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Roth v. Garcia Masquez: Fitting Motion Pictures with International Shoes

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NOTES

ROTH v. GARCIA MARQUEZ: FITTING MOTION PICTURES WITH INTERNATIONAL SHOES

I. INTRODUCTION

You're an American living in Paris. You write novels for a living. After numerous efforts, your reputation begins to grow. Even so, your bank account isn't exactly burgeoning.

Then one morning, a Hollywood producer shows up at your door. "Loved your last book," the producer coos. "I have to have it." His voice is hypnotic as he describes the fantastic major motion picture he will build around your literary creation. You agree to talk more. He flies back home. Telephone calls and faxes are exchanged.

You visit Los Angeles for three days to attend a conference on American writers living in Paris. While you're in town, the producer invites you to a social lunch and you dine with him in the Polo Lounge. He presses you for a commitment. You remain reserved. You return to Paris, to your cold-water garret and a half-dozen affectionate cats.

Soon after your return, the fax spits a piece of curling paper on the floor. It is a letter from the producer. "Babe," the letter reads, "this confirms our deal. I own worldwide non-literary rights to your last book. You agree to share the risk and rewards of our venture by accepting ten percent of the net profits from all our joint ventures."

You call the producer and sputter a protest. He listens impatiently, then says, "Look, we made a deal at lunch. But if you prefer, I'll see you in court." Two weeks later you receive a summons to appear in the U.S. District Court in Los Angeles, California.

As you stare at the legal document, you think to yourself, "Is it possible this American court can decide my destiny?"

The answer is most likely, "Yes it can," based on the Ninth Circuit's recent decision in *Roth v. Garcia Marquez*.[1]

This Note will argue that *Roth* sets a dangerously low threshold for personal jurisdiction in the Ninth Circuit when motion picture rights to

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1. 942 F.2d 617 (9th Cir. 1991) (Nelson, J.) (Judge Nelson is the author of a string of important Ninth Circuit opinions dealing with personal jurisdiction questions).

literary properties owned by offshore individuals are in dispute.[2] This is of no small concern. Indeed, in the wake of *Roth*, it seems that any foreign citizen who agrees to enter into any kind of film deal with a Los Angeles-based producer will necessarily be presumed to have "purposefully availed himself of the privilege of conducting activities in the [California] forum by some affirmative act or conduct," and subject to the personal jurisdiction of the U.S. District Court.[3] This, as will be demonstrated at length in this Note, creates a fundamental inequity in the law.

The personal jurisdiction holding of *Roth* is based on erroneous assumptions about how the motion picture business works. Indeed, the Ninth Circuit is presently laboring under the mistaken assumption that any motion picture produced by a California-based individual will necessarily be largely produced or distributed from within California.[4] That assumption ignores the realities of the motion picture industry. What's more, the court's assumption resulted in a holding which gives unscrupulous producers a potent legal tool; a tool those individuals can be counted upon to use. Indeed, in reaching its result, the *Roth* court inadvertently crafted a potent threat to those offshore individuals who own valuable intellectual properties.[5]

Roth's fatal flaw is that it ignores the reality of the writer-producer relationship in the modern world of motion pictures. Following the court's ruling, a wealthy producer angling for a desirable literary property can force its owner to terms with the threat of litigation in the United States, where it may be difficult if not impossible for the owner to defend his or her rights. If the owner is a struggling writer who has created a fantastic literary property, one potentially worth millions of dollars in the filmed entertainment market, the potential for abuse by sophisticated deal makers is startling.

Finally, this Note will discuss the need for a more flexible application of existing personal jurisdiction tests, especially those used in determining purposeful availment,[6] to cases involving intellectual property rights in the filmed entertainment industry. A better informed application of existing mechanisms would allow for a more equitable result in the case of an international literary rights dispute, of the *Roth* variety. Such a test would also aid in leveling the playing field so that, whatever the specific property

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2. *Id.*
3. *Id.* at 620-21 (emphasis omitted).
4. *Id.* at 622.
5. *Id.* at 629.
6. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

right, the poor and talented can do business with the rich and grasping on a level playing field. The goal is to free offshore artists from the fear that even speaking with a Los Angeles-based producer about a potential film deal automatically exposes them to the risk of ruinous litigation in Southern California's federal courtrooms.

II. BACKGROUND

A. Roth v. Garcia Marquez: *Statement of the Facts*

Richard Roth is an old-line Hollywood producer who has been associated in the past with such filmed entertainment companies as Warner Brothers and DeLaurentiis Entertainment. His credits include "Manhunter" (DeLaurentiis Entertainment Group 1986)[7], "Modern Bride" (MGM/UA 1983) with Diane Keaton, David Lynch's "Blue Velvet" (DeLaurentiis Entertainment Group 1986), and "In Country" (Warner Bros. 1989).

Gabriel Garcia Marquez is one of the most renowned Spanish-language literary figures alive in the world today. A citizen of Columbia, he was honored with the Nobel Prize for literature in 1982.[8] Currently residing in Mexico City, Garcia Marquez has authored a substantial body of work which includes a number of best selling novels.[9] He is a man of considerable influence in Latin American circles, and counts Cuban leader Fidel Castro among his personal friends.[10] The novelist has also earned a reputation as a champion of Latin American causes and culture.[11]

Carmen Balcells is the founder and president of Agencia Literaria Carmen Balcells, S.A., a literary agency based in Barcelona, Spain.[12] A Spanish citizen, Balcells also makes her home in the city of Barcelona.[13] She has been Garcia Marquez' literary agent for more than twenty-five years.[14]

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7. Films are identified by distributor.

8. *Roth*, 942 F.2d at 619.

9. Garcia Marquez' works include ONE HUNDRED YEARS OF SOLITUDE (1970), AUTUMN OF THE PATRIARCH (1976), CHRONICLE OF A DEATH FORETOLD (1983), and THE GENERAL IN HIS LABYRINTH (1990).

10. Spencer Reiss & Peter Katel, *Autumn of the Patriach*, NEWSWEEK, Aug. 10, 1992, at 42.

11. Richard Boudreaux, *Regional Outlook; After The 'Lost Decade,' A Strong Latin Spirit*, L.A. TIMES, Aug. 6, 1991, World Report, at 1.

12. Opening Brief of Defendants-Appellees/Cross-Appellants at 5, Roth v. Garcia, 942 F.2d 617 (9th Cir. 1991) (Nos. 90-55713, 90-55751).

