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# Griffis v. Luban: A Red Herring in the High Seas of Personal Jurisdiction

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**GRIFFIS V. LUBAN: A RED HERRING IN THE HIGH SEAS OF PERSONAL JURISDICTION**

Laura S. Ferster<sup>†</sup>

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I. INTRODUCTION

Although the Minnesota Supreme Court’s recently issued decision in *Griffis v. Luban*<sup>1</sup> arrived among claims of protection for free speech on the Internet,<sup>2</sup> the court missed a significant

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1. 646 N.W.2d 527 (Minn. 2002).

2. See Mark A. Cohen, *Web Posting Didn’t Give Foreign State Jurisdiction; Alabama Judgment Can’t Be Enforced in Minnesota*, MINNESOTA LAWYER, July 15, 2002, at 1.

opportunity to clarify the developing law surrounding Internet contacts sufficient to confer personal jurisdiction over non-residents. Instead, the court injected additional variables into established personal jurisdiction jurisprudence. Specifically, the *Griffis* court imported a new and completely unnecessary personal jurisdiction test for use in claims involving intentional torts.

The personal jurisdiction test for intentional torts that serves as the focal point of the *Griffis* holding was adopted from the Third Circuit's decision of *IMO Industries, Inc. v. Kiekert AG*.<sup>3</sup> As this article will explain, the adoption of the *IMO Industries* test appears to displace existing due process notions and Minnesota authority that would have adequately addressed the issues in *Griffis*.<sup>4</sup> This confusing addition to Minnesota's case law will likely produce more questions than it answered regarding not only Internet contacts and personal jurisdiction, but also the status of Minnesota personal jurisdiction law generally. Therefore, although the supreme court reached the correct result in *Griffis*, the decision's impact and precedential value are in question.

This article attempts to analyze the reasoning of *Griffis* and critiques the court's adoption of the Third Circuit's test. Part II discusses the facts of *Griffis*; Part III analyzes both the court of appeals' and the supreme court's decisions in *Griffis*, with emphasis on the supreme court's decision and the underlying concepts of personal jurisdiction that were cited, used, or ignored by the court; and Part IV illustrates alternative reasoning the *Griffis* court could have used in making its decision, and concludes that, for all intents

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3. *Griffis*, 646 N.W.2d at 535 (adopting the test articulated in *IMO Industries, Inc. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir. 1998), which ostensibly crafts and applies a modified version of the effects test derived in *Calder v. Jones*, 465 U.S. 783 (1984)).

4. In Minnesota, the fairness of exercising personal jurisdiction over a non-resident defendant has been determined by applying a five-factor test. *See, e.g.* *M.G. Incentives, Inc. v. J.J. Marchand*, 2001 WL 96223, at \*2 (Minn. Ct. App. 2001). Under this test, the court examines the following factors: "(1) the quantity of the contacts with the forum state; (2) the quality and nature of the contacts; (3) the connection between the cause of action and the contacts; (4) the state's interest in providing a forum; and (5) the convenience to the parties." *Id.* (citing *KSTP-FM, LLC v. Specialized Communications, Inc.*, 602 N.W.2d 919, 923 (Minn. Ct. App. 1999)); *Marquette Nat'l Bank v. Norris*, 270 N.W.2d 290, 295 (Minn. 1978). This test summarizes significant personal jurisdiction principles into a cohesive approach ensuring uniform application of due process protections. *See also Valspar Corp. v. Lukken Color Corp.*, 495 N.W.2d 408, 411 (Minn. 1992) (analyzing similar factors in holding that minimum contacts were sufficient to establish personal jurisdiction).

and purposes, *Griffis* is—or should be—limited to its exceptionally unique procedural posture.

## II. GRIFFIS: FACTS & PROCEDURAL HISTORY

### A. Facts

In *Griffis v. Luban*, a Minnesota resident (“Luban”) was sued in an Alabama court by an Alabama resident (“Griffis”) for defamation and invasion of privacy.<sup>5</sup> Luban and Griffis had both participated in an Internet newsgroup that was organized around the topic of archeology.<sup>6</sup> Luban maintained a non-professional interest in the history and culture of ancient Egypt. Griffis taught noncredit courses in ancient Egyptian history and culture at the University of Alabama and also worked as a self-employed consultant.<sup>7</sup> Through their postings to the newsgroup, a disagreement between Luban and Griffis arose on the subject of Egypt and Egyptology.<sup>8</sup> In the course of their on-line disagreement, Luban posted challenges to Griffis’ professional credentials on the newsgroup website.<sup>9</sup> After filing her defamation suit, Griffis obtained a default judgment in an Alabama court against Luban, who had been advised by counsel not to answer the Alabama complaint.<sup>10</sup> Thereafter, Griffis sought enforcement of the judgment in Minnesota.<sup>11</sup>

Under Minnesota law, a defendant has the right to contest an action based on a foreign court’s judgment by demonstrating “that the foreign court rendered the judgment in the absence of personal jurisdiction over the defendant.”<sup>12</sup>

Such judgments are not entitled to full faith and credit in Minnesota. Minnesota courts will uphold a foreign

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5. *Griffis*, 646 N.W.2d. at 528.

6. *Id.* at 530 (explaining that an Internet newsgroup is a “forum for Internet users that addresses a specific topic and allows participants to exchange information and engage in discussions or debate by ‘posting’ messages on the website” and noting that the newsgroup could be “accessed anywhere by any person with Internet access”).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 531 (citing *David M. Rice, Inc. v. Intrex, Inc.*, 257 N.W.2d 370, 372 (Minn. 1977)).

court's exercise of personal jurisdiction over a nonresident defendant when two requirements are met: (1) compliance with the foreign state's law providing jurisdiction, and (2) the exercise of jurisdiction under circumstances that do not offend the Due Process Clause of the federal constitution [sic].<sup>13</sup>

The district court found that Alabama's long-arm statute permitted the exercise of personal jurisdiction over Luban and that such jurisdiction complied with the Due Process Clause.<sup>14</sup> Therefore, the Minnesota district court found that Alabama had personal jurisdiction over Luban and thus its judgment should be afforded full faith and credit.<sup>15</sup>

### B. *Griffis in the Minnesota Court of Appeals*

The Minnesota Court of Appeals upheld the district court's decision, also concluding that the Alabama court properly exercised personal jurisdiction over Luban.<sup>16</sup> The court of appeals analyzed Alabama's personal jurisdiction law, which differs from Minnesota's long-arm statute in that it does not contain a special exclusion for defamation and privacy claims, and applies principles of due process to the full extent allowed under the Constitution.<sup>17</sup>

13. *Id.* (citing Uniform Enforcement of Foreign Judgments Acts, MINN. STAT. § 548.27 (2000); *Hutson v. Christensen*, 295 Minn. 112, 117, 203 N.W.2d 535, 538 (1972); *Intrex*, 257 N.W.2d at 372).

14. *Griffis v. Luban*, 633 N.W.2d 548, 549 (Minn. Ct. App. 2001).

15. *Id.*

16. *Id.*

17. *Id.* at 551-52 (noting that in contrast to Minnesota's long-arm statute, Alabama's personal jurisdiction law contains no exclusions for claims of defamation); *see* MINN. STAT. § 543.19 subd. 1 (2001).

