

Excerpt of *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218 (9th Cir. 2011) cert. denied, 132 S. Ct. 1101 (U.S. 2012)

W. FLETCHER, Circuit Judge:

Mavrix Photo, Inc. (“Mavrix”) sued Brand Technologies, Inc. and its CEO, Brad Mandell (collectively, “Brand”), in federal district court for the Central District of California, alleging that Brand infringed Mavrix’s copyright by posting its copyrighted photos on its website. Brand moved to dismiss for lack of personal jurisdiction. See [Fed.R.Civ.P. 12\(b\)\(2\)](#). The district court denied Mavrix’s motion for jurisdictional discovery and granted Brand’s motion to dismiss. We reverse. We hold that Brand is not subject to general personal jurisdiction in California, but that its contacts with California are sufficiently related to the dispute in this case that it is subject to specific personal jurisdiction.

I. Background

Mavrix, a Florida corporation with its principal place of business in Miami, is a celebrity photo agency. Mavrix pays photographers for candid photos of celebrities. Its primary business is licensing and selling *1222 those photos to purveyors of celebrity news such as *People* and *Us Weekly* magazines. Many of the celebrities whom Mavrix photographs live and work in Southern California. Mavrix keeps a Los Angeles office, employs Los Angeles-based photographers, has a registered agent for service of process in California, and pays fees to the California Franchise Tax Board.

Brand, an Ohio corporation with its principal place of business in Toledo, operates a website called *celebrity-gossip.net*. As its name suggests, the website covers popular personalities in the entertainment industry and features photo galleries, videos, and short articles (for example, “Lindsay Lohan Stays Sexy and Sober,” and “Shiloh Jolie–Pitt Named Most Influential Infant”). The website has several interactive features. Visitors to the site may post comments on articles, vote in polls (“Is Robert Pattinson the sexiest man on the planet?”), subscribe to an email “Celebrity Newsletter,” join the “Gossip Center” membership club, and submit news tips and photos of celebrities. The website is very popular. When this litigation began, Alexa.com, an Internet tracking service, ranked *celebrity-gossip.net* as number 3,622 out of approximately 180 million websites worldwide based on traffic. By comparison, the national news website MSNBC.com was then ranked number 2,521. In its marketing materials, Brand claims that *celebrity-gossip.net* currently receives more than 12 million unique U.S. visitors and 70 million U.S. page views per month. Gossip Center Network, *Media Kit*, at 3, available at http://cdn.gossipcenter.com/gossipgirls_cdn/GCN–MediaKit.pdf (last visited July 21, 2011). The record does not reflect how many of the website’s visitors are California residents.

Like any large media entity, *celebrity-gossip.net* courts a national audience, not restricted to California. However, the website has some specific ties to California. Brand makes money from third-party advertisements for jobs, hotels, and vacations in California. The website also features a “Ticket Center,” which is a link to the website of a third-party vendor that sells tickets to nationwide events. Some of these events are in California. Brand has agreements with several California businesses. A California Internet advertising agency solicits buyers and places advertisements on *celebrity-gossip.net*. A California wireless provider designed and hosts on its servers a version of *celebrity-gossip.net* accessible to mobile phone users. A California firm designed the website and performs site maintenance. Finally, Brand has entered a “link-sharing” agreement with a California-based national news site, according to which each site agrees to promote the other’s top stories. However, Brand has no offices, real property, or staff in California, is not licensed to do business in California, and pays no California taxes.

In 2008, a photographer working for Mavrix shot thirty-five pictures of Stacy Ferguson and Josh Duhamel while the couple was bathing, sunning, and jet skiing in the Bahamas. Ferguson, better known by her stage name Fergie, is a singer in the hip-hop group the Black Eyed Peas. The group has sold some 56 million records in the last decade and has won Grammy awards for such hit singles as “I Gotta Feeling” and “My Humps.” See *The Black Eyed Peas*, Wikipedia, http://en.wikipedia.org/wiki/The_Black_Eyed_Peas (last visited July 21, 2011). Ferguson’s husband Duhamel is an actor who has appeared, most notably, in the trilogy of *Transformers* movies. See *Josh Duhamel*, The

Internet Movie Database, <http://www.imdb.com/name/nm0241049> (last visited July 21, 2011). Mavrix registered its copyright in the photos and posted them on its *1223 website. Mavrix alleges that shortly thereafter Brand reposted the photos on celebrity-gossip.net in violation of Mavrix's copyright. Mavrix alleges that in doing so Brand destroyed the market value of the photos.