13. *Id.*

14. *Id.*

In late 1986, Roth contacted Garcia Marquez in Mexico City to express interest in making a film based on the well-received novel,[15] *Love in the Time of Cholera*.[16] That December, Roth flew to Havana, Cuba, to meet Garcia Marquez and discuss the project.[17] During their meeting, Garcia Marquez told Roth that he would not consider selling the *Cholera* film rights unless three conditions were met: (1) that Roth would pay Garcia Marquez a substantial sum of money (which Balcells would later specify as five million dollars);[18] (2) that Roth use a Latin American director; and (3) that Roth shoot the film in Cartegna de Indias, Columbia, where *Cholera* is set.[19]

It was only natural that Garcia Marquez should authorize Balcells to negotiate with Roth on his behalf, which is precisely what he did.[20] Shortly thereafter, Roth wrote to Balcells and offered to purchase the film rights for an amount far less than that demanded by Garcia Marquez.[21] Roth and his agent, Peter Rawley, travelled to Barcelona to meet with Balcells, and then Rawley made the trip again on his own in August 1987.[22] No deal was made, but telephone and telex negotiations continued.[23]

From time to time, Roth talked directly with Garcia Marquez about efforts to locate a suitable Latin American director. Roth telephoned Garcia Marquez numerous times, and visited the author in Mexico City twice in 1987 and 1988.[24]

In May 1988, Balcells travelled to California to attend an American Booksellers Association convention.[25] She met with Roth and his counsel,

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15. GABRIEL GARCIA MARQUEZ, LOVE IN THE TIME OF CHOLERA (1985).

16. *Roth*, 942 F.2d at 618.

17. Opening Brief of Defendants-Appellees/Cross-Appellants at 5, *Roth* (Nos. 90-55713, 90-55751).

18. The unusually large fee was meant to help fund the advancement of Latin American cinema through Marquez' existing foundation. *Id.* at 6.

19. From the Defendants-Appellees'/Cross-Appellants' briefs, the three conditions appear to reflect a certain suspicion of the capitalist Hollywood film business by author Garcia Marquez. *See generally* Defendants-Appellees'/Cross-Appellants' Briefs, *Roth* (Nos. 90-55713, 90-55751).

20. *Roth*, 942 F.2d at 619.

21. Opening Brief of Defendants-Appellees/Cross-Appellants at 6, *Roth* (Nos. 90-55713, 90-55751).

22. *Id.*

23. *Id.* at 6-7.

24. *Id.* at 7.

25. *Id.*

Alan U. Schwartz, during a break in the convention, but no deal was reached.[26]

In November 1988, Garcia Marquez visited Los Angeles for four days at a friend's social invitation.[27] During the visit, he encountered Roth during a party and agreed to have lunch. During the meal, Roth described the problems he was having locating a Latin American director for *Cholera*.[28] Garcia Marquez suggested a Brazilian director.[29] When Roth raised the difficulties of filming in Cartegna de Indias, Garcia Marquez agreed that the film could be shot in Brazil.[30]

On November 17, 1988, Schwartz telefaxed a letter to Balcells in Barcelona. The letter offered Garcia Marquez $200,000 for a two-year option on the film rights to *Cholera*, plus a package of other payments to be triggered by various events relating to the planned film.[31]

On January 19, 1989, Schwartz telefaxed a second letter to Balcells outlining a revised offer to Garcia Marquez.[32] The letter offered to raise the initial option payment to $400,000, with the balance of the terms identical to those contained in the November 17, 1988 letter.[33] The second letter also stated that Schwartz would "immediately set about preparing a more formal agreement for Garcia Marquez' signature" which would be forwarded at a later date.[34] Balcells signed the offer letter without consulting Garcia Marquez and returned it to Roth by telefax the following day.[35]

The subsequent 25-page long-form contract prepared by Schwartz was silent on the nationality of the film's director and location of filming.[36]

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26. Opening Brief of Defendants-Appellees/Cross-Appellants at 7, *Roth* (Nos. 90-55713, 90-55751).

27. *Id.*

28. *Id.* at 7-8.

29. *Id.* at 8.

30. *Id.*

31. These included the right to extend the option for an additional year upon payment of an additional $100,000, with all option payments to be applied against a total $1.25 million paid upon exercise of the option. Another $400,000 fell due upon the film's release in video, and $350,000 upon its broadcast television release. Roth also offered to pay Garcia Marquez 5% of the net profits of the film. *Roth*, 942 F.2d at 619.

32. Opening Brief of Defendants-Appellees/Cross-Appellants at 8, *Roth* (Nos. 90-55713, 90-55751).

33. *Id.*

34. Appellants' Opening Brief at 4, *Roth* (No. 90-55713).

35. *Id.* at 5.

36. Opening Brief of Defendants-Appellees/Cross-Appellants at 10, *Roth* (Nos. 90-55713, 90-55751).

Balcells raised her objections to the proposed formal contract. More negotiations followed, but no agreement was ever reached.[37]

B. Procedural History

In December 1991, Roth and his production company, Richard Roth Productions, filed a complaint in the district court seeking declaratory relief to determine the status of his rights to produce *Love in the Time of Cholera* as a motion picture.[38] Garcia Marquez and Balcells were named as defendants.[39]

The defendants filed a motion to dismiss alleging that the court lacked personal jurisdiction over them and that, because there was no binding contract, the plaintiffs failed to state a claim.[40] The trial court denied the motion to dismiss for lack of personal jurisdiction, but granted the motion to dismiss for failure to state a claim.[41]

The plaintiffs subsequently appealed the dismissal, and the defendants cross-appealed, arguing that the district court had wrongly decided the personal jurisdiction issue.[42] On August 8, 1991, the Ninth Circuit Court of Appeals filed its opinion affirming the trial court's decision on both the contract and personal jurisdiction issues.[43] It is the court's decision on the personal jurisdiction question that is the subject of this Note.

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37. *Roth*, 942 F.2d at 620.

38. Roth's position was that Garcia Marquez' demands for a Latin American director and for a Brazilian shooting location were not made essential terms until after the January 19, 1989 offer had been accepted. Appellants'/Cross-Appellees' Reply Brief at 6, *Roth* (No. 90-55713). The federal appellate court appeared to accept Garcia Marquez' assertion that the nationality of the director and the location of filming were both original conditions which were made known to Roth at the earliest stages of negotiations. *Roth*, 942 F.2d at 619.

39. *Roth*, 942 F.2d at 617.

40. FED. R. CIV. P. 12(b)(2), (b)(6).

41. *Roth*, 942 F.2d at 620.

42. Opening Brief of Defendants-Appellees/Cross-Appellants at 11, *Roth* (Nos. 90-55713, 90-55751).

43. *Roth*, 942 F.2d at 629.

III. STANDARD OF REVIEW

A. *The Law of Personal Jurisdiction*

Personal jurisdiction, sometimes referred to as *in personam* jurisdiction, is simply the power of the court over the defendant's person.[44] Absent personal jurisdiction, a court lacks the power to issue an *in personam* judgment.[45]

The power of a federal court to hear a case based on diversity of citizenship over non-resident defendants turns on two independent considerations.[46] First, does an applicable state rule or statute potentially confer personal jurisdiction over a defendant?[47] Second, is the assertion of *in personam* jurisdiction in accord with constitutional principals of due process?[48]

In California, the applicable statute potentially conferring personal jurisdiction over a foreign defendant is referred to as the "long-arm statute."[49] The statute states that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."[50] "Thus the statutory limitations upon jurisdiction are 'coextensive with the outer limits of due process under the state and federal constitutions, as those limits have been defined by the United States Supreme Court.'"[51]

In a line of cases beginning with the seminal *International Shoe Co. v. Washington*,[52] the United States Supreme Court has defined the manner by which due process limits state power to exercise personal jurisdiction over out-of-state defendants.[53] The primary concern is one of equity, i.e., at what point does requiring foreign defendants to defend themselves in a distant forum offend "traditional conceptions of fair play and substantial