As to a cause of action arising from any acts enumerated in this subdivision, a court of this state with jurisdiction of the subject matter may exercise personal jurisdiction over any foreign corporation or any nonresident individual, or the individual's personal representative, in the same manner as if it were a domestic corporation or the individual were a resident of this state. This section applies if, in person or through an agent, the foreign corporation or nonresident individual:

- (a) Owns, uses, or possesses any real or personal property situated in this state, or
- (b) Transacts any business within the state, or
- (c) Commits any act in Minnesota causing injury or property damage, or
- (d) *Commits any act outside Minnesota causing injury or property damage in Minnesota, subject to the following exceptions when no jurisdiction shall be found:*

In its decision, the court of appeals adopted the reasoning of a United States Supreme Court case, *Calder v. Jones*,<sup>18</sup> which held that jurisdiction over non-resident defendants for purposes of intentional torts may be exercised where the “effects of their intentional conduct were felt in the forum state.”<sup>19</sup> The court of appeals, relying on *Calder*, found that Luban “should have foreseen that she might be sued in Alabama because she had actual knowledge of the effect that her messages were having in Alabama.”<sup>20</sup> The court of appeals viewed Luban’s postings as sufficient contact with the state of Alabama because she made the postings “even after she was threatened with legal action” by Griffis’ lawyer.<sup>21</sup> The court also expressly found that (1) the messages could have been and were received in Alabama; (2) Luban was aware her messages would be read in a foreign state; and (3) Luban was aware her messages were causing damage in Alabama.<sup>22</sup> Thus, the court of appeals held, “[Luban] should have realized that by making potentially defamatory statements that were being read in Alabama, she could be haled into court in Alabama to prove the truth of those statements.”<sup>23</sup>

### C. Griffis in the Minnesota Supreme Court

The Minnesota Supreme Court reversed the court of appeals, holding that the Alabama court did not have personal jurisdiction

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- (1) Minnesota has no substantial interest in providing a forum; or
  - (2) the burden placed on the defendant by being brought under the state’s jurisdiction would violate fairness and substantial justice; or
  - (3) *the cause of action lies in defamation or privacy.*

*Id.* (emphasis added).

18. 465 U.S. 783 (1984).

19. *Griffis*, 633 N.W.2d at 552 (citing *Calder*, 465 U.S. at 787 n.6); see *IMO Indus. Inc. v. Kiekert AG*, 155 F.3d 254, 265-66 (3d. Cir. 1998) (citing *Calder v. Jones*, 465 U.S. 783 (1984)) (stating that *Calder* essentially examined the following three factors to determine whether personal jurisdiction existed: (1) whether the defendant committed an intentional tort; (2) whether the plaintiff felt the brunt of the harm caused by that tort in the forum such that the forum state was the focal point of the plaintiff’s injury; and (3) whether the defendant expressly aimed the tortious conduct at the forum such that the forum state was the focal point of the tortious activity).

20. *Griffis*, 633 N.W.2d at 552-53.

21. *Id.* at 553.

22. *Id.*

23. *Id.*

over Luban when it rendered its default judgment.<sup>24</sup> Like the court of appeals, the Minnesota Supreme Court, analyzed Alabama's personal jurisdiction law by applying the principles of due process to the full extent allowed under the Constitution.<sup>25</sup> After articulating the basic, long-standing principles of personal jurisdiction, the *Griffis* court went on to focus on two specific federal cases—*Calder* and *IMO Industries, Inc. v. Kiekert AG*.<sup>26</sup> Importantly, the *IMO Industries* test is essentially a repackaging of the *Calder* test.<sup>27</sup> Thus, both the Minnesota Court of Appeals and the Minnesota Supreme Court essentially relied on the same case—*Calder v. Jones*—yet reached different conclusions. Specifically, the Minnesota Supreme Court found, *inter alia*, that Luban's postings to the Internet newsgroup were not sufficient to show that she knew Griffis would suffer harm in Alabama.<sup>28</sup> Therefore, the Alabama judgment was not enforceable in Minnesota.<sup>29</sup>

### III. ANALYSIS OF THE *GRIFFIS* HOLDING

#### A. "Sound Bites" of Fair Play and Substantial Justice

The Minnesota Supreme Court decision in *Griffis* cites several well-known United States Supreme Court decisions in articulating the due process standards of personal jurisdiction.<sup>30</sup> However, the

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24. *Griffis v. Luban*, 646 N.W.2d 527, 536-37 (Minn. 2002).

25. *Id.*

26. 155 F.3d 254 (3d Cir. 1998).

27. See *Remick v. Manfredy*, 238 F.3d 248, 258 (3rd Cir. 2001) (analyzing how the court in *IMO Indus.* applied the three-prong effects test of *Calder*); Christopher Allen Kroblin, Note, *Expanding the Jurisdictional Reach for Intentional Torts: Implications for Cyber Contacts*, 31 GOLDEN GATE U. L. REV. 51, 72-75 (2001) (describing the court's analysis in *IMO Indus.* as systematically applying the factors developed in *Calder's* effects test, specifically focusing on the express aiming requirement); Rachael T. Krueger, Comment, *Traditional Notions of Fair Play and Substantial Justice Lost in Cyberspace: Personal Jurisdiction and On-Line Defamatory Statements*, 51 CATH. U. L. REV. 301, 330 (2001) (quoting *IMO Indus.*, 155 F.3d at 265) (describing *IMO's* use of the effects test and concluding that the defendant must "manifest behavior intentionally targeted at and focused on [the forum]" for *Calder* to be satisfied).

28. *Griffis*, 646 N.W.2d at 536-37.

29. *Id.* at 537.

30. *Id.* at 532 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952); *Int'l Shoe Co. v. Washington*, 326

*Griffis* decision merely cites the key language from these cases while ignoring the principles they established. A brief review of these decisions is therefore appropriate.

The *Griffis* decision first cites the 1945 seminal case of *International Shoe Co. v. Washington*,<sup>31</sup> in which the United States Supreme Court held that a shoe company with sales persons operating in a local forum had sufficient minimum contacts with the forum state such that maintenance of a suit for contribution to the state's unemployment compensation fund did not offend "traditional notions of fair play and substantial justice."<sup>32</sup> The Court recognized the shift from a strictly geographical basis to a procedural due process basis for personal jurisdiction:

Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of the court was prerequisite to its rendition of a judgment personally binding him . . . . But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.<sup>33</sup>

*International Shoe* was responsible for articulating the bedrock principles of modern day personal jurisdiction analysis. It infused the analysis with the notion that due process must be measured by the "quality and nature of the activity in relation to the fair and orderly administration of the laws that it was the purpose of the Due Process Clause to insure [sic]."<sup>34</sup> The Court in *International Shoe* further stated that the Due Process Clause does not "make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations."<sup>35</sup> Thus, early cases recognized the need for flexible standards of personal jurisdiction that protected due process and notice rights

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U.S. 310, 319 (1945); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

31. 326 U.S. 310 (1945).

32. *Id.* at 316 (internal citations omitted).

33. *Id.*

34. *Id.* at 319.

35. *Id.*



of potential defendants.

*Helicopteros Nacionales de Colombia, S.A. v. Hall*<sup>36</sup> is cited by the *Griffis* court in its analysis of personal jurisdiction for the following proposition: “In judging minimum contacts for purposes of assessing the validity of specific jurisdiction, a court focuses on the ‘relationship among the defendant, the forum, and the litigation.’”<sup>37</sup> In *Helicopteros*, the plaintiffs brought a wrongful death action in Texas against a Colombian corporation.<sup>38</sup> The United States Supreme Court analyzed the defendant’s contacts with the forum state under the rubric of “general jurisdiction”<sup>39</sup> since the parties had agreed that the dispute did not “arise out of” and was “not related to” the defendant’s activities within the forum.<sup>40</sup> The Court held that the defendant did not have sufficient contacts with Texas for general jurisdiction.<sup>41</sup> While *Helicopteros* is meaningful to distinguish between general and specific jurisdiction, its application does not advance the analysis of specific personal jurisdiction at issue in *Griffis*.

*Griffis* cites *Hanson v. Denckla*,<sup>42</sup> stating that “[f]or the minimum contacts requirement to be satisfied, the defendant must have ‘purposefully avail[ed] herself of the privilege of conducting activities within the forum State . . . .’”<sup>43</sup> In *Hanson v. Denckla*, the Supreme Court decided that a Florida state court did not have personal jurisdiction over an indispensable Delaware party, a trustee for a decedent’s Delaware trust, in a controversy involving rights to the Delaware trust.<sup>44</sup> The decedent in *Hanson* had

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36. 466 U.S. 408 (1984).

37. *Griffis v. Luban*, 646 N.W.2d 527, 532 (Minn. 2002) (quoting *Helicopteros*, 466 U.S. at 414-15).

38. *Helicopteros*, 466 U.S. at 410.

