You Can Have It, But Can You Hold It?: Treating Domain Names as Tangible Property

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Introduction

In the summer of 2009, the United States Bankruptcy Court in Utah was confronted with the now common task of resolving the ownership of a domain name.[2] The domain name at stake in the case of *In re Paige* was freecreditscore.com, reportedly worth between $350,000 and $200 million.[3] Before it reached the court, this domain name had been traded and appropriated so many times, by so many parties, that as Judge Thurman wrote in the court's opinion, "[t]he facts of this case . . . lend themselves almost to mystery novel status."[4] Yet, at the heart of the conflict was a seemingly simple conversion action,[5] wherein the bankruptcy trustee of Paige's estate claimed that the defendants had wrongfully taken possession and control of the domain name freecreditscore.com from Paige, its original owner.[6]

In unraveling the knot of the domain's ownership, the court was faced with another issue, one the judiciary has wrestled with for more than ten years: the exact legal status of a domain name.[7] Courts have been unable

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2 Jubber v. Search Mkt. Direct, Inc. (*In re* Paige), 413 B.R. 882, 888 (Bankr. D. Utah 2009).

3 *Id.* at 887-88.

4 *Id.* at 888-89.

5 The court defined conversion as follows:

> Under Utah law, conversion is "an act of willful interference with [property] done without lawful justification by which the person entitled thereto is deprived of its use and possession." Although conversion results from intentional conduct it does not require a conscious wrongdoing, but only an intent to exercise dominion or control over the goods inconsistent with the owner's rights. The Plaintiffs must prove all elements of conversion by a preponderence of the evidence.

Id. at 916 (alteration in original) (citations omitted).

6 *Jubber*, 413 B.R. at 888.

7 *Id.* at 917 n.168.

to come to a consensus on how property and tort law should be analogized and applied to digital interactions. Two precedents existed, but the *Paige* court was bound by neither.[8] Either the domain was only a contractual right for the domain registration and services, established by the agreements between the registrar and the registrant, or it was intangible property.[9] No matter which option the court chose, the conversion claim would be invalid: a contract for services cannot be converted,[10] and Utah law did not allow a conversion claim with respect to intangible property.[11] Intangible property is a somewhat generic term used to denote things that can be owned and transferred to others but that have no physical substance.[12] The term includes things such as debts and other alienable obligations, intellectual property, as well as types of data and information.[13] State laws vary on whether it is possible to convert intangible property without somehow merging it into a physical form,[14] and Utah is among those that do not allow such claims.[15] Instead, the court validated the conversion claim in the only way Utah law would allow: by determining that a domain name is, in fact, tangible property.[16]

The *Paige* court held that a domain name is tangible property because it can be "perceived by the senses": it has a physical presence on a computer drive, and one can exclude others from access to it.[17] Unfortunately, the court's argument in support of its conclusion is not persuasive, but this is not sufficient cause to dismiss the conclusion itself. The court developed a novel approach to domain names, and this approach has significant advantages (which the court did not explore) over previously held views.

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8 *See id.* at 917.

9 *Id.* at 917.

10 An action for conversion applies only to chattels, certain negotiable instruments, and certain types of future interests in chattels. *See* Restatement (Second) of Torts §§ 222A, 241A, 243 (1965).

11 *In re Paige*, 413 B.R. 916-20.

12 Navistar Int'l Transp. Corp. v. State Bd. of Equilization, 884 P.2d 108, 110 (Cal. 1994) ("Although there appears to be no comprehensive definition of intangible property, such property is generally defined as property that is a 'right' rather than a physical object.") (citation omitted); Norris v. Norris, 731 S.W.2d 844, 845 (Mo. 1987) ("Intangible personal property is that which has no intrinsic and marketable value, but is merely the representative of evidence of value, such as certificates of stock, bonds, promissory notes, and franchises."); Adams v. Great Am. Lloyd's Ins. Co., 891 S.W.2d 769, 772 (Tex. App. 1995) ("Intangible property, on the other hand, has no physical existence but may be evidenced by a document with no intrinsic value."); Black's Law Dictionary 1253 (8th ed. 2004) ("Property that lacks a physical existence.").

13 *See, e.g.*, Thyroff v. Nationwide Mut. Ins. Co., 864 N.E.2d 1272, 1276-77 (N.Y. 2007).

14 *Id.* (comparing state applications of the merger doctrine to intangible property, particularly computer data).

15 *In re Paige*, 413 B.R. at 916.