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44. BLACK'S LAW DICTIONARY 791 (6th ed. 1990).
45. Pennoyer v. Neff, 95 U.S. 714 (1877).
46. Data Disc, Inc. v. Systems Technology Assocs., 557 F.2d 1280, 1286 (9th Cir. 1977).
47. *Id.*
48. *Id.*
49. *Roth*, 942 F.2d at 620.
50. CAL. CIV. PROC. CODE § 410.10 (West 1980).
51. *Data Disc, Inc.*, 557 F.2d at 1286.
52. 326 U.S. 310 (1945).
53. *Data Disc, Inc.*, 557 F.2d at 1287.

justice?"[54] In the Ninth Circuit, those equitable concerns are most often expressed in the context of a defendant's "contacts" with the forum:

> We have interpreted *International Shoe* and its progeny as allowing jurisdiction by California Courts over a nonresident defendant if he has enough continuous contacts with California to subject him to the court's general jurisdiction or if the specific cause of action arises out of a defendant's more limited contacts with the state so that California may exercise limited or specific jurisdiction over him.[55]

Thus, in assessing the equities of personal jurisdiction, the court looks for evidence of "contacts" that the defendants may have maintained with the forum state. If the level of contacts, judged by quality as well as quantity, rises above a certain threshold, the height of which is largely fact dependent, then personal jurisdiction is presumed to conform with constitutional due process.[56] This is the essence of what are widely referred to as the "minimum contacts" defendants must have with a state forum to satisfy due process concerns.[57]

The decision in *Roth v. Garcia Marquez* turned on the question of limited jurisdiction.[58] There was no question in *Roth* that the defendants did not have the kinds of continuous, high-quality contacts with the California forum that would have subjected them to the court's general jurisdiction.[59]

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54. *Burger King*, 471 U.S. at 464 (quoting *International Shoe*, 326 U.S. at 320).

55. *Roth*, 942 F.2d at 620.

56. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108-10 (1986).

57. *Id.* at 108-09.

58. *Roth*, 942 F.2d at 620.

59. *International Shoe* and its progeny are interpreted by the Ninth Circuit as allowing a forum state to assert general personal jurisdiction over defendants if they have enough continuous contacts with the forum of such high quality that due process is not offended. This "general jurisdiction" standard relieves the court from having to balance interests to calculate the fairness of asserting personal jurisdiction over a defendant. In effect, once the defendants are determined to have maintained the frequency and quality of forum contacts which make it equitable to assert general jurisdiction over their persons, the courts conclusively presume such personal jurisdiction satisfies constitutional Due Process. *See id.* at 620 (quoting *International Shoe*, 326 U.S. at 316). However, if the defendants have only limited contacts with the forum state, the courts will apply a complex series of balancing tests. The tests are gauged to determine whether the defendants may be haled into court in the forum state without offending "traditional notions of fair play and substantial justice." *See id.* at 621; *see also Data Disc, Inc.*, 557 F.2d at 1287.

B. The Ninth Circuit Approach

1. The Three-Part Test

The Ninth Circuit follows a three-part test in determining whether California may assert limited jurisdiction over nonresident defendants.[60] First, "the nonresident defendant must have purposefully availed himself of the privilege of conducting activities in the forum by some affirmative act or conduct."[61] Second, "the plaintiff's claim must arise out of or result from the defendant's forum-related activities."[62] Third, the "exercise of jurisdiction must be reasonable."[63]

The first prong of the three-prong limited jurisdiction test—purposeful availment of the privilege of conducting activities in the forum—is the key prong of the test.[64] This prong determines which party will bear the ultimate burden of proving or disproving that the court may assert jurisdiction without offending constitutional due process concerns.[65] "Once purposeful availment has been established, the forum's exercise of jurisdiction is presumptively reasonable. To rebut that presumption, a defendant 'must present a compelling case' that the exercise of jurisdiction would, in fact, be unreasonable."[66]

The second prong of the limited jurisdiction test, arising out of forum-related activities,[67] is virtually a useless appendage under the facts of a major motion picture controversy such as *Roth*, since one of the parties will always live in California in such a dispute. The *Roth* court acknowledged this reality and disposed of that prong in summary fashion.[68]

2. Seven Factors Gauging Reasonableness

Almost as important as the first prong of the limited jurisdiction test is the third and final prong, which requires the exercise of personal

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60. *Roth*, 942 F.2d at 620.
61. *Id.* at 620-21.
62. *Id.* at 621.
63. *Id.*
64. *Id.* at 621-22.
65. *Roth*, 942 F.2d at 625.
66. Shute v. Carnival Cruise Lines, 897 F.2d 377, 386 (9th Cir. 1990) (quoting *Burger King*, 471 U.S. at 476), *rev'd on other grounds*, 111 S. Ct. 39 (1991).
67. *Roth*, 942 F.2d at 621.
68. *Id.* at 622.

jurisdiction over a defendant to be reasonable.[69] The Ninth Circuit uses a seven-part balancing test to analyze the reasonableness of personal jurisdiction.[70] No single factor is considered dispositive on the issue of reasonableness.

The seven factors are:

(1) the extent of the defendant's purposeful interjection into the forum state's affairs;
(2) the burden on the defendant;
(3) conflicts of law between the forum and defendant's home jurisdiction;
(4) the forum's interest in adjudicating the dispute;
(5) the most convenient judicial resolution of the dispute;
(6) the plaintiff's interest in convenient and effective relief; and
(7) the existence of an alternative forum.[71]

The complex nature of the three-part limited jurisdiction test, one where the third prong has its own seven-part balancing test, gives tremendous power to the court in defining "traditional conceptions of fair play and substantial justice"[72] for any given set of facts. The reason is that the scales that balance any given set of interests depend, for its subjective center, on the perceptions, predispositions, and prejudices of the reviewing court.[73]

3. Distinguishing Contract and Tort Actions

"It is important to distinguish contract from tort actions" in determining purposeful availment, the *Roth* court observed, since the acts of a tortfeasor will necessarily differ in kind from those of a contracting defendant.[74] Accordingly, in considering whether Garcia Marquez and Balcells had purposefully availed themselves of the privilege of conducting activities in California by some affirmative act, the court distinguished their actions from those of parties whose conduct was tortious.[75]

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69. *Id.* at 623.

70. *Id.*

71. *Id.*; *see also* Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1199-1201 (9th Cir. 1988) (Nelson, J.). The seven factors were first enunciated in Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1270 (9th Cir. 1981).

72. *Data Disc, Inc.*, 557 F.2d at 1287 (quoting *International Shoe*, 326 U.S. at 316).

73. *See, e.g.*, *Roth*, 942 F.2d at 623-25.

74. *Id.* at 621.