39. *Id.* at 414-15 (explaining that general jurisdiction involves the exercise of jurisdiction over a non-resident where, although the cause of action does not arise out of or relate to the nonresident’s activities in the forum, there are otherwise sufficient contacts between the state and the nonresident) (citations omitted).

40. *Id.* at 415.

41. *Id.* at 411, 416 (Defendant’s contacts were as follows: it had purchased 80% of its helicopter fleet, spare parts, and accessories in excess of \$4 million from a company in Texas; it sent prospective pilots to Texas for training and to ferry the aircraft to South America; it sent management and maintenance personnel to visit its helicopter supplier in Texas to become familiar with the plant and for technical consultation; and it received into its New York City and Panama City, Florida bank accounts over \$5 million in payments drawn from a Texas bank.).

42. 357 U.S. 235 (1958).

43. *Griffis v. Luban*, 646 N.W.2d 527, 532 (Minn. 2002) (quoting and modifying *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

44. *Hanson*, 357 U.S. at 238.

established the trust in Delaware before moving to Florida where she became a resident.<sup>45</sup> The *Hanson* Court decided that the Delaware court properly refused to enforce a Florida judgment, thus denying the judgment full faith and credit in Delaware.<sup>46</sup> The *Hanson* Court cited *International Shoe* for the proposition that “it 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 protection of its laws.”<sup>47</sup> The Court found that the Delaware trustee did not have sufficient minimum contacts with Florida where the only connection with the forum resulted from decedent’s decision to exercise her power of appointment there.<sup>48</sup> The trust company at issue had no office in Florida, neither held nor administered any business assets in Florida, and solicited no business there.<sup>49</sup> The Court explained that the unilateral activity of the party asserting the existence of a relationship does not provide the requisite contact with the state necessary for personal jurisdiction and that the “suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida.”<sup>50</sup> Under these circumstances, the Court was unwilling to find personal jurisdiction over the Delaware resident.

*Griffis* also cites *World-Wide Volkswagen Corp. v. Woodson*<sup>51</sup> for the often stated proposition: “[t]he defendant’s conduct and connections with the forum state must be such that the defendant ‘should reasonably anticipate being haled into court there.’”<sup>52</sup> In *World-Wide Volkswagen*, the individual plaintiffs, residents of New York, sued the defendant, a New York corporation, in Oklahoma for injuries sustained in Oklahoma from an accident in an automobile that had been purchased in New York.<sup>53</sup> The accident occurred while the plaintiffs were driving through Oklahoma.<sup>54</sup> In concluding that the Oklahoma court did not have jurisdiction over the defendant, the Court determined that the defendant carried

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45. *Id.*

46. *Id.* at 254-55.

47. *Id.* at 253.

48. *Id.*

49. *Id.* at 251.

50. *Id.* at 252-53.

51. 444 U.S. 286 (1980).

52. *Griffis v. Luban*, 646 N.W.2d 527, 532 (Minn. 2002) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

53. *World-Wide Volkswagen*, 444 U.S. at 286.

54. *Id.*

on no activity in Oklahoma, made no direct sales, and provided no services there. Thus, the Court held, the defendant did not avail itself of the privileges or benefits of Oklahoma's laws.<sup>55</sup> In so finding, the Supreme Court discussed the transformation of the American economy and the relaxation of the limits imposed by the Due Process Clause, but stated that "[n]evertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution."<sup>56</sup> The Court held that where an individual or corporate defendant has no contacts, ties, or relations with the state, personal jurisdiction will not be found.<sup>57</sup> The Court stated:

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state; even if the forum State has strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.<sup>58</sup>

In *World-Wide Volkswagen*, the Court refused to base jurisdiction on the isolated occurrence of the accident in Oklahoma and rejected the argument that the inherent mobility of the automobile made it foreseeable that the vehicle at issue would cause injury in Oklahoma.<sup>59</sup> As to foreseeability, the Court stated "[t]he foreseeability that is critical to the due process analysis" is "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."<sup>60</sup> The Court further stated that "the Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."<sup>61</sup>

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55. *Id.* at 295.

56. *Id.* at 293 (attributing this transformation of the American economy to the advancement of technology and the nationalization of commerce through the increased use of phone lines and travel).

57. *Id.* at 294.

58. *Id.*

59. *Id.* at 295.

60. *Id.* at 297.

61. *Id.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

Given the defendant's lack of purposeful activities, the Court held it could not have reasonably anticipated being haled into court in Oklahoma.<sup>62</sup>

The *Griffis* court, citing *Burger King Corp. v. Rudzewicz*, noted that “[t]he Supreme Court has explained that specific jurisdiction may be found where the nonresident 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.’”<sup>63</sup> In *Burger King*, a Florida franchiser brought an action in Florida for breach of contract and trademark infringement against a Michigan resident and franchisee.<sup>64</sup> The Court held that personal jurisdiction over the defendant in Florida was proper even though the defendant had no physical presence in the forum.<sup>65</sup> The Court held that personal jurisdiction existed where the defendant “deliberately reached out beyond Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization.”<sup>66</sup> The Court emphasized that the defendant entered into a highly structured, twenty-year relationship that “envisioned continuing and wide-reaching contacts with Burger King in Florida.”<sup>67</sup> The Court stated that the “purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person.”<sup>68</sup> The Court stated that “[j]urisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a substantial connection with the forum State.”<sup>69</sup> The Court explained as follows:

[W]here the defendant deliberately has engaged in

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62. *Id.* at 295.

63. *Griffis v. Luban*, 646 N.W.2d 527, 532 (Minn. 2002) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotations and citations omitted)).

64. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 463 (1985).

65. *Id.* at 476 (stating that “so long as a *commercial* actor’s efforts are purposefully directed toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there”) (emphasis added).

66. *Id.* at 479-80 (internal quotation omitted).

67. *Id.* at 480 (internal quotation and citation omitted).

68. *Id.* at 475 (internal quotations and citations omitted).

69. *Id.* (internal quotations and citations omitted).

significant activities within a State, or has created continuing obligations between himself and the residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by the benefits and protections of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum . . . .<sup>70</sup>

Although it found that the Michigan defendant was subject to the jurisdiction of the Florida courts, the Court in *Burger King* made clear that “[t]he Due Process Clause protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations.”<sup>71</sup> Where such a connection is absent, the defendant has “no clear notice that it is subject to suit in the forum and thus no opportunity to alleviate the risk of burdensome litigation there.”<sup>72</sup> The Court went on to state that “even a single act can support jurisdiction” where a “substantial connection” with the forum is created thereby.<sup>73</sup> However, on this point, the Court was quick to explain:

The Court has noted, however, that some single or occasional acts related to the forum may not be sufficient to establish jurisdiction if their nature and quality and the circumstances of their commission create only an attenuated affiliation with the forum. This distinction derives from the belief that, with respect to this category of isolated acts, the reasonable foreseeability of litigation in the forum is substantially diminished.<sup>74</sup>

The United States Supreme Court’s decisions summarized above reflect flexibility in applying traditional personal jurisdiction concepts to a variety of circumstances. The Court’s decision in *Burger King* is especially significant because it was decided after *Calder v. Jones*, the case responsible for the two completely different results reached by the Minnesota Court of Appeals and the Minnesota Supreme Court in the *Griffis* case.<sup>75</sup> The Court’s

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70. *Id.* at 475-76 (internal quotations and citations omitted).

71. *Id.* at 471-72 (internal quotation and citation omitted).

72. *Id.* at 476 n.17 (internal quotation and citation omitted).

73. *Id.* at 476 n.18 (internal quotation and citation omitted).

74. *Id.* (internal quotations and citations omitted).

