducting activities, in Arizona" ²⁶⁸ So for Arizona to constitutionally exercise personal jurisdiction over Cybersell FL, it would have to do so under a purposeful direction theory. But Cybersell FL had been formed only a year and a half before it filed suit; its service mark registration for "Cybersell" had been published only two months before; and when Cybersell FL's founders "chose the name 'Cybersell' for their venture, Cybersell AZ had no home page on the web nor had the PTO granted their application for the service mark." ²⁶⁹ Thus, there could be neither Type I nor Type II express aiming. Nothing in the case (at least until after Cybersell AZ made its demand on Cybersell FL) suggests that Cybersell FL knew or had reason to know of Cybersell AZ, ²⁷⁰ *a fortiori*, Cybersell FL had no purpose to impact Cybersell AZ in Arizona. Under that framework, the court need not have considered whether Cybersell FL's Internet activities constituted related forum contact, although it seems hard today to dispute that an Internet website advertising commercial services, accessible in the forum, and infringing the mark of a plaintiff registered in the forum, is not a related forum contact regardless of whether it is passive or active. ²⁷¹

268. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997).

269. *Id.* at 415.

270. *Cf. Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 480 (1985):

Rudzewicz' refusal to make the contractually required payments in Miami, and his continued use of Burger King's trademarks and confidential business information after his termination, caused foreseeable injuries to the corporation in Florida. For these reasons it was, at the very least, presumptively reasonable for Rudzewicz to be called to account there for such injuries.

Id.

271. *See supra* notes 74-77 and accompanying text; *cf. Indianapolis Colts v. Metro. Baltimore Football Club, Ltd.*, 34 F.3d 410, 412 (7th Cir. 1994) (holding that, without more, nationwide cable television broadcast of Baltimore CFL Colts games constituted jurisdictional contact with Indiana). Indeed, if personal presence in the forum is not required for personal jurisdiction, see *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (discussing *Pennoyer v. Neff*, 95 U.S. 714 (1877)), there is an argument that physical contact should not be required either.

Second, consider *Panavision*.²⁷² One is tempted to consider it a purposeful availment case, because Toeppen had offered to sell “panavision.com” and “panaflex.com” to Panavision through a demand letter directed at California.²⁷³ But the Anticybersquatting Consumer Protection Act²⁷⁴ had not yet been enacted in 1998, when *Panavision* was decided, and under Panavision’s trademark dilution theory, it might well be difficult to satisfy the “arising out of” prong of the specific jurisdiction test based on the letter.²⁷⁵ Put another way, notwithstanding Toeppen’s offer, Panavision was neither a contract case nor a purposeful availment case.²⁷⁶ But under a purposeful direction analysis, Toeppen would be subject to personal jurisdiction. Toeppen registered the domain names with the purpose to affect Panavision in California—by depriving it of those domain names as part of his extortion scheme.²⁷⁷ With that Type I express aiming, there would be no reason to consider whether Toeppen’s demand letter constituted related forum contact for purposes of Type II express aiming.

Finally, consider *Bancroft & Masters*, a declaratory judgment action arising out of a trademark dispute. As in *Panavision*, the defendant intended to cause an impact on the plaintiff in the forum.²⁷⁸ Here, it was to force Bancroft & Masters to act or lose rights in the “masters.com” domain name.²⁷⁹ Thus, *Bancroft & Masters* was also a Type I express aiming case.

V. CONCLUSION

Schwarzenegger,²⁸⁰ the Ninth Circuit’s latest attempt to grapple with the meaning of express aiming, demonstrates the need for a different approach. The Type I and Type II express aiming approach is generally consistent with the Ninth Circuit’s effects test jurisprudence. Recognizing Type I and Type II express aiming explicitly may well provide courts with a more logical, predictable, and doctrinally sound basis for applying the *Calder*

272. *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998).

273. *Id.* at 1319.

274. *See* Anticybersquatting Consumer Protection Act of 1999, Pub. L. No. 106-113, §§ 3001–3010, 113 Stat. 1501 (1999).

275. Panavision may have confronted difficulty proving that its trademark dilution causes of action arose out of Toeppen’s demand letter to California. *See, e.g., Dole Food Co. v. Watts*, 303 F.3d 1104, 1114 (9th Cir. 2002).

276. *See supra* notes 136–145 and accompanying text.

277. *See supra* notes 138–139 and accompanying text.

278. *See supra* note 156 and accompanying text.

279. *See id.*

280. 374 F.3d 797 (9th Cir. 2004).

effects test, including applying it in cases involving different intentional torts and different media.