16 *Id.* at 918.

17 *Id.*

This Note will explore the three ways that courts have applied existing laws to domain names: treating the domain names as purely contractual rights, treating them as intangible property, and treating them as tangible property. None of these approaches are perfect. Existing tort, property, and contract law are not equipped to conclusively address the unique issues surrounding ownership of domain names. Of the three different views, however, treating domain names as tangible property is the most reasonable in light of the historical development of the doctrines of tangible and intangible property, the apparent intent of Congress, and public policy. Part I of this Note will explain the purpose of domain names, the relevant technical aspects of domain name creation and administration, and the actions Congress has taken with regard to domain-related legal claims. Part II will review existing precedents treating domain names as service contracts or intangible property, and will identify deficiencies in both approaches. Part III will step through the logic of the *Paige* holding and identify why the court's arguments fail to support its conclusion that a domain name is tangible property. Part IV will examine reasons why the *Paige* holding nevertheless has merit and detail the advantages that such a holding provides by clarifying the rights of domain name owners and other interested parties.

I. Domain Names: How They Work and How They Are Affected by Statutes

When one registers and pays for a domain name, this seemingly simple transaction invokes a hugely complex system of technical and contractual coordination. The Domain Name System (DNS) is the map that brings order to the World Wide Web—not in the sense that it categorizes or arranges the information available on the Web—but in the sense that it gives people a framework for interacting with that information. The DNS is administered by hundreds of companies across millions of computers. In addition to the technical aspects of domain name registration and use, the act of purchasing a domain name also implicates laws governing trademark and unfair competition. Congress has responded to these concerns by passing laws governing what types of domain names can be registered by whom, and providing jurisdiction for courts over domain names themselves.

A. The Domain Name System: How It Functions, How It Is Administered, and How It Affects Users

The purpose of the DNS is to bring order to the way that computers communicate with each other. Large networks of computers use the Internet Protocol (IP) system, the internal organization system of the Internet, to communicate with one another around the globe, quickly

and inexpensively, over multiple physical paths.[18] An IP address is the numerical identifier of a particular source of data on the Internet;[19] in this sense, it works similarly to longitude and latitude coordinates for locating a physical place. Computers use these IP addresses to route information and establish connections among themselves;[20] however, the IP system is too complex for humans to interact with directly.[21]

The DNS provides an interface to the IP system that is more accessible to humans, but the two are separate in terms of legal status and operation. IP addresses cannot be owned, but are disseminated through an "address lending" method to provide for future changes and expansion.[22] A single IP address can be assigned to multiple domain names,[23] and a single domain name for a major website can point to a cluster of IP addresses, any of which may or may not be valid at a given time due to location, load, and security concerns.[24]

The DNS is distributed through millions of machines throughout the world, yet in function, it acts as a single database.[25] A domain name is organized as a hierarchy. For example, in the domain name maps.google.com, ".com" is the top-level domain (TLD), "google" is the second-level, or enterprise-level domain, and "maps" is the third-level domain.[26] Each TLD, such as .com, .org, or .gov, is administered by a single entity; for instance, the .com TLD is administered by VeriSign Global Registry Services.[27] There are over seventy-seven million enterprise-level domains

18 *Glossary*, ICANN, http://www.icann.org/en/general/glossary.htm (last modified Aug. 13, 2010).

19 *Id.*

20 Stephen M. Ryan, Raymond A. Plzak & John Curran, *Legal and Policy Aspects of Internet Number Resources*, 24 Santa Clara Computer & High Tech. L.J. 335, 336 (2008).

21 *See id.* at 338-39.

22 *Id.* at 340-41 (citation omitted).

23 For instance, multiple domain names can refer to the same website on a single server. *See id.* at 339. Also, it's possible for one computer with a single IP address to host multiple websites owned and operated by different entities. *See Name-based Virtual Host Support*, Apache, http://httpd.apache.org/docs/2.0/vhosts/name-based.html (last visited Aug. 26, 2010).

24 *E.g.*, Luiz André Barroso, Jeffrey Dean & Urs Hölzle, *Web Search for a Planet: The Google Cluster Architecture*, IEEE Micro, Mar.-Apr. 2003, at 22, 23, *available at* http://labs.google.com/papers/googlecluster-ieee.pdf (describing the user advantages of Google's complex IP-clustering service).

25 Catherine T. Struve & R. Polk Wagner, *Realspace Sovereigns in Cyberspace: Problems with the Anticybersquatting Consumer Protection Act*, 17 Berkeley Tech. L.J. 989, 1019-20 (2002).