75. See *Griffis v. Luban*, 646 N.W.2d 527, 534-35 (Minn. 2002) (recognizing the significance that *Burger King* was decided after *Calder* but adopting the three-part *IMO Industries* test in any event).

decision in *Burger King* contains an amalgam of personal jurisdiction jurisprudence and articulates the fluid concepts in an extremely useful manner. Thus, as will be explained in Part IV A, *Burger King* provided a much better framework for analyzing and deciding *Griffis* than did the cases of *Calder* and *IMO Industries*.<sup>76</sup>

### B. *The Quagmire of Calder and IMO Industries*

#### 1. *The Facts of Calder*

In *Calder*, California resident and entertainer Shirley Jones sued Florida residents in California over an allegedly libelous National Enquirer article, written and edited by two of the defendants, concerning her California activities.<sup>77</sup> Although the National Enquirer was distributed nationally, it had its largest circulation in California.<sup>78</sup> Plaintiff's profession as an entertainer was centered in California.<sup>79</sup> The reporter and the editor, the individual defendants, moved to quash service of process for lack of personal jurisdiction.<sup>80</sup> Although one defendant's contacts with California, which included a visit and several phone calls, were alleged as a basis for jurisdiction, the Court found it unnecessary to consider those direct contacts with the forum.<sup>81</sup> Instead, the Court held that California had personal jurisdiction over the reporter and editor because their Florida-based conduct was "expressly aimed" at California, knowing that the "brunt" of the harmful "effects" would be felt primarily there.<sup>82</sup> This reasoning has become known by courts as the "effects test."<sup>83</sup> The Court emphasized that the alleged tort was not "mere untargeted negligence."<sup>84</sup> Under these circumstances, the defendants "must 'reasonably anticipate being haled into court'" in California for their out-of-state actions.<sup>85</sup>

It is important to recognize that *Calder* is somewhat of an anomaly in Supreme Court personal jurisdiction jurisprudence, as

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76. *See infra* Part IV.A.

77. *Calder v. Jones*, 465 U.S. 783, 784-85 (1984).

78. *Id.* at 785.

79. *Id.* at 788.

80. *Id.* at 784-85.

81. *Id.* at 787 n.6.

82. *Id.* at 789-90.

83. *See, e.g., IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 261 (3d Cir. 1998).

84. *Calder*, 465 U.S. at 789.

85. *Id.* at 790 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

that decision has resulted in a myriad of different interpretations and applications in state and federal courts across the country.<sup>86</sup> By approving the assertion of personal jurisdiction over the individual defendants based on the “effects” of their intentionally tortious conduct in the forum state, *Calder* has such potentially broad application that it could render any jurisdictional boundaries non-existent and effectively nullify a long line of precedent establishing the limits of jurisdiction over nonresident defendants.<sup>87</sup>

The results in *Calder* were properly mitigated by the subsequent decision of *Burger King*, which, as the *Griffis* court noted, makes clear “that the foreseeability of effects in the forum is not itself enough to justify long-arm jurisdiction.”<sup>88</sup> On this point, the *Griffis* court quoted *Burger King* as follows:

[T]he constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum State. Although it has been argued that foreseeability of causing [injury] in another State should be sufficient to establish such contacts there when *policy considerations* so require, the Court has consistently held that this kind of foreseeability is not a sufficient benchmark for exercising personal jurisdiction. Instead, the foreseeability that is critical to due process analysis is that the defendant’s conduct and connection with the forum State such are that he should reasonably anticipate being haled into court there.<sup>89</sup>

The Minnesota Supreme Court’s explicit recognition of this aspect of *Burger King* makes its decision to import the *Calder* concepts even more baffling. Perhaps, as the *Burger King* decision suggests, public policy considerations were at play in *Calder* where the courts were

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86. See, e.g., *Griffis*, 646 N.W.2d at 533 (discussing several cases and stating that courts “have come to varying conclusions about how broadly the ‘effects test’ approved in *Calder* can be applied to find jurisdiction”). See also, e.g., Donald I. Baker et al., *Defendants Motion to Dismiss Memorandum of Points and Authorities In Support Thereof*, 33 LOY. L.A. L. REV. 1061, 1079-80 (2000); Christine G. Heslinga, *The Founders Go On-Line: An Original Intent Solution to a Jurisdictional Dilemma*, 9 WM. & MARY BILL RTS. J. 247, 261-62 (2000); Shelby R. Quast, *International Legal Developments in Law Review 1998*, 33 INT’L LAW 429, 431-32 (1999).

87. See, e.g., Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an On-Line World*, 28 CONN. L. REV. 1137, 1167 (1996) (discussing the potential breadth of *Calder* and *Keeton* in establishing jurisdiction over users and operators of Internet bulletin board systems).

88. *Griffis*, 646 N.W.2d at 534.

89. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)) (internal citations omitted) (emphasis added).

copying with the tabloid press, which possibly reflected a public disdain for such press at that time. In any event, despite its obvious recognition that it was not necessary to incorporate the *Calder* principles into its personal jurisdiction analysis,<sup>90</sup> the *Griffis* decision has adopted a test that is entirely premised on *Calder's* effects test.<sup>91</sup> It is not clear why the Minnesota courts chose *Griffis*, an anomalous case itself, to adopt such reasoning.

## 2. IMO Industries—*The Third Circuit's Approach to Calder*

In its decision in *Griffis*, the Minnesota Supreme Court noted that *Calder* has produced a variety of reactions from a multitude of jurisdictions.<sup>92</sup> The *Griffis* court identified the Third Circuit's approach to *Calder* in *IMO Industries* as "the most cogent analysis of the *Calder* effects test."<sup>93</sup> In *IMO Industries*, a New Jersey multinational corporation sued a German corporation in a New Jersey court for the intentional tort of interfering with the plaintiff's attempt to sell its wholly-owned Italian subsidiary to a French corporation that was one of the defendant's competitors.<sup>94</sup> The Third Circuit affirmed the dismissal of the action for lack of personal jurisdiction.<sup>95</sup>

In deciding that New Jersey lacked personal jurisdiction over the defendant, the Third Circuit expressly stated that because the issue involved an intentional tort, it was required to consider *Calder* in making its decision.<sup>96</sup> The court expressed concern, however,

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90. See, e.g., *M.G. Incentives, Inc. v. J.J. Marchand*, 2001 WL 96223 (Minn. Ct. App. 2001) (finding personal jurisdiction existed over defendant for claims including breach of contract, conversion, and fraud); *Humphrey v. Granite Gate Resorts*, 568 N.W.2d 715 (Minn. Ct. App. 1997), *aff'd without comment by* 576 N.W.2d 747 (Minn. 1998) (finding personal jurisdiction existed over defendant for claims of deceptive trade practices, false advertising, and consumer fraud); *Hughes ex rel. Praul v. Cole*, 572 N.W.2d 747, 751 (Minn. Ct. App. 1997) (finding personal jurisdiction over non-resident father existed for purposes of order for protection due to child's suffering effects of abuse in Minnesota); *Olson v. Magnuson*, 457 N.W.2d 394, 396 (Minn. Ct. App. 1990) (using a five-factor test for determining whether adequate minimum contacts exist to exercise personal jurisdiction to conclude that the court has jurisdiction over evangelical churches in action alleging sexual abuse of children).

91. *Griffis*, 646 N.W.2d at 532-37.

92. *Id.* at 533.

93. *Id.* at 534.

94. *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 257-58 (3d Cir. 1998).

95. *Id.* at 268.

96. *Id.* at 259-60.



over the possible breadth of the *Calder* decision.<sup>97</sup> The Third Circuit took issue with the inference drawn from *Calder* that an out-of-state defendant can anticipate being haled into the forum because the defendant knew that the plaintiff resided in the forum.<sup>98</sup> The Third Circuit concluded that the *Calder* effects test is not satisfied by the “mere allegation that the plaintiff feels the effect of the defendant’s tortious conduct in the forum [simply] because the plaintiff is located there.”<sup>99</sup> Significantly, the Third Circuit stated that in *Calder*, the Supreme Court did not “carve out a special intentional torts exception to the traditional specific jurisdiction analysis so that a plaintiff could always sue in his or her home state,”<sup>100</sup> and that “*Calder*’s holding cannot be severed from its facts.”<sup>101</sup>

Notwithstanding its own recognition that *Calder* did not establish a separate and distinct personal jurisdiction analysis for claims of intentional torts and that *Calder* was severely limited to its facts, the Third Circuit nonetheless fashioned the following three-part test for personal jurisdiction based on *Calder* for use in cases involving intentional torts:

- (1) The defendant committed an intentional tort;
- (2) The plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; and
- (3) The defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the activity.<sup>102</sup>

Even though the court in *IMO Industries* proclaimed that its three-part test mitigated the overly broad potential of the *Calder* effects test, in actuality, the elements of the test appear to simply interpret the holding of *Calder*.<sup>103</sup> Thus, the *Griffis* court’s decision to adopt

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97. *Id.* at 262-63.