75. *Id.*

By way of example, the court hypothesized tort-feasor defendants with no forum contacts other than those resulting from their purposeful availment to cause an effect inside the forum from outside the forum.[76] Those tort-feasors, the court concluded, are subject to the jurisdiction of the forum in which the effect occurred. This is because the defendants must reasonably expect to be "haled" into court[77] in the forum where their tortious act caused an injury.[78] This establishes that the "purposeful availment" necessary to fulfill the personal jurisdiction test in a tort situation is necessarily a minimal standard.[79]

By contrast, when examining personal jurisdiction in a contract setting, the *Roth* court declared that the judicial magnifying glass will examine the "economic reality"[80] of the contractual relationship and the "future consequences of the contract"[81] in determining personal availment.[82] This approach is consistent with that suggested in *Burger King v. Rudzewicz*,[83] where the Supreme Court concluded "prior negotiations, and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing . . . must be evaluated in determining whether the defendant purposefully established minimum contacts with the forum."[84]

IV. THE *ROTH* COURT'S ANALYSIS

A. Fitting Motion Pictures With International Shoes

In reaching its determination on the issue of limited personal jurisdiction, the *Roth* court necessarily followed the familiar path first trod

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76. This so-called "effects test" was first described in Calder v. Jones, 465 U.S. 783, 788-89 (1984). In *Calder*, the U.S. Supreme Court considered an allegedly libelous tabloid article that focused upon and caused harm within California, but was edited and published in Florida. The Court held it proper for a California court to assert personal jurisdiction over those responsible for the offending article. The Court reasoned that the "effects" of the out-of-forum conduct made it reasonable that those responsible for the article would be haled into court in California. *Id.*; *see also Roth*, 942 F.2d at 621.

77. *Burger King*, 471 U.S. 462, 475 (1985).

78. *Roth*, 942 F.2d at 621. *See also* Haisten v. Grass Valley Medical Reimbursement Fund, 784 F.2d 1392, 1397 (9th Cir. 1986); *Calder*, 465 U.S. at 789.

79. *Roth*, 942 F.2d at 621.

80. *Id.* at 622 (quoting *Haisten*, 784 F.2d at 1398).

81. FDIC v. British-American Ins. Co., 828 F.2d 1439, 1443 (9th Cir. 1987) (Nelson, J.).

82. *Roth*, 942 F.2d at 622.

83. 471 U.S. 462 (1985).

84. *Id.* at 479.

in *International Shoe v. Washington.*[85] The dispute between Roth and Garcia Marquez was a contractual dispute between Roth, a citizen of California, Garcia Marquez, a resident of Mexico, and Balcells, a resident of Spain.[86] The amount in controversy was in excess of $50,000.[87] Therefore, the action sounded in diversity.[88]

The California long-arm statute allowed personal jurisdiction to be asserted over the defendants "on any basis not inconsistent with the Constitution of [California] or of the United States."[89] Federal and state due process inquiries were therefore merged into a single analysis.[90]

Neither Garcia Marquez nor Balcells had any contacts with California of a frequency or quality that would have caused the court to assert general jurisdiction over their persons.[91] So, the issue became one of deciding whether the court might assert limited jurisdiction without offending constitutional due process concerns.[92] As a result, the court was required to determine whether Garcia Marquez and Balcells had the requisite "minimum contacts" with California, which would assure that exercise of jurisdiction would not "offend traditional notions of fair play and substantial justice."[93]

B. Applying The Three-Part Test

The *Roth* court began its analysis by attempting to determine whether the defendants had purposefully availed themselves of the privilege of conducting activities in California.[94] The rule for evaluating this prong, the court recited, is that "the defendant must have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state."[95]

Garcia Marquez and Balcells argued that since Roth had initiated the contacts and acted as the prime mover of the literary rights deal, he had

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85. 326 U.S. 310 (1945).
86. *Roth*, 942 F.2d at 619.
87. *Id.*
88. 28 U.S.C. § 1332 (1986 & Supp. 1992).
89. CAL. CIV. PROC. CODE § 410.10 (West 1980); *Roth*, 942 F.2d at 620.
90. *Roth*, 942 F.2d at 620.
91. *Id.*
92. *Id.*
93. *Id.* (quoting *International Shoe*, 326 U.S. at 316 (internal quotation omitted)).
94. *Id.* at 621.
95. *Roth*, 942 F.2d at 621 (quoting *Sinatra*, 854 F.2d at 1195).

reached out to them, rather than vice versa.[96] Since they did not purposefully avail themselves of any benefit or protection of the forum, they argued they could not be subject to California law.[97]

The court acknowledged Roth's arguments to the contrary, duly noting the many telephone calls, returned letters and facsimiles which criss-crossed the forum border.[98] It also noted the Los Angeles visits, though their effect on the ultimate resolution was down-played.[99]

The evidence balanced almost evenly between the parties, the court determined.[100] Thus, the nature of the contract under negotiation took on overriding significance.[101] "The point here is simply that the contract concerned a film, most of the work for which would have been performed in California," said the court.[102] "Though neither side decisively triumphs under this analysis, it appears that there was enough purposeful availment here to compel a finding of jurisdiction on this prong."[103]

C. The Court Examines Reasonableness

After finding the purposeful availment prong satisfied, the court summarily disposed of the second prong, noting undisputed evidence that the action arose out of forum-related activities.[104] Hence, the court directed its analysis towards determining the reasonableness of personal jurisdiction, the third prong of the three-part test.[105]

The court evaluated each of the seven factors to be weighed according to circumstances in this case, and came to a decision on each. By a narrow margin, the court found that Garcia Marquez and Balcells had purposefully availed themselves of the privilege of conducting activities in California.[106] It determined that defending a lawsuit in California would not place so great a "burden on the defendants" as to "constitute a deprivation of due process."[107] It found no significant "conflict of law between the

96. *Id.*
97. *Id.*
98. *Id.* at 621-22.
99. *Id.* at 621.
100. *Roth*, 942 F.2d at 622.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Roth*, 942 F.2d at 623.
106. *Id.* at 622.
107. *Id.* at 623.

forum and defendant's home jurisdiction," and likewise declared California's "interest in adjudicating the dispute" to be of little determinative value.[108] The "most efficient judicial resolution" factor was deemed a "toss-up," with the balance of facts favoring neither side conclusively.[109] The "plaintiff's interest in convenient and effective relief' was found to weigh in Roth's favor, "but not as decisively as in other cases."[110] Spain and Mexico were found to constitute suitable "alternative forums" for litigation, and so the seventh factor was found to favor Garcia Marquez and Balcells.

D. A Holding Favoring Personal Jurisdiction

As a result of weighing the seven reasonableness factors, the court held that it could assert personal jurisdiction over Garcia Marquez and Balcells:

> "Once purposeful availment has been established, the forum's exercise of jurisdiction is *presumptively reasonable*. To rebut that presumption, a defendant 'must present a *compelling case*' that the exercise of jurisdiction would, in fact, be unreasonable." Appellees may be able to show that the exercise of jurisdiction might be unreasonable, but the closeness of the question manifests that they cannot do so in a compelling fashion.[111]

Subsequently, the court examined the trial court ruling that Roth could not state a claim, and affirmed on the grounds that there was no actionable contract formed between the parties.[112] While the *Roth* outcome was a favorable result for Garcia Marquez and Balcells, it created a disturbing precedent for foreign owners of literary properties suitable for motion pictures organized or produced in the United States.

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108. *Id.* at 624.
109. *Id.*
110. *Roth*, 942 F.2d at 624.
111. *Id.* at 625 (citations omitted).
112. *Id.* at 629.