Mavrix sued in federal district court for the Central District of California, alleging that Brand infringed Mavrix's copyright in the photos. *See* 17 U.S.C. § 501. Mavrix sought an injunction barring Brand from further disseminating the photos, as well as actual and statutory damages. *See id.* §§ 502, 504. Brand moved to dismiss for lack of personal jurisdiction. *See* Fed.R.Civ.P. 12(b)(2). The district court denied Mavrix's request for leave to conduct jurisdictional discovery and granted the motion to dismiss. Mavrix timely appealed.

II. Standard of Review

[1] [2] [3] [4] [5] We review a dismissal for lack of personal jurisdiction *de novo*. *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir.2008). In opposing a defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that jurisdiction is proper. *Id.* Where, as here, the defendant's motion is based on written materials rather than an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss. *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir.2010). The plaintiff cannot "simply rest on the bare allegations of its complaint," but uncontroverted allegations in the complaint must be taken as true. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir.2004) (quoting *Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir.1977)). "[W]e may not assume the truth of allegations in a pleading which are contradicted by affidavit," *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1284 (9th Cir.1977), but we resolve factual disputes in the plaintiff's favor, *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir.2006).

[6] [7] Where, as here, no federal statute authorizes personal jurisdiction, the district court applies the law of the state in which the court sits. Fed.R.Civ.P. 4(k)(1)(A); *Panavision Int'l, L.P. v. Toepfen*, 141 F.3d 1316, 1320 (9th Cir.1998). California's long-arm statute, Cal.Civ.Proc.Code § 410.10, is coextensive with federal due process requirements, so the jurisdictional analyses under state law and federal due process are the same. *Schwarzenegger*, 374 F.3d at 800–01. For a court to exercise personal jurisdiction over a nonresident defendant consistent with due process, that defendant must have "certain minimum contacts" with the relevant forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)).

III. Discussion

A. General Jurisdiction

[The court first finds that Brand Technologies is not subject to general jurisdiction in California because it does not have continuous and systematic contacts with the state]

B. Specific Jurisdiction

[13] In the alternative, Mavrix argues that Brand has sufficient "minimum contacts" with California arising out of, or related to, its actions in reposting the photos of Ferguson and Duhamel to justify the exercise of specific jurisdiction. We analyze specific jurisdiction under a three-prong test:

- (1) The non-resident defendant must *purposefully direct his activities* or consummate some transaction with the forum or resident 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 *1228 which arises out of or

relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger, 374 F.3d at 802 (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir.1987) (emphases added)). Mavrix bears the burden of satisfying the first two prongs. *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir.1990). If Mavrix does so, the burden then shifts to Brand to set forth a "compelling case" that the exercise of jurisdiction would not be reasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

Only the first prong is at issue here. As to the second prong, Mavrix's claim of copyright infringement arises out of Brand's publication of the photos on a website accessible to users in the forum state. As to the third prong, Brand does not argue that the exercise of jurisdiction would be unreasonable on the basis of any of the factors listed in *Burger King*.

^[14] The first prong of the specific jurisdiction test refers to both purposeful direction and purposeful availment. We have explained that in cases involving tortious conduct, we most often employ a purposeful direction analysis. *Schwarzenegger*, 374 F.3d at 802. "In tort cases, we typically inquire whether a defendant 'purposefully direct[s] his activities' at the forum state, applying an 'effects' test that focuses on the forum in which the defendant's actions were felt, whether or not the actions themselves occurred within the forum." *Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1206 (9th Cir.2006) (en banc) (quoting *Schwarzenegger*, 374 F.3d at 803 (alterations in original)). The "effects" test, which is based on the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), requires that "the defendant allegedly must have (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." *Brayton Purcell*, 606 F.3d at 1128 (quoting *Yahoo!*, 433 F.3d at 1206). Because Mavrix has alleged copyright infringement, a tort-like cause of action, purposeful direction "is the proper analytical framework." *Id.* (citing *Schwarzenegger*, 374 F.3d at 802).

We believe that the Supreme Court's recent decision in *J. McIntyre Machinery, Ltd., v. Nicaastro*, — U.S. —, 131 S.Ct. 2780, 180 L.Ed.2d 765 (2011), is consistent with the line of cases finding specific jurisdiction when there has been purposeful direction. *J. McIntyre Machinery* was a product liability case. The question was whether suit could be brought in New Jersey state court against a manufacturer headquartered in the United Kingdom based on an injury caused by an allegedly defective product made in the U.K. In performing a purposeful *availment* (rather than a purposeful *direction*) analysis, the plurality wrote:

As a general rule, the exercise of judicial power is not lawful unless the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). There may be exceptions, say, for instance, in cases involving an intentional tort. But the general rule is applicable in this products-liability case, and the so-called "stream-of-commerce" doctrine cannot displace it.