98. *Griffis*, 646 N.W.2d at 534 (paraphrasing the Third Circuit’s concern about the breadth of the *Calder* test).

99. *IMO Indus.*, 155 F.3d at 263.

100. *Id.* at 265.

101. *Id.* at 261.

102. *Id.* at 265.

103. See Christopher Allen Kroblin, Note, *Expanding the Jurisdictional Reach for*

the *IMO Industries* test will do little to protect litigants from the overbroad concepts of personal jurisdiction articulated in *Calder*.

The focus of the *IMO Industries* test is the third-prong—the “expressly aimed” portion of the test.<sup>104</sup> If it is found that the defendant “expressly aimed” its tortious conduct at the forum, then the need to consider whether the brunt of the harm was actually suffered by the plaintiff in the forum arises.<sup>105</sup> In order for a court to make the “expressly aimed” determination, the plaintiff “must show that the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum, and point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum.”<sup>106</sup> The resulting analysis required by this prong of the test would arguably involve extensive fact finding regarding intricate details of the case, including causation, the subjective knowledge of a defendant, and the potential need to determine the *intent* of the defendant when it “aimed” a tortious act at the forum. Indeed, the first part of the test—whether the defendant committed an intentional tort—appears to require that a fact determination be made by the court at the threshold juncture of jurisdictional disputes. Applying this three-prong test, the court concluded that the plaintiff was unable to demonstrate the requisite conduct indicating that the defendant “expressly aimed” its tortious conduct at New Jersey.<sup>107</sup>

### 3. *The Minnesota Supreme Court Adopts the IMO Industries Three-Part Personal Jurisdiction Test*

The *Griffis* court, in adopting the Third Circuit’s three-part test, expressly shared the Third Circuit’s concern over the breadth of the potential application of *Calder*.<sup>108</sup> Similarly, the *Griffis* court

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*Intentional Torts: Implications for Cyber Contacts*, 31 GOLDEN GATE U. L. REV. 51, 81-82 (2001) (recognizing that three elements must be met for the *Calder* effects test to be satisfied: (1) an intentional act; (2) expressly aimed at the forum state; (3) causing harm that the defendant knows the brunt of which will be felt in the forum state); Rachael T. Krueger, Comment, *Traditional Notions of Fair Play and Substantial Justice Lost in Cyber-Space: Personal Jurisdiction and On-Line Defamatory Statements*, 51 CATH. U. L. REV. 301, 309 (2001) (listing similar three-part *Calder* test).

104. *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 266 (3d Cir. 1998).

105. *Id.*

106. *Id.*

107. *Id.* at 268.

108. *Griffis v. Luban*, 646 N.W.2d 527, 534 (Minn. 2002). *See also supra* notes 90-94 and accompanying text.

agreed with the Third Circuit's conclusion that the Supreme Court did not create an exception to the personal jurisdiction analysis for intentional torts.<sup>109</sup> Still, the *Griffis* decision adopted the Third Circuit's test along with its inconsistent reasoning, thus perpetuating the notion that *Calder* must be applied under circumstances involving intentional torts.<sup>110</sup>

In *Griffis*, the court applied the Third Circuit's three-part test and analyzed the facts giving rise to the plaintiff's claim of personal jurisdiction.<sup>111</sup> Like the *IMO Industries* court, the court in *Griffis* focused on whether the defendant "expressly aimed the allegedly tortious conduct at the forum such that the forum was the focal point of the tortious activity."<sup>112</sup> In determining whether the defendant "knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum," the court reviewed the record for any indication that Luban "expressly aimed [her] tortious conduct at the forum."<sup>113</sup> The plaintiff had argued that the following facts provided a basis for jurisdiction: (1) Luban directed her defamatory statements at the Alabama forum because she targeted her messages at the plaintiff, whom Luban knew to be an Alabama resident; (2) Luban knew that the messages posted to the archeology newsgroup could be read anywhere in the world and that, in fact, they were read by the plaintiff in Alabama; and (3) that Luban's statements had "deleterious effects" on plaintiff's business and reputation.<sup>114</sup>

Rejecting the plaintiff's argument, the *Griffis* court found that Luban did not expressly aim the statements at Alabama.<sup>115</sup> Instead, the court found that Luban "intentionally directed [her statements] at Griffis, whom she knew to be an Alabama resident . . . ."<sup>116</sup> In so finding, the court noted that the statements were not "targeted at the state of Alabama or at an Alabama audience beyond Griffis herself."<sup>117</sup> Interestingly, it is difficult to understand how this aspect of the test is much different from

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109. *Griffis*, 646 N.W.2d at 535.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 535-36.

114. *Id.* at 535.

115. *Id.*

116. *Id.*

117. *Id.* (stating that the other two prongs of the effects test need not be addressed because all three prongs must be satisfied for jurisdiction to attach).

purposeful availment concepts discussed earlier in connection with existing personal jurisdiction jurisprudence. Although Griffis argued that the newsgroup to which Luban posted her messages was “widely read by her colleagues,”<sup>118</sup> the court found that the record contained no evidence that “any other person in Alabama read the statements.”<sup>119</sup>

Ironically, the court also noted that Griffis had not asserted that “Alabama has a unique relationship with the field of Egyptology, like the close relationship between the plaintiff’s profession and the forum state that the Supreme Court found relevant in *Calder*.”<sup>120</sup> The court’s acknowledgment of this unique aspect of *Calder* serves to highlight its incongruous decision to incorporate *Calder* into Minnesota personal jurisdiction law, particularly under the anomalous facts of this case. The court went on to conclude that “the fact that messages posted to the newsgroup *could* have been read in Alabama, just as they *could* have been read anywhere in the world, cannot suffice to establish Alabama as the focal point of the defendant’s conduct.”<sup>121</sup>

The *Griffis* court’s findings are consistent with long-standing principles of minimum contacts and purposeful availment, as discussed in Part IV A, making the adoption of the Third Circuit’s three-part test wholly unnecessary. In addition, the *Griffis* court engaged in evaluating whether the allegedly defamatory statements harmed Griffis. The court found no support in the record for the assertion that “Luban’s messages were read by any other person in Alabama, or by anyone in the academic community at the University of Alabama” and concluded that Griffis had not been harmed.<sup>122</sup> In so concluding, the court effectively decided that an essential element of defamation was lacking—that of publication.<sup>123</sup>

As a result, the three-part test adopted by the *Griffis* court has the potential to encourage future courts to make personal jurisdiction decisions by deciding underlying substantive claims, a posture that has heretofore been wholly unnecessary in personal jurisdiction

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118. *Id.* at 536.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *See* *Northwest Airlines, Inc. v. Friday*, 617 N.W.2d, 590, 594 (Minn. Ct. App. 2000) (“For a statement to meet the legal standards for defamation, ‘it must be communicated to someone other than the plaintiff.’”) (quoting *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980)).

analyses.

Given that the *Griffis* court had ample personal jurisdiction authority at its disposal, the court should not have adopted *IMO Industries*' questionable three-part test. It is unclear whether the supreme court intends this test to displace existing Minnesota personal jurisdiction authority in all cases, in cases involving intentional torts, or only in cases involving enforcement of foreign judgments. As a consequence, the *Griffis* decision is at odds with the primary purposes of the Due Process Clause: notice and predictability of the legal system, which allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.<sup>124</sup> As discussed next, the *Calder/IMO Industries* debacle apparent in *Griffis* could have been avoided by applying existing, long-standing judicial authority to determine that the Alabama court did not have personal jurisdiction over Luban.