V. CRITIQUE OF THE *ROTH* COURT ANALYSIS

A. The Court Makes An Assumption

The court in *Roth* held that it could equitably assert personal jurisdiction over Garcia Marquez and Balcells.[113] However, the reasons behind that holding are both intellectually intriguing and deeply disturbing. Simply put, it appears the reason the *Roth* court felt bound to assert personal jurisdiction over Garcia Marquez was because the deal for rights to *Cholera* was a deal rooted in the motion picture industry.[114]

Indeed, the court's assumptions about where the film industry is based and how the industry operates lay at the heart of its finding that it could assert personal jurisdiction over Garcia Marquez and Balcells.[115] In many ways, the assumption was quaint as that familiar melody, "Hooray for Hollywood." The true message of *Roth* is that the Ninth Circuit still views Hollywood as a geographic place, even though modern day film-makers recognize that Hollywood is really more a term describing a global state of mind.

B. Determining Purposeful Availment

The notion that defendants must purposefully avail themselves of the privileges of a forum by some affirmative act before that forum may assert jurisdiction over their persons was born out of concerns about basic fairness.[116] "The [Supreme] Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests, or on 'conceptualistic . . . theories of the place of contracting or of performance.'"[117] Instead, the law requires an inquiry into the facts and circumstances of each case to determine whether the defendants have "purposefully established 'minimum contacts' in the forum state."[118]

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113. *Id.* at 625.

114. *Id.* at 622.

115. *Roth*, 942 F.2d at 622.

116. "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Burger King*, 471 U.S. at 475.

117. *Id.* at 478 (citations omitted).

118. *Id.* at 474.

In the *Roth* court's words:

> Purposeful availment examines whether the defendant's contacts with the forum are attributable to his own actions or are solely the actions of the plaintiff. In order to have purposefully availed oneself of conducting activities in the forum, the defendant must have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state.[119]

The *Roth* court took this language from *Sinatra v. National Enquirer*.[120] In turn, *Sinatra* relied upon the seminal *Asahi Metal Industry Co. v. Superior Court*.[121] In *Asahi*, the Supreme Court further explained the purposeful availment requirement by stating:

> "The constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant purposefully established 'minimum contacts' in the forum state." . . . "Jurisdiction is proper where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State."[122]

The *Roth* court also relied on *Burger King v. Rudzewicz*[123] to provide the important notion that the purposeful availment requirement ensures a defendant is not haled into a jurisdiction solely as a result of "random,

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119. *Roth*, 942 F.2d at 621 (quoting *Sinatra*, 854 F.2d at 1195 (citations omitted)).

120. 854 F.2d at 1195 (Nelson, J.). As will be seen later, the *Roth* court relied heavily upon the personal jurisdiction analysis it followed in *Sinatra*. However, this may have contributed to distorting the result in *Roth*, since *Sinatra* was a tort case, while *Roth* sounded in contracts. *See infra* text accompanying note 157.

121. 480 U.S. 102 (1987) (plurality opinion). In this case, the Supreme Court expounded upon the key nature of the personal availment requirement in a personal jurisdiction analysis. Asahi was a Japanese manufacturer of tire valve assemblies who was named as a defendant in a cross-action for indemnity by Taiwanese tire tube manufacturer Cheng Shin Rubber Industrial Co. Cheng Shin brought the indemnity action after it was named as a defendant in a California product liability action, though all Asahi tire valve assembly sales took place in Taiwan. The California Supreme Court held that personal jurisdiction over Asahi was consistent with the Due Process Clause since Asahi knew its tire valve assemblies were incorporated into Cheng Shin tubes later sold in California. The U.S. Supreme Court reversed, holding that mere awareness that a product would eventually be sold in a forum was not enough to satisfy constitutional due process concerns. *Id.*

122. *Id.* at 108-09 (quoting *Burger King*, 471 U.S. at 474).

123. 471 U.S. 462 (1984). *Burger King* was a key case in the *Roth* court's jurisdiction analysis. The court was particularly persuaded by *Burger King*, because it dealt with a similar issue, i.e., the effect of contracts upon personal jurisdiction. *See Roth*, 942 F.2d at 621-22.

fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person."[124]

Moreover, the *Roth* court acknowledged that merely making a contract with a resident of the forum state is not enough to create personal jurisdiction over a nonresident.[125] On the other hand, the *Roth* court noted, when a contractual obligation creates a significant continuing relationship, then due process concerns tend to melt away.[126] Accordingly, the Supreme Court found that, "with respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their actions."[127]

Even so, contracts which arise because of the efforts of others must be distinguished from contracts created out of the defendant's active volition. As the *Roth* court stated, "We have explained that 'the purposeful availment analysis turns upon whether the defendant's contacts are attributable to 'actions by the defendant himself,' or conversely to the unilateral activity of another party.'"[128]

Based on the foregoing, it would seem the personal jurisdiction question presented in *Roth* should be easily decided in favor of no personal jurisdiction. From the facts presented, Roth was the party whose actions drove the negotiations for film rights to *Cholera*. Roth was the active, proactive party, the one who pursued Garcia Marquez and Balcells, and his

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124. *Roth*, 942 F.2d at 621 (quoting *Burger King*, 471 U.S. at 475)). In *Burger King*, a Michigan resident had signed a twenty-year franchise agreement with a Florida-based fast food restaurant chain. When the deal soured and the Michigan resident was haled into U.S. District Court in Florida, lack of personal jurisdiction became an important defense. However, the Supreme Court found the Michigan resident to have purposefully availed himself of the benefits of Florida by virtue of his extensive and long-term contractual obligations. *Burger King*, 471 U.S. at 487.

125. *Roth*, 942 F.2d at 621; *see also* Gray & Co. v. Firstenberg Mach. Co., 913 F.2d 758 (9th Cir. 1990). "A contract alone does not automatically establish the requisite minimum contacts necessary for the exercise of personal jurisdiction. Prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing are the factors to be considered." *Gray & Co.*, 913 F.2d at 760 (citations omitted).

126. *Roth*, 942 F.2d at 622.

127. *Id.* at 617 (quoting *Burger King*, 471 U.S. at 473).

128. *Id.* at 621 (quoting Hirsch v. Blue Cross, Blue Shield, 800 F.2d 1474, 1478 (9th Cir. 1986)).

pursuit took place almost exclusively outside of the California forum.[129] Garcia Marquez and Balcells played largely passive, reactive roles in the negotiations.[130] The proposed deal was a one-shot sale of literary rights which would create no substantial continuing relationship between Roth and Garcia Marquez.[131] In addition, unlike other cases where parties had formed substantial and long-term contractual commitments, in *Roth*, there was never any valid contract between the plaintiff and the defendants.[132] But in spite of all this, the Ninth Circuit found in favor of personal jurisdiction.[133]

C. The Court Considers Future Consequences and Takes A Wrong Turn

Despite what would appear to be significant obstacles in the way of imposing personal jurisdiction on the defendants, the *Roth* court was undaunted. The court's finding that the defendants had indeed purposefully availed themselves of the benefits of the state of California did not turn on the defendants' own activities, such as sending telefaxes or making telephone calls.[134] In fact, the court concurred with a substantial line of authority holding that electronic international communications by and of themselves do not rise to the level of quality contacts that might create personal jurisdiction.[135]

The *Roth* court found that two facts "marginally worked in [Garcia Marquez' and Balcells'] favor: their minimal physical presence in the

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129. *Id.* at 619. Balcells' and Garcia Marquez' chance meetings with Roth while they were visiting California on other matters by themselves did not rise to the quality of contacts to constitute purposeful availment. *Id.* at 621. "Garcia Marquez and Balcells were in Los Angeles for other purposes when each met individually with Roth. While we concede that negotiations did take place at that time, it should be borne in mind that 'temporary physical presence' in the forum does not suffice to confer personal jurisdiction." *Id.* (quoting FDIC v. British-American Ins. Corp., 828 F.2d 1439, 1443 (9th Cir. 1987) (Nelson, J.)).