J. McIntyre Mach., 131 S.Ct. at 2785 (plurality op. of Kennedy, J.); see also *id.* at 2787 (distinguishing intentional tort cases from cases governed by this "general *1229 rule"). We therefore address the three requirements of the *Calder* "effects" test in turn.

^[15] First, we conclude that Brand "committed an intentional act." There is no question that it acted intentionally reposting the allegedly infringing photos of Ferguson and Duhamel.

^[16] Second, we conclude that Brand "expressly aimed at the forum state." In prior cases, we have struggled with the question whether tortious conduct on a nationally accessible website is expressly aimed at any, or all, of the forums in which the website can be viewed. See, e.g., *Brayton Purcell*, 606 F.3d at 1129–31; *Pebble Beach*, 453 F.3d at 1156–58; *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1019–21 (9th Cir.2002); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321–22 (9th Cir.1998); *Cybersell*, 130 F.3d at 417. On the one hand, we have made clear that "maintenance of a passive website alone cannot satisfy the express aiming prong." *Brayton Purcell*, 606 F.3d at 1129. On the other, we have held that "operating even a passive website in conjunction with 'something more'—conduct directly targeting the forum—is sufficient." *Rio Props.*, 284 F.3d at 1020. In determining whether a nonresident defendant has done "something more," we have considered several factors, including the interactivity of

the defendant's website, e.g., *Pebble Beach*, 453 F.3d at 1153–54, 1158; *Cybersell*, 130 F.3d at 417–20; the geographic scope of the defendant's commercial ambitions, e.g., *Pebble Beach*, 453 F.3d at 1156–58; *Rio Props.*, 284 F.3d at 1020–21; and whether the defendant “individually targeted” a plaintiff known to be a forum resident, e.g., *Brayton Purcell*, 606 F.3d at 1129; *Pebble Beach*, 453 F.3d at 1156–57; *Panavision*, 141 F.3d at 1321–22.

In this case, we find most salient the fact that Brand used Mavrix's copyrighted photos as part of its exploitation of the California market for its own commercial gain. The Court's decision in *Keeton* is directly relevant. See *Schwarzenegger*, 374 F.3d at 803 (describing *Keeton* as a purposeful direction case). The plaintiff in *Keeton* was a New York resident. She sued Hustler magazine, an Ohio corporation, for libel in New Hampshire based on the circulation in New Hampshire of copies of the magazine that contained the allegedly libelous material. 465 U.S. at 772, 104 S.Ct. 1473. The plaintiff sued in New Hampshire in order to take advantage of the state's unusually long statute of limitations, even though she had virtually no connection with the forum. *Id.* at 772 n. 1, 780, 104 S.Ct. 1473. Hustler had a circulation of 10,000–15,000 copies per month in New Hampshire, but no other contacts with the forum. *Id.* at 772, 104 S.Ct. 1473. The Court concluded that Hustler's

regular circulation of magazines in the forum State is sufficient to support an exercise of jurisdiction in a libel action based on the contents of the magazine.... Such regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous. It is, therefore, unquestionable that New Hampshire jurisdiction over a complaint based on those contacts would ordinarily satisfy the requirement of the Due Process Clause that a State's assertion of personal jurisdiction over a nonresident defendant be predicated on “minimum contacts” between the defendant and the State.

Id. at 773–74, 104 S.Ct. 1473. The Court acknowledged that New Hampshire accounted for a share of Hustler's overall business that was too small to support the exercise of general jurisdiction, but noted that Hustler was “carrying on a ‘part of its general business’ in New Hampshire, and *1230 that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire.” *Id.* at 779–80, 104 S.Ct. 1473 (quoting *Perkins*, 342 U.S. at 438, 72 S.Ct. 413). Finally, the Court specified that because Hustler

has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine.... [Hustler] produces a national publication aimed at a nationwide audience. There is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed.

Id. at 781, 104 S.Ct. 1473.

As did Hustler in distributing its magazine in New Hampshire, Brand “continuously and deliberately exploited” the California market for its website. Brand makes money by selling advertising space on its website to third-party advertisers: the more visitors there are to the site, the more hits that are made on the advertisements; the more hits that are made on the advertisements, the more money that is paid by the advertisers to Brand. A substantial number of hits to Brand's website came from California residents. One of the ways we know this is that some of the third-party advertisers on Brand's website had advertisements directed to Californians. In this context, it is immaterial whether the third-party advertisers or Brand targeted California residents. The fact that the advertisements targeted California residents indicates that Brand knows—either actually or constructively—about its California user base, and that it exploits that base for commercial gain by selling space on its website for advertisements. Compare, e.g., *Brayton Purcell*, 606 F.3d at 1130 (nonresident defendant subject to specific jurisdiction “had every reason to believe prospective clients in [the forum] would see the website—indeed, attracting new business was the point”) with *Cybersell*, 130 F.3d at 419 (nonresident defendant not subject to specific jurisdiction because “there is no evidence that any part of its business (let alone a continuous part of its business) was sought or achieved” in forum).