#### IV. ALTERNATIVE APPROACHES AND PRACTICAL LIMITATIONS OF *GRIFFIS*

This section illustrates of the following concepts: (A) *Griffis* could have been decided using existing principles of personal jurisdiction, obviating any need to resort to the adoption of the *IMO Industries* test; (B) persuasive authority from federal circuit courts provide a more useful and reasonable framework for analyzing *Calder* and *IMO Industries*; (C) in light of Minnesota statutes and case law, the application of *Griffis* to cases arising under Minnesota law should be strictly limited to its facts; and (D) existing Minnesota authority may be relied on in cases involving issues of personal jurisdiction, intentional torts, and Internet contacts, further demonstrating the limited practical applicability of *Griffis* to cases arising under substantive Minnesota law.

##### A. *Deciding Griffis Using Existing Personal Jurisdiction Principles*

In finding that the Alabama court lacked personal jurisdiction over the defendant, the *Griffis* court found that (1) the defendant did not expressly aim the statements in question at Alabama; (2) the target and only recipient of the statements was the plaintiff herself, not the state of Alabama or a larger Alabama audience; and

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

(3) the defendant posted messages to an Internet newsgroup that could have been read in Alabama or anywhere else in the world.<sup>125</sup> In evaluating the quality and nature of Luban's activities, Griffis' claims do not articulate any connection between Luban and Alabama in which Luban purposefully availed herself of the privilege of conducting activities within the jurisdiction.<sup>126</sup> Luban's activities occurred within the context of an Internet newsgroup to which members from all over the globe had access.<sup>127</sup> The purpose of the newsgroup is to share ideas about a particular subject—Egyptology—which does not implicate Luban in taking advantage of any of the laws or protections of Alabama. Luban similarly did not direct her activities toward the state of Alabama.<sup>128</sup> Rather, her activities were directed toward the newsgroup—an amorphous location—and at Griffis herself. Like the plaintiffs in *World Wide Volkswagen*, the chance “meeting” of Luban and Griffis via the newsgroup and the subsequent disagreement that occurred in the context of postings to the newsgroup website did not make it foreseeable that injury to Griffis would occur in Alabama. Indeed, any conduct and connection between Luban and Alabama was patently absent in this case. Such connection is critical to the due process analysis. Such an attenuated, chance, and isolated connection does not provide a basis to conclude that Luban was on notice that she may be sued in Alabama.<sup>129</sup> This lack of notice prevented Luban from structuring her conduct to avoid suit in Alabama. Given this lack of purposeful activity directed at the *forum*, Luban could not reasonably have anticipated being haled into court there.<sup>130</sup>

In addition, the fact that Luban directed her activities at a resident of the forum does not, in and of itself, give rise to personal jurisdiction in this case.<sup>131</sup> As the Court in *Burger King* stated, in order for a non-resident to be liable in the forum state for injuries that were proximately caused by the defendant's activity, the defendant must have “engaged in significant activities within a state

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125. Griffis v. Luban, 646 N.W.2d 527, 535-36 (Minn. 2002).

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

127. Griffis, 646 N.W.2d at 530.

128. Id. at 535.

129. Id. at 536-37.

130. Id.

131. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (stating that the defendant must also have fair warning that an activity will subject them to foreign jurisdiction).

or [have] created continuing obligations between himself and the residents of the forum.”<sup>132</sup> Here, Luban’s activities—statements made in the context of the newsgroup website—do not create substantial connections with Alabama or continuing obligations between herself and Griffis. Unlike the defendant in *Burger King*, Luban neither reached out to Griffis for any specific reason related to her residence in Alabama; nor cultivated a relationship with Griffis that necessitated continuing contact with either Griffis or Alabama. Luban’s activity involved communications with Griffis and other users of the newsgroup, which pertained to a topic of study and conversation.<sup>133</sup> Within that context, differences of opinion apparently occurred. Subsequent statements made by Luban grew out of these differences of opinion. The knowledge of the fact that the postings *could have* been received in Alabama, or anywhere else in the world for that matter, lacks the type of foreseeability sufficient to put the defendant on notice of being haled into court in the forum.<sup>134</sup>

Further, while in some circumstances “even a single act can support jurisdiction,” Luban’s conduct did not create the requisite substantial connection with Alabama.<sup>135</sup> Any connection or affiliation with Alabama arising from Luban’s conduct was “attenuated” at best.<sup>136</sup> Consequently, the foreseeability of litigation in Alabama based on the isolated nature of Luban’s actions was substantially diminished.<sup>137</sup> Thus, the Alabama court did not have personal jurisdiction over Luban when it rendered its default judgment and, therefore, the Alabama judgment should not be entitled to full faith and credit in Minnesota.

The above analysis is only one example of how existing authority and concepts could have been used to reach the same result the *Griffis* court reached without the adoption of a new personal jurisdiction test. There may be some benefit to an enhanced personal jurisdiction analysis for certain types of claims

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132. *Id.* at 476 (internal quotation and citation omitted).

133. *Griffis*, 646 N.W.2d at 530.

134. *See Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (“[T]he foreseeability that is critical to due process analysis . . . is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”)).

135. *See id.* at 476 n.18.

136. *See id.* at 475-76.

137. *See id.* (stating that an isolated act usually diminishes the reasonable foreseeability of litigation in the forum).

where public policy considerations are required. Nevertheless, without providing more guidance, the Minnesota Supreme Court should have ignored the Third Circuit's interpretation of *Calder* and decided the case on the particular facts using long-standing personal jurisdiction authority and principles. This is especially so for two reasons: (1) the claims at issue in *Griffis* arose in the unique posture of the attempted Minnesota enforcement of the default Alabama judgment; and (2) the same claims under Minnesota law, as discussed next, would have been decided in an entirely different manner.

*B. Other Persuasive Authority Interpreting Calder*

A recent case from the federal district court in Minnesota demonstrates that other avenues were open to the *Griffis* court in interpreting and applying *Calder*. In *Mulcahy v. Cheetah Learning, LLC*, the plaintiff sued a corporate defendant and an individual defendant for copyright infringement.<sup>138</sup> The defendants moved to dismiss for lack of personal jurisdiction. The court dismissed, without prejudice, claims against the individual defendant, but allowed the action to proceed against the corporate defendant.<sup>139</sup> The court held that the individual defendant's activities, which consisted of attending a one-day conference in Minnesota and giving a speech that was generally related to the topic of the copyright infringement allegations, did not relate to or arise from the plaintiff's claims. Thus the court held, it could not exercise personal jurisdiction over her.<sup>140</sup> The plaintiff had argued, however, that the defendant's conduct should be subjected to the *Calder* effects test because the defendants intentionally infringed on the copyright of a Minnesota resident.<sup>141</sup>

In determining that the *Calder* effects test did not apply to the individual defendant, the court cited a number of federal circuit court cases.<sup>142</sup> First, the court prefaced its analysis by stating that "the mere fact that [the plaintiff] has alleged that Defendants committed an intentional tort against her . . . does not necessarily justify haling them in to a Minnesota Court."<sup>143</sup> It then stated that

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138. 2002 WL 31053211 (D. Minn. Sept. 4, 2002).

139. *Id.* at \*5-6.

140. *Id.* at \*4.

141. *Id.* at \*4.

142. *Id.* at \*4-5.

143. *Id.* at \*4 (quoting *IMO Indus.*, 155 F.3d at 262, and citing *Hicklin Eng'g*



“[a]lthough courts ‘have struggled somewhat with *Calder*’s import’ it is clear that the effects test does not entirely supplant minimum contacts analysis.”<sup>144</sup>

In declining to apply the *Calder* effects test to the individual defendant, the court found that “[n]either the allegedly infringing materials in this case nor the harm from those materials is exclusively or primarily centered in this forum.”<sup>145</sup> Thus, it appears that since there were no underlying contacts between the forum and the individual defendant, the court refused to exercise personal jurisdiction over her. On the other hand, the court relied on the *Calder* effects test and the plaintiff’s allegations to bolster its findings that the corporate defendant had purposefully directed its activities at Minnesota such that personal jurisdiction over that defendant was proper.<sup>146</sup>

Given the plethora of existing persuasive authority interpreting the *Calder* effects test in a more thorough and reasonable manner—as demonstrated by the *Mulcahy* court—it is unclear why the *Griffis* court proceeded to adopt the *IMO Industries* court’s three-part test, especially with no further guidance as to its future applicability.