130. *Roth*, 942 F.2d at 622.

131. *Id.* at 619-20.

132. *Id.* at 628.

133. *Id.* at 629.

134. *Id.* at 622. This was not for lack of arguing by the plaintiff. However, the court followed Peterson v. Kennedy, 771 F.2d 1244, 1262 (9th Cir. 1985), which stated that "both this court and the courts of California have concluded that ordinarily 'use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the forum state.'" *Peterson*, 711 F.2d at 1262.

135. *See Peterson*, 771 F.2d at 1262; *see also* Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247 (9th Cir. 1980).

forum[136] and the fact that it was [Roth] who made the sedulous efforts of solicitation."[137] Then, relying on its own odd assumptions about how motion pictures are made, the court lost its way:

> While this is a very close call, a final and broader issue appears to swing the first prong for Roth, namely the *future consequences* of the contract. . . . The point here is simply that the contract concerned a film, most of the work for which would have been performed in California. Though the shooting most likely would have taken place in Brazil, all of the editing, production work, and advertising would have occurred in California. This is not an instance where the contract was a one shot deal that was merely negotiated and signed by one party in the forum; on the contrary, most of the future of the contract would have centered on the forum. The checks that Roth would have sent Garcia Marquez, which appellees attempt[ed] to minimize, would have depended upon activities in California and the United States.[138]

This statement is fairly unequivocal about the future of the *Cholera* film project. However, the statement assumes numerous facts which were not apparent from the parties' briefs, and displays a certain naivete about how the modern motion picture business works.

D. The Contract that Never Was

Overlooking the fact that, aside from representations about where *Cholera* was to be filmed, neither Roth nor Garcia Marquez detailed how and where production was to take place, the broad conclusions about the future of the *Cholera* project were built on shaky ground to say the least.

Film projects are known for taking numerous twists and turns. Had Roth been successful in negotiating the contract he wished, his option to rights for *Cholera* would have been assignable[139] and could have been

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136. Aside from the two brief meetings in California, Garcia Marquez and Balcells were near total strangers to the forum. Garcia Marquez had only visited California four times in his life for a total of less than twenty days over a twenty-year period. He did maintain a small, dollar-denominated account with a California bank, but it was not his primary account and was used for transactions taking place outside the forum. Balcells had visited California only twice in her life, for a total of approximately seven days. Opening Brief of Defendants-Appellees/Cross-Appellants at 5, *Roth* (Nos. 90-55713, 90-55751).

137. *Roth*, 942 F.2d at 622.

138. *Id.* (emphasis omitted) (citations omitted).

139. Opening Brief of Defendants-Appellees/Cross-Appellants at 10, *Roth* (Nos. 90-55713, 90-55751).

sold as easily to a British or Italian film company as to another American. For that matter, Roth might have chosen to rely upon his relationship with producer Dino Delaurentiis,[140] who during the relevant period was coaxing production to his non-union studio facilities in North Carolina.[141] There is no reason editing need have taken place in California; that decision generally depends upon the desires of the director.[142] So, *Cholera* might not even have been edited in the United States. Similarly, advertising did not have to take place predominately in California; it could just as easily occurred in the venues where *Cholera* was to be exhibited.[143] As for the creation of that advertising, why overlook New York's Madison Avenue?

Ultimately, the source of any literary rights royalty checks paid by Roth to Garcia Marquez would not depend upon California activities, but rather, would depend on whether or not the film found a paying audience, how large that audience might be, and where it was located. For example, it would not be unusual for a film with foreign overtones to earn its largest receipts overseas. In that case, the amount the picture might earn would depend heavily on whether it is accepted in rich markets, such as Japan or Germany, rather than in less lucrative markets such as Latin America or Africa. In the domestic market, the picture's exposure in California would depend almost exclusively upon a distributor's judgment about its reception in that state. For that matter, if *Cholera* resulted in what is known in film industry parlance as a "bomb," there would be no royalty checks whatsoever. Since motion pictures in general tend to lose rather than earn money,[144] the court's analysis of cash sources leaves much to be desired.

E. The Court Effectively Removes Two Prongs From a Three-Prong Test

In reaching a determination on purposeful availment, the court leaned so heavily on its assumption that the film was to be made in Hollywood

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140. Dave Kehr, *'Manhunter' Menaced By Overstyled Quarry*, CHI. TRIB., Aug. 15, 1986, at J.

141. David Tuller, *Moviemakers Come To Main Street*, N.Y. TIMES, Apr. 27, 1986, § 3, at 4.

142. According to Garcia Marquez, the director of "Love in the Time of Cholera" was to have been a Latin or South American national. *Roth*, 942 F.2d at 619.

143. *Cf.* Peter Dean, *$19.8 Mil War Chest For U.K. Video Drive*, BILLBOARD, Feb. 23, 1991, at 1.

144. David Robb, *Net Profits: Breaking Even is Hard to Do*, HOLLYWOOD REP., Sept. 14, 1992, at 1.

that the court effectively eliminated the second and third prongs of the personal jurisdiction test.

From a practical standpoint, the second prong, forum-related activity, usually will not be at issue in a literary rights dispute. The plaintiffs will always be able to show that any rights contract tied to a motion picture is, at least partially, related to the forum where the plaintiffs are based, rendering the prong moot.[145]

As for the third prong of the test, i.e., the reasonable exercise of jurisdiction, this prong will theoretically always act to prevent an unfair result. In a literary rights dispute such as *Roth*, however, this prong will always present too low a threshold to adequately protect against what must really be termed a violation of constitutional due process unless is it applied at the outset of the analysis, instead of at the end.[146] The reason is, once the defendants are found to have fulfilled the purposeful availment prong, those defendants are immediately saddled with the burden of proving personal jurisdiction would be unreasonable.[147] "Once purposeful availment has been established, the forum's exercise of jurisdiction is presumptively reasonable. To rebut that presumption, a defendant must present a compelling case that the exercise of jurisdiction would, in fact, be unreasonable."[148]

There is no binding legal reason why reasonable exercise of jurisdiction cannot be examined as a threshold question in personal jurisdiction analysis. Judge Nelson followed this approach in at least one decision prior to her opinion in *Roth*.[149] The *Roth* approach, on the other hand, with its immediate presumption of reasonableness, turns what should be a mechanism tuned for fairness and equity, right on its head.