The record does not show that Brand marketed its website in California local media. Cf. *Rio Props.*, 284 F.3d at 1020. But it is clear from the record that Brand operated a very popular website with a specific focus on the California—centered celebrity and entertainment industries. Based on the website's subject matter, as well as the size and commercial value of the California market, we conclude that Brand anticipated, desired, and achieved a substantial California viewer base. This audience is an integral component of Brand's business model and its

profitability. As in *Keeton*, it does not violate due process to hold Brand answerable in a California court for the contents of a website whose economic value turns, in significant measure, on its appeal to Californians.

The applicability of *Keeton* to this case depends on two similarities between celebrity-gossip.net and Hustler magazine. First, both were large publications that sought and attracted nationwide audiences. Both publications could count on reaching consumers in all fifty states. Second, both publications cultivated their nationwide audiences for commercial gain. Accordingly, neither could characterize the consumption of its products in any state as “random,” “fortuitous,” or “attenuated.” *Burger King*, 471 U.S. at 486, 105 S.Ct. 2174. Rather, consumption was a predictable consequence of their business models. See *Goodyear*, 131 S.Ct. at 2855 (“[W]here ‘the sale of a product ... arises from the efforts *1231 of the manufacturer or distributor to serve ... the market for its product in [several] States, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others.’” (quoting *World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. 559 (emphasis and second alteration added by *Goodyear*))); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 899 (9th Cir.2002); *Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp.*, 633 F.2d 155, 158–60 (9th Cir.1980). The same would not necessarily be true, for example, of a local newspaper, an individual, or an unpaid blogger who posted an allegedly actionable comment or photo to a website accessible in all fifty states, but who could not be as certain as Brand or Hustler that his actions would be so widely observed and who did not seek commercial gain from users outside his locality. Not all material placed on the Internet is, solely by virtue of its universal accessibility, expressly aimed at every state in which it is accessed. But where, as here, a website with national viewership and scope appeals to, and profits from, an audience in a particular state, the site’s operators can be said to have “expressly aimed” at that state.

We acknowledge the burden that our conclusion may impose on some popular commercial websites. But we note that the alternative proposed by Brand’s counsel at oral argument—that Mavrix can sue Brand only in Ohio or Florida—would substantially undermine the “interests ... of the plaintiff in proceeding with the cause in the plaintiff’s forum of choice.” *Kulko v. Superior Court of Cal.*, 436 U.S. 84, 92, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978). Brand’s theory of jurisdiction would allow corporations whose websites exploit a national market to defeat jurisdiction in states where those websites generate substantial profits from local consumers. See *Burger King*, 471 U.S. at 473–74, 105 S.Ct. 2174 (“[W]here individuals ‘purposefully derive benefit’ from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise predictably from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.” (quoting *Kulko*, 436 U.S. at 96, 98 S.Ct. 1690)). We also note that the “expressly aimed” requirement is a necessary but not sufficient condition for jurisdiction. In order to establish specific jurisdiction, a plaintiff must also show that jurisdictionally significant harm was suffered in the forum state.

^[17] We therefore turn to the question of harm, the third element of the *Calder* effects test. We conclude that Brand has “caus[ed] harm that [it] knows is likely to be suffered in the forum state.” In determining the situs of a corporation’s injury, “[o]ur precedents recognize 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.” *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1113 (9th Cir.2002). “[J]urisdictionally sufficient harm may be suffered in multiple forums.” *Id.* (citing *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir.1993)). Mavrix alleges that, by republishing the photos of Ferguson and Duhamel, Brand interfered with Mavrix’s exclusive ownership of the photos and destroyed their market value. The economic loss caused by the intentional infringement of a plaintiff’s copyright is foreseeable. See *Brayton Purcell*, 606 F.3d at 1131. It was foreseeable that this economic loss would be inflicted not only in Florida, Mavrix’s principal place of business, but also in California. A substantial part of *1232 the photos’ value was based on the fact that a significant number of Californians would have bought publications such as *People* and *Us Weekly* in order to see the photos. Because Brand’s actions destroyed this California-based value, a jurisdictionally significant amount of Mavrix’s economic harm took place in California.

In sum, we conclude that Mavrix has presented a prima facie case of purposeful direction by Brand sufficient to survive a motion to dismiss for lack of personal jurisdiction.

Conclusion

We conclude that Brand is subject to specific personal jurisdiction, but not general personal jurisdiction, in California. We therefore reverse the district court's dismissal of Mavrix's complaint and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.