C. *Northwest Airlines, Inc. v. Friday: No Personal Jurisdiction in Minnesota over Claims of Defamation and Privacy via the Internet*

In *Northwest Airlines, Inc. v. Friday*,<sup>147</sup> the Minnesota Court of Appeals held that alleged defamatory contacts of a Washington State resident, made via e-mail to various locations in Minnesota, did not subject the Washington resident to personal jurisdiction in

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*Inc. v. Aidco, Inc.*, 959 F.2d 738, 739 (8th Cir. 1992); *United States v. Swiss Am. Bank Ltd.*, 274 F.3d 610, 623 (1st Cir. 2001); *Panda Bradywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 869 (5th Cir. 2001); *Bancroft & Masters*, 223 F.3d 1082, 1087 (9th Cir. 2000); *Wallace v. Herron*, 778 F.2d 391, 394 (7th Cir. 1985)).

144. *Id.* at \*5 (quoting *Bancroft & Masters*, 223 F.3d at 1087, and discussing *Dakota Indus. Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1391 (8th Cir. 1991); *Swiss Am. Bank*, 274 F.3d at 624; *Allred v. Moore & Peterson*, 117 F.3d 278, 286-87 (5th Cir. 1997)).

145. *Id.* at \*5.

146. *Id.* at \*5. *Cf. Raymedica, Inc. v. Vladimir Stoy*, 2002 WL 31185916 (D. Minn. Sept. 30, 2002). There, the court held that the effects test is an alternative and equal basis of jurisdiction. Even absent a finding of minimum contacts, the court held that satisfaction of the effects test was enough to confer jurisdiction. *Id.* at \*4-5.

147. 617 N.W.2d 590 (Minn. Ct. App. 2000).

Minnesota.<sup>148</sup> In that case, the plaintiff, Northwest Airlines, Inc. (“Northwest”), sued Washington resident Louise Friday (“Friday”) for defamation and business disparagement in Minnesota. The defendant and her husband, Craig Friday, had previously sued Northwest in Washington for claims in connection with Mr. Friday’s employment.<sup>149</sup> Defendant Friday sent out a press release by e-mail from Washington that repeated many of the lawsuit’s allegations and attached an electronic copy of the complaint.<sup>150</sup> In response, Northwest sued Friday for defamation and business disparagement.<sup>151</sup> Friday disputed that the Minnesota court had personal jurisdiction over her.<sup>152</sup> The chief distinction between *Friday* and *Griffis* is that Alabama’s personal jurisdiction law differs significantly from Minnesota’s long-arm statute with regard to claims of defamation and privacy.<sup>153</sup> It is important to understand this difference between the two cases because it severely limits the applicability of *Griffis* to future personal jurisdiction cases arising under Minnesota defamation and privacy law.

Northwest alleged in its complaint that the “press release was issued in Minnesota and elsewhere,” and that it was “picked up by newspapers that are published in the Twin Cities.”<sup>154</sup> Friday admitted that the “e-mail was addressed to individuals in various cities throughout the country, and one or more of the addressees were located in Minnesota.”<sup>155</sup> However, she also averred that she owned no property in Minnesota, transacted no business in Minnesota, was not employed in Minnesota, and had only been in Minnesota once, to change planes, in the last few years.<sup>156</sup> The district court dismissed the action for lack of personal jurisdiction relying on Minnesota’s long-arm statute.<sup>157</sup>

The court of appeals upheld the dismissal, noting that

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148. *Id.* at 592.

149. *Id.* (stating that the allegations contained in the Washington complaint included whistleblower retaliation, humiliation, defamation, emotional distress, ADA violations, harassment, and allegations that Craig Friday was fit to fly, and that Northwest’s actions to the contrary were taken in retaliation for his numerous complaints about Northwest’s unsafe practices).

150. *Id.*

151. *Id.*

152. *Id.*

153. *See* *Griffis v. Luban*, 633 N.W.2d 548, 549 (Minn. Ct. App. 2001).

154. *Northwest Airlines*, 617 N.W.2d at 592.

155. *Id.*

156. *Id.*

157. *Id.* at 596.

“although both state and federal law must be satisfied, the Minnesota Supreme Court has interpreted the long-arm statute in such a way that ‘when analyzing most personal jurisdiction questions, Minnesota courts may simply apply the federal case law’ on minimum contacts.”<sup>158</sup> However, the *Friday* case involved an exception to that general rule “requiring [the court] to interpret a little-used provision in [Minnesota’s] long-arm statute.”<sup>159</sup> Minnesota’s long-arm statute provides that Minnesota courts do not have jurisdiction over nonresidents when “the cause of action lies in defamation or privacy.”<sup>160</sup> The *Friday* court stated that “according to the plain terms of the statute, when an act is committed outside Minnesota that causes injury inside the state, and the cause of action asserted is defamation or privacy, there is no personal jurisdiction over the nonresident defendant.”<sup>161</sup> Thus, the central issue in *Friday* was “whether, by sending ‘one or more’ allegedly defamatory e-mails to Minnesota recipients, Friday committed an ‘act in Minnesota’ or an ‘act outside Minnesota.’”<sup>162</sup>

The *Friday* court rejected Northwest’s claims that the operative “act” for purposes of defamation occurs when the defamatory information is *received* rather than when it is made or sent.<sup>163</sup> Such a construction would mean that, for purposes of the long-arm statute, the defendant committed an “act” within the state, thus removing her conduct from the defamation exception of the long-arm statute.<sup>164</sup> In addressing this point, the *Friday* court stated that:

The publication of a defamatory statement . . . does indeed require two acts: the act of the alleged defamer in making the statement, and the act of a third party in understanding it. Given this fact, our decision in *Wheeler* properly focuses on the act committed by the defendant—making the allegedly defamatory statement—as the operative act for purposes of determining jurisdiction

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158. *Id.* at 592 (citing *Valspar Corp. v. Lukken Color Corp.*, 495 N.W.2d 408 (Minn. 1992)).

159. *Id.* at 592-93 (citing MINN. STAT. § 543.19 (1998)).

160. *Id.*; see *supra* note 17.

161. *Northwest Airlines, Inc. v. Friday*, 617 N.W.2d 590, 593 (Minn. Ct. App. 2000) (citing *Paulucci v. William Morris Agency, Inc.*, 952 F.Supp. 1335, 1342 (D. Minn. 1997) (stating that a defamation “case presents one of the statute’s anomalies, and falls outside ‘most’ of the jurisdictional questions”)).

162. *Id.* (comparing MINN. STAT. § 543.19, subd. 1(c), with MINN. STAT. § 543.19, subd. 1(d)(3)).

163. *Id.* at 594.

164. See *id.*

under the long-arm statute.<sup>165</sup>

In arguing that Minnesota had jurisdiction over Friday, Northwest urged the court to view contacts made via the Internet and e-mail as qualitatively different from regular mail, telephone calls, and faxes.<sup>166</sup> This assertion was intertwined with the argument that the operative “act” for purposes of defamation was the receipt of the allegedly defamatory information.<sup>167</sup> However, the court declined to adopt such a position stating:

Although Northwest argues that “the phenomenon and power” of the Internet justifies a different result, it has failed to demonstrate why that should be so in this case. This case involves “one or more” individually sent and received e-mails, which, as the district court cogently observed, are “just electronic mail.” Northwest has provided no reason why the fact that the letters in this case were sent by e-mail should cause a different result than if they were sent by traditional mail. The legislature obviously did not have the Internet in mind when it drafted the long-arm statute, and the legislature may well wish to reconsider the statute in light of “the phenomenon and power” of the Internet. Such considerations, however, are not relevant in this case, and our decision is the result of a straightforward application of the long-arm statute and relevant caselaw.<sup>168</sup>

As of October, 2002, Minnesota’s long-arm statute remains unchanged from when the court decided *Friday* in 2000.<sup>169</sup>

In its brief to the appeals court, Northwest also argued for the application of the *Calder* effects test.<sup>170</sup> The *Friday* court disregarded *Calder* entirely in making its decision, instead focusing on “a straightforward application of the [Minnesota] long-arm statute and relevant caselaw.”<sup>171</sup> Thus, the unique procedural posture of *Griffis* cannot be disregarded when evaluating its reasoning because, in Minnesota, claims of defamation and privacy are subject to dismissal under the Minnesota long-arm statute. As

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165. *See id.* (internal quotations omitted).