F. The Insurmountable Presumption

Because the *Roth* court found that Garcia Marquez and Balcells had purposefully availed themselves of the privilege of conducting activities in

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145. *Roth*, 942 F.2d at 622.

146. *Cf.* Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 112-13 (1987).

147. *Roth*, 942 F.2d at 625.

148. *Id.* (quoting Shute v. Carnival Cruise Lines, 897 F.2d 377, 386 (9th Cir. 1990), *rev'd on other grounds*, 111 S. Ct. 39 (1991).

149. FDIC v. British-American Ins. Corp., 828 F.2d 1439, 1442 (9th Cir. 1987) (Nelson, J.) ("because we find that the exercise of personal jurisdiction over [British American Ins. Co.] is unreasonable, we need not determine whether the first two prongs of the [personal jurisdiction] test are satisfied").

the California forum, it turned to the third prong of the personal jurisdiction test to reach a final result.[150] The third prong, which demands that exercise of personal jurisdiction be reasonable, required the *Roth* court to balance seven discrete factors.[151]

When the balancing was done, the scales tipped slightly in favor of unreasonableness, a result favorable to Garcia Marquez and Balcells.[152] Yet, the end result was something counter-intuitive, due in large part to the rebuttable presumption created by the finding of purposeful availment.

Because Garcia Marquez and Balcells had the burden of rebutting the presumption created by the first prong, purposeful availment, a close win on the third prong's balancing test to determine reasonableness simply wasn't enough to prevail. As the court noted: "Appellees may be able to show that the exercise of jurisdiction might be unreasonable, but the closeness of the question manifests that they cannot do so in a compelling fashion."[153] Therefore, in a close situation, a court following the *Roth* rationale must always find personal jurisdiction.

It follows that in accord with *Roth*, the Ninth Circuit has deemed itself the appropriate forum for any major motion picture dispute which might arise. Call it, the court of the stars.

G. The Seven-Part Balancing Test Was Weighted Unfairly

Examining the court's step-by-step seven-part analysis demonstrates how its assumptions on purposeful availment unfairly stacked the deck in favor of finding personal jurisdiction.

1. Extent of Purposeful Interjection

The court did not consider the extent of purposeful interjection. The court reasoned that, since the appellees had already been determined to have purposefully availed themselves of the privileges of conducting activities in California, "there [was] no need to analyze this first factor separately."[154]

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150. *Roth*, 942 F.2d at 623.
151. *Id.* at 625.
152. *Id.*
153. *Id.*
154. *Id.* at 623.

The court's refusal to analyze the extent of Garcia Marquez' "purposeful interjection" appears somewhat result oriented. From the facts before it, the court understood that it was Roth, the Los Angeles-based producer, who was actively attempting to lure Garcia Marquez and *Cholera* into the California forum.[155] If anything, the excessively high price initially demanded for film rights, coupled with strict conditions regarding the nationality of any director attached to the project and the specific location for shooting, indicated a definite reluctance on Garcia Marquez' part to avail himself of the privilege of conducting activities in California.[156]

The court reached its conclusion on the extent of Garcia Marquez' and Balcells' purposeful interjection with few words, and little more than citations to *Sinatra v. National Enquirer, Inc.*[157] and *Haisten v. Grass Valley Medical Reimbursement Fund, Inc.*[158] as authority.[159] An examination of the facts in both of these cases makes the *Roth* court's reliance upon them immediately suspect. In *Sinatra*, for example, the subject defendant was a purposeful tort-feasor whose actions were focused on the California forum, in stark contrast with the passive contractual posture of Garcia Marquez.[160] *Haisten* involved insurance contracts,[161] again, a far cry from the unconsummated agreement which lay at the heart of *Roth*.

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155. *Roth*, 942 F.2d at 621.

156. *See* Opening Brief of Defendants-Appellees/Cross-Appellants at 6, *Roth* (Nos. 90-55713, 90-55751).

157. 854 F.2d 1191, 1199 (9th Cir. 1988) (Nelson, J.). The defendant, a Swiss "rejuvenation" clinic which had aided the National Enquirer in documenting a story headlined "[Frank] Sinatra Injected with Youth Serum—He's Secretly Treated with Sheep Cells at Swiss Clinic," was the subject of the personal jurisdiction analysis. In deciding that the clinic had purposefully availed itself of the California forum, the *Sinatra* court noted that the clinic had (1) actively appropriated the name of Frank Sinatra, a citizen of the state, and (2) advertised in the forum to solicit patients. *Id.* at 1195. Needless to say, aside from the fact that it also concerns a celebrity and the question of personal jurisdiction, a tort-grounded decision like *Sinatra* should carry minimal weight in considering the questions raised by a contract case like *Roth*, since there is a fundamental difference between asserting jurisdiction over a tort-feasor who has inflicted injury in a forum, and a contract defendant who is simply at the wrong end of a bargain.

158. 784 F.2d 1392, 1401 (9th Cir. 1986). *Haisten* concerned an offshore insurance company which sold malpractice coverage in California. Aside from the fact that *Haisten* involved an actual contract, rather than a hypothetical agreement, the case is distinguishable from *Roth* on two points. First, it is well-established that personal jurisdiction may be asserted over an insurer who enters into insurance contracts within a forum. *Cf.* McGee v. International Life Ins. Co., 355 U.S. 220 (1957). Second, insurance is a highly regulated area and in the case of *Haisten*, no fewer than two discrete statutes were controlling. *Haisten*, 784 F.2d at 1404-06.

159. *Roth*, 942 F.2d at 623.

160. *Sinatra*, 854 F.2d at 1199.

161. *Haisten*, 784 F.2d at 1395.

2. Burdens on Defendant

The *Roth* court ignored the *Asahi* warning that if the defendant would be unduly burdened by litigating in a U.S. forum, the "burdens on the defendant" factor should be given "significant weight."[162] The court instead preferred to invoke the axiom that "modern advances in communications and transportation have significantly reduced the burden of litigating in another country,"[163] thereby eliminating intercontinental distances and language barriers as factors. It was almost as if the *Roth* court perceived *Asahi* as having been decided in the era of covered wagons rather than in 1987.[164]

In the context of a rights dispute between a producer and an author, the court's reasoning was wholly inadequate. If the court had considered Garcia Marquez' and Balcells' financial resources, their past experiences with litigating disputes either in the United States or abroad, and their facility with the English language, then perhaps its conclusion might have carried more weight. Instead, the court seemed unwilling to engage in much more than a superficial analysis:

> At bottom, because Roth had no problems in his globe-trotting endeavors to persuade Balcells and Garcia Marquez to sell the film rights to him, he should not complain that litigation outside the United States would be particularly onerous for him. [Garcia Marquez and Balcells] have shown no similar propensity for travel. Although this factor cuts in favor of [Garcia Marquez and Balcells], "unless such inconvenience is so great as to constitute

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162. *Roth*, 942 F.2d at 623. The *Asahi* court's admonition that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders" is given short shrift by the *Roth* court. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987). The burden on Garcia Marquez and Balcells to litigate a contract in the United States could not have been significantly less than that faced by Asahi, which was headquartered in Japan.