26 Ramaswamy Chandramouli & Scott Rose, US Dep't of Commerce, NIST Special Pub. 800-81r1, Secure Domain Name System (DNS) Deployment Guide: Recommendations of the National Institute of Standards and Technology 2-2 (2009), *available at* http://csrc.nist.gov/publications/drafts/800-81-rev1/nist_draft_sp800-81r1-round2.pdf.

27 *VeriSign Internet Infrastructure: An Overview*, Verisign 5 (Oct. 26, 2007), https://www.verisign.com/corporate/internet-infrastructure-overview.pdf.

registered in the .com TLD alone.[28] The Internet Corporation for Assigned Names and Numbers (ICANN), a nonprofit corporation established by the United States Department of Commerce in 1998, assigns and coordinates management of each TLD.[29] ICANN is also responsible for accrediting registrars, companies that are authorized to sell domain names to end-users.[30] These registrars must coordinate their sales with the manager of each TLD (*e.g.*, VeriSign for .com domains) both to verify that a name is available and to register it once a user has purchased it.[31] The manager of the TLD then adds the new registration to its database and publishes it to the DNS.[32] When a user types a domain name into a web browser, the browser queries the DNS to find the IP address associated with that domain.[33] Enterprise-level domains are the focus of the controversies in the cases discussed in this Note.

B. The Anticybersquatting Consumer Protection Act and the Utah E-Commerce Integrity Act

From a registrant's, or buyer's, standpoint, domain registrations for enterprise-level domains are performed on a first come, first served basis.[34] Before 1999, an entity had no automatic *right* to a domain name if another registered it first, regardless of whether the domain in question was the company's name, trademark, or even a personal name.[35] In 1999, in response to growing concern about protection of trademark rights in domain names,[36] Congress passed the Anticybersquatting Consumer Protection Act (ACPA).[37] ACPA creates a federal cause of action for the owner of a trademark if a person "registers, traffics in," or uses in "bad faith" a domain name that is "confusingly similar to that mark."[38] The statute allows a court

28 Chandramouli & Rose, *supra* note 26.

29 *Id.* at 2-3.

30 *Information for Registrars and Registrants*, ICANN, http://www.icann.org/en/registrars/ (last visited Sept. 12, 2010).

31 Chandramouli & Rose, *supra* note 26, at 2-3.

32 *Id.*

33 *Id.* at 2-4.

34 Michael P. Allen, *In Rem Jurisdiction from* Pennoyer *to* Shaffer *to the Anticybersquatting Consumer Protection Act*, 11 Geo. Mason L. Rev. 243, 250 (2002) (citation omitted).

35 *See id.* at 251-52 & nn.50-51.

36 *See* S. Rep. No. 106-140, at 7-8 (1999) ("Legislation is needed to address these problems and to protect consumers, promote the continued growth of electronic commerce, and protect the goodwill of American businesses. Specifically, legislation is needed to clarify the rights of trademark owners with respect to bad faith, abusive domain name registration practices, to provide clear deterrence to prevent bad faith and abusive conduct, and to provide adequate remedies for trademark owners in those cases where it does occur.").

37 Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) (2006).

38 *Id.* § 1125(d)(1)(A)(ii). The definition of "domain name" in the ACPA applies only to

to order the "forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark."[39] Ordinarily, a trademark owner would bring an in personam action against the offending registrants. If the mark owner is unable to obtain in personam jurisdiction, however, ACPA also provides for an in rem action against the domain name itself.[40] The action in rem is brought to determine ownership of the domain name and the rights of parties and all other persons with regard to it.[41] An in rem action under ACPA must be brought in the jurisdiction where the registrar or registry is located.[42] In such cases, ACPA empowers the court to direct an order of forfeiture, cancellation, or transfer to the registrar of the offending domain, bypassing the domain name owner entirely. ACPA provides for civil penalties for registrars that fail to comply with such an order.[43] The statute also provides some protection for domain owners against bad faith lawsuits by trademark holders.[44]

In February 2010, Utah became the first state to pass its own version of ACPA, the Utah E-Commerce Integrity Act ("Utah Act").[45] The Utah Act provides, in addition to causes of action for phishing and pharming,[46] for in rem jurisdiction similar to that provided by ACPA over domain names in cybersquatting cases.[47] The Utah Act, however, requires the domain owner to be located in the state, even for in rem actions against the domain name itself.[48] Given this unusual limitation,[49] it is not clear whether plaintiffs will find much use in the act's in rem jurisdictional grant. The act also extends anticybersquatting protections beyond ACPA to personal names that are not trademarks;[50] however, it provides no protection, as ACPA does, for bad faith lawsuits by trademark owners against lawfully registered domains.[51] Whether the Utah statute will

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second-level domains, i.e., names registered with a domain name registrar and not to names of files, web pages, or email addresses. 2 Anne Gilson LaLonde, Gilson on Trademarks § 7A.06[1][a] (2010).

39 15 U.S.C. § 1125(d)(1)(C).

40 *Id.* § 1125(d)(2)(A).

41 *See* Black's Law Dictionary 13 (3d pocket ed. 2006).

42 15 U.S.C. § 1125(d)(2)(A); *see also* LaLonde, *supra* note 38, at § 7A.06[1][e][ii] (2010).

43 15 U.S.C. § 1125(d)(2)(D)(i).

44 *See id.* § 1125(d)(1)(B)(ii).

45 Utah Code Ann. § 13-40-101 (West, Westlaw through 2010 Sess.).

46 *Id.* § 13-40-201.

47 *See id.* § 70-3a-309(2)(a).

48 *Id.*

49 Generally, actions in rem are concerned only with the property or thing at issue and are unconcerned with the location of the property's registered owner. *See, e.g.*, Combs v. Combs, 60 S.W.2d 368, 370 (Ky. 1933) ("[A] proceeding strictly in rem is one against the thing itself with no cognizance taken of its owner or persons having a beneficial interest in it . . . .").

50 § 70-3a-309.

51 *See id. Contra* 15 U.S.C.A. § 1125(c)(16) (West 2009).

encourage other states to pass similar legislation is yet to be determined.

Congress has granted property status to domain names only with regard to trademark infringement actions.[52] However, Congress has not spoken directly on the question of whether a domain name is or can be property that might be converted or garnished by a party other than the registrant, registrar, or proper trademark holder. Such a determination has been left to the market and the courts.

II. Conflicting Precedents on Determining the Status of Domain Names

Sir Tim Berners-Lee, inventor of the protocols underlying the World Wide Web,[53] recently described the DNS as "the Achilles heel of the Web."[54] He was criticizing ICANN's ownership and administration of the DNS,[55] but his comments could apply equally well to courts' uncertain and inconsistent approaches to legal issues surrounding domain names. Any discussion of domain names necessarily involves complex explanations of technological issues, and courts strive to analogize these issues to fit within existing tort, property, and contract law frameworks. During twenty years of disputes over domain names, two opposing views have taken hold in various courts. The minority view is that domain names are primarily rights created by and bound to service contracts. The majority view is that domain names are a new type of intangible property.

A. Domain Names as Primarily Contractual Rights: Network Solutions v. Umbro

The first of the two prevailing views on the status of a domain name originated in *Network Solutions, Inc. v. Umbro International, Inc.*, a case from the Supreme Court of Virginia in 2000.[56] Umbro International won a default judgment and permanent injunction against 3263851 Canada, Inc. regarding the domain name umbro.com.[57] In its attempt to enforce the judgment, Umbro began a garnishment proceeding against Network Solutions to recover thirty-eight domain names (including umbro.com) that Canada, Inc.

52 Juliet M. Moringiello, *Seizing Domain Names to Enforce Judgments: Looking Back to Look to the Future*, 72 U. Cin. L. Rev. 95, 123 (2003).

53 Victoria Shannon, *Pioneer Who Kept the Web Free Honored with a Technology Prize*, N.Y. Times, June 14, 2004, at C4.

54 *Isn't it Semantic?*, BCS (Mar. 2006), http://www.bcs.org/serverphp?show=conWebDoc.3337.

55 *Id.*

56 Network Solutions, Inc. v. Umbro Int'l, Inc., 529 S.E.2d 80 (Va. 2000).

57 *Id.* at 81.

had registered.[58] Network Solutions responded that the domain names were not garnishable property and characterized them as only "'standardized, executory service contracts' or 'domain name registration agreements.'"[59]

The court adopted Network Solutions's theory that a domain name is "'simply a reference point in a computer database . . . [or a] vernacular shorthand for the registration services that enable the Internet addressing system to recognize a particular domain name as a valid address.'"[60] Therefore, whether a domain name is property or is not property is irrelevant to determining the rights a registrant holds because those rights are defined by the contract between the registrant and registrar.[61