166. *Id.* at 594-95.

167. *See* Brief of Appellant, at 11-12, *Northwest Airlines, Inc. v. Friday*, 617 N.W.2d 590 (Minn. Ct. App. 2000) (No. C1-00-528).

168. *Northwest Airlines, Inc. v. Friday*, 617 N.W.2d 590, 594-95 (Minn. Ct. App. 2000).

169. *See* MINN. STAT. § 543.19, subd. 1 (2002).

170. *See supra* note 167, at 1, 16-17.

171. *Northwest Airlines*, 617 N.W.2d at 595.

such, *Griffis* is limited to its specific facts and its unique procedural posture.

*D. Minnesota Cases Involving Issues of Personal Jurisdiction, Intentional Torts, and Internet Contacts*

At least two cases have been decided in Minnesota that did not involve defamation and privacy claims in which Internet contacts were argued to have created the requisite sufficient minimum contacts. In *Humphrey v. Granite Gate Resorts*,<sup>172</sup> the court of appeals considered the propriety of exercising personal jurisdiction over an Internet advertiser engaged in soliciting business for an on-line gambling enterprise.<sup>173</sup> The Internet advertiser provided a Nevada telephone number for interested consumers to call.<sup>174</sup> The Minnesota Attorney General sued the defendant advertiser for deceptive trade practices, false advertising, and consumer fraud on the Internet.<sup>175</sup> In affirming the district court's exercise of personal jurisdiction over the defendant, the court of appeals focused on the commercial nature of the contacts made by the advertiser (which included a finding that Minnesota Internet users had accessed the advertiser's website over 248 times in a two-week period) and concluded that, for purposes of due process, the advertiser had purposely availed itself of the privileges of conducting business in Minnesota.<sup>176</sup> In so holding, the court stated that "[a]dvertising in the forum state, or establishing channels for providing regular advice to customers in the forum state indicates a defendant's intent to serve the market in that state."<sup>177</sup> The court wisely cautioned, however, that it will "take some time to determine the precise balance between the rights of those who use the Internet to disseminate information and the powers of the jurisdictions in which receiving computers are located to regulate for the general welfare."<sup>178</sup> The court applied established legal principles of personal jurisdiction and limited its task to deciding the dispute based on the particular facts of the case before it.

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172. 568 N.W.2d 715 (Minn. Ct. App. 1997), *aff'd without comment* by 576 N.W.2d 747 (Minn. 1998).

173. *See id.* at 718.

174. *Id.* at 717.

175. *Id.*

176. *Id.* at 718-19.

177. *Id.* at 719.

178. *Id.* at 718.

More recently, in the unpublished decision of *M.G. Incentives, Inc. v. Marchand*,<sup>179</sup> the Minnesota Court of Appeals upheld the district court's exercise of personal jurisdiction over a defendant whose contacts with the plaintiff included e-mail.<sup>180</sup> In that case, a Minnesota business incentives company sued a non-resident company alleging, *inter alia*, breach of contract, conversion, and fraud in connection with the sale of marketing tools.<sup>181</sup> In exercising personal jurisdiction over the defendant, however, the court specifically rejected the argument that the defendant's e-mail contacts *alone* established personal jurisdiction.<sup>182</sup> In so concluding, the court stated as follows:

[I]s it not a nonresident's contacts with the forum *state*, and not with the forum state's *residents*, that determines whether minimal contacts exist? An email message is directed to a specific person, or rather to a specific email address, and that address is independent of the intended recipient's geographical location. Email stands virtually alone in communications traffic, unfettered by any specific geographical site. People often review their email from locations other than where they principally conduct business. To conclude that email contacts alone might establish personal jurisdiction would potentially subject the sender to jurisdiction in any state in which the recipient reviews a message. We leave it to the supreme court to determine whether email correspondence alone may establish personal jurisdiction.<sup>183</sup>

The court went on to apply existing Minnesota authority and principles of personal jurisdiction in evaluating the defendant's non-email contacts with the plaintiff.<sup>184</sup> In finding the defendant's contacts sufficient for personal jurisdiction, the court focused on the selling behavior of the defendant, which included faxes, phone calls, mailings, and an in-person visit to the plaintiff.<sup>185</sup>

The contacts at issue in *Griffis* can be likened to the e-mail contacts discussed, and rejected, in *M.G. Incentives*. Internet postings, like e-mail, may be directed at a particular individual

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179. 2001 WL 96223 (Minn. Ct. App. 2001).

180. *M.G. Incentives*, 2001 WL 96223, at \*4.

181. *Id.* at \*2.

182. *Id.* at \*3.

183. *Id.*

184. *See id.* at \*2-\*3.

185. *Id.* at \*4.

independent of an intended target or a recipient's geographical location. Indeed, the Minnesota Supreme Court in *Griffis* recognized this very concept in concluding that Luban's postings to the newsgroup could not provide the basis of jurisdiction.<sup>186</sup> Like e-mail, Internet postings are not restricted by specific geographical sites. Like e-mail, postings to an Internet newsgroup may be reviewed from locations other than where the senders or recipients of the postings conduct business or reside. Similarly, jurisdiction based on postings made to an Internet newsgroup could potentially subject the sender to jurisdiction in any state in which the recipient reviews the message. Given the existence of Minnesota authority addressing relevant issues of personal jurisdiction and Internet contacts, the Minnesota Supreme Court's adoption of the Third Circuit's three-part test for intentional torts was unwarranted.

#### V. CONCLUSION

With its decision in *Griffis*, the Minnesota Supreme Court appears to have adopted a new test for personal jurisdiction involving claims of intentional torts that would potentially displace existing Minnesota authority. This new test is embodied in a case that had nothing to do with underlying substantive Minnesota law. Rather, the fundamental question in *Griffis* involved the enforcement of a foreign court judgment applying Alabama law in a Minnesota court. It is important to note that had the claims in *Griffis* arisen under Minnesota law, *Northwest Airlines v. Friday* would have been applied. Given its peculiar posture, *Griffis* provided an unlikely vehicle for such a fundamental change in Minnesota's personal jurisdiction law.

Furthermore, the Minnesota Supreme Court's adoption of the Third Circuit's test is in inherent conflict with its recognition—and the Third Circuit's recognition—that no special category of personal jurisdiction analysis exists for intentional torts. This internal inconsistency in the reasoning of *Griffis* produces a practical problem for future litigants in that it fails to express whether the new test actually displaces existing Minnesota personal jurisdiction law and if so, under what conditions. Finally, when considered carefully, the test adopted by *Griffis*, which focuses on whether the defendant “expressly aimed the allegedly tortious conduct at the forum such that the forum was the focal point of the

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186. *Griffis v. Luban*, 646 N.W.2d 527, 536 (Minn. 2002).

tortious activity,” does not appear to differ greatly from the “purposeful availment” criteria of long-standing personal jurisdiction law.<sup>187</sup> While such a focus may comprise an enhanced criteria, a truly separate and distinct category of analysis seems to be lacking, further exposing the flaws inherent in the Third Circuit’s reasoning, as well as the *Griffis* court’s subsequent adoption of the same.<sup>188</sup>

Although the Third Circuit and the *Griffis* courts proclaimed that the *IMO Industries* test controls the potential for the overly broad application of *Calder*, their decisions have added a host of complicated factors to an already imprecise process. Far from expressing coherent views regarding Internet contacts and personal jurisdiction, the confusion surrounding the test adopted by the *Griffis* court will likely spawn years of litigation and require further clarification, definition, and guidance regarding the proper application of the test. As such, the *Griffis* decision evinces an unnecessary muddying of Minnesota’s personal jurisdiction waters.

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187. *Mulcahy v. Cheetah Learning LLC*, 2002 WL 31053211 (D. Minn. Sept. 4, 2002), at \*5 (citing *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 624 (1st Cir. 2001)).

188. *Id.* (relying on *Calder* to bolster its exercise of personal jurisdiction over the corporate defendant).