163. *Roth*, 942 F.2d at 623 (quoting *Sinatra*, 854 F.2d at 1199).

164. The court in *Sinatra* supported the "modern communications" axiom by noting the foreign defendant clinic had long maintained an agent in the United States. "The continuing contacts between the Clinic's United States-based agent and California translate into less of a litigation burden than if the Clinic maintained no physical presence or agent within the United States." *Sinatra*, 854 F.2d at 1199. Since neither Garcia Marquez nor Balcells had any such agent or continuous contact with the forum, the invocation of the "modern communications" rationale appears ill-used.

> a deprivation of due process, it will not overcome clear justifications for the exercise of jurisdiction."[165]

The court found this factor favored neither party,[166] and then set out to find a justification for personal jurisdiction.

3. Extent of Conflict with Sovereignty of Foreign State

The court ignored the interests of Mexico and Spain in upholding the rights of their nationals to license an acclaimed novel, one which arguably could be considered a national literary treasure.[167] The court instead relied heavily on *Sinatra* for the proposition that "the factor of conflict with the sovereignty of the defendant's state is not dispositive because, if given controlling weight, it would always prevent suit against a foreign national in a United States court."[168] This is puzzling, given the previously mentioned differences between a motion picture rights licensing controversy and a Swiss rejuvenation clinic's unlicensed appropriation of Frank Sinatra's name and persona.[169]

The main defendant in this action, Gabriel Garcia Marquez, is one of the most acclaimed living Spanish-language writers, and as a Nobel Prize-winner, can be counted among the greatest living writers in the world.[170] How is it an American court can decide that the interests of foreign countries have not been invaded without even pausing to acknowledge the status in those foreign lands of the man whose fate it is deciding?

To the court's credit, it does find that this prong "lines up" on Garcia Marquez' and Balcells' side, but does not really explain why.[171]

4. The Remaining Factors

The *Roth* court's analysis of the remaining four factors did little to shed light on its final decision. In considering the forum state's interest in adjudication, the court decided this factor was a toss-up, slightly in favor

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165. *Roth*, 942 F.2d at 623 (quoting Hirsch v. Blue Cross, Blue Shield, 800 F.2d 1474, 1481 (9th Cir. 1986).

166. *Id.*

167. *Id.* at 623-24.

168. *Id.*

169. *Sinatra*, 854 F.2d at 1192; *see also supra* note 157.

170. Richard Boudreaux, *After the 'Lost Decade,' a Strong Latin Spirit*, L.A. TIMES, Aug. 6, 1991, World Report, at 1.

171. *Roth*, 942 F.2d at 624.

of Garcia Marquez and Balcells.[172] The court's consideration of the most efficient judicial resolution factor resulted in another "push."[173] Again, erroneous assumptions about film financing and production make the conclusion suspect. Furthermore, the court decided the convenience and effectiveness of relief for the plaintiff factor in favor of Roth, though not decisively.[174] Finally, Garcia Marquez and Balcells were favored by the availability of an alternative forum factor, since litigation could be pursued in Spain or Mexico as easily as in California.[175]

5. Balancing the Seven Factors

Once the court determined that Garcia Marquez and Balcells purposefully availed themselves of the privileges of conducting activities in the California forum,[176] the burden shifted to the defendants to show why the forum's courts should not have jurisdiction over the persons within the forum.[177]

Given the facts of this case, how is it that the court found that Garcia Marquez and Balcells had *not* presented a compelling case that exercise of personal jurisdiction would be unreasonable? The answer must be that the *Roth* court, in balancing the seven factors, did not afford enough weight to the actual facts, and instead, let its assumptions about film-making control its analysis. Perhaps the court believed that simply because Garcia Marquez was a renowned, award-winning writer, that he must also be wealthy enough to travel to and litigate in California.[178] The court let its Hollywood-centric prejudices about the film industry color its thinking.

The consequence of *Roth* is appellate authority that sets a dangerous precedent. This is especially true where the defending party is a well-known artist with few financial resources and the plaintiff is a wealthy business person who is adept at converting creative properties into large sums of cash.

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172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 624-25.

176. *Roth*, 942 F.2d at 625.

177. *Id.* (quoting *Shute*, 897 F.2d at 386, *rev'd on other grounds*, 111 S. Ct. 39 (1991)).

178. Fame, however, is a highly unreliable gauge of personal assets, as any member of the creative community understands. Thus, such an unspoken assumption, especially at the initial pleading stage prior to discovery, is fraught with danger.

H. The Court's Assumptions About How Films Are Made Threatens To Short-Circuit Due Process

Since the days of *International Shoe*, courts have worked at defining a personal jurisdiction standard rooted in fairness and equity.[179] This is not an area well-suited to mechanical tests or jurisdiction by rote. Instead, the courts have striven to create intricately-tuned legal scales capable of balancing and measuring diverse party interests.[180] This web of balancing tests is meant to assure that the plaintiff's interest in choosing a forum is evenly matched to the defendant's interest in litigating in a place where, even if it is not convenient, is a fair forum in which to mount a defense.

So how does *Roth* fit this complex tapestry? As is clear from the discussion above, because the *Roth* court permitted preconceived notions about the dynamics of a motion picture deal to color its analysis, its personal jurisdiction decision opens the door to overreaching and injustice.

Regardless of Garcia Marquez' own ability to defend a lawsuit in U.S. District Court in Los Angeles, future deal makers are bound to take notice of the lessons *Roth* teaches. When negotiating a licensing deal for creative properties with off-shore artists, an aggressive producer has been handed a powerful weapon by the *Roth* court. The producer will know that as long as a bargain is rooted in motion pictures and the agreement is sufficient to sustain a motion to dismiss,[181] the Los Angeles-based business person can haul an artist halfway around the world to defend that artist's own creation. What's more, that deal making leverage exists even if a predatory business person is the sole aggressor and the artist is wholly passive. In the business environment of the modern day motion picture industry, where a book or a screenplay can generate millions of dollars in the right (or wrong) hands, the personal jurisdiction holding of *Roth* makes little sense.

VI. CONCLUSION

The future consequences analysis and the "to be made in Hollywood" assumption are what led the *Roth* court astray. In the case of literary properties and motion picture productions, assumptions about the final form the project will take are dangerous. Film deals by their nature remain amorphous until fully consummated.

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179. *Burger King*, 471 U.S. at 464.

180. *See International Shoe*, 326 U.S. 310 (1945) and its progeny.

181. FED. R. CIV. P. 12(b)(6).

Admittedly, the motion picture world is an insular realm steeped in arcane practices and odd business realities. It is not a world which is readily understood by the outsider. Regardless, the business of entertainment is a business of increasing importance in this global information age, and filmed entertainment is of particular importance to California in these difficult economic times.

But, this means the courts carry an extra burden when they are called upon to decide cases which have the potential of making California more or less hospitable to that rare and precious individual who is the creative artist. *Roth* sets a disturbing precedent, and future courts should beware of following its perilous path. To act otherwise is to risk that the artists of our world will conclude that their last choice should be Hollywood.

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This Note is dedicated to my wife Cheryl, my son William, my daughter Jennifer, and my friend, John Wolfgang "Amadeus" Gehart. A family is a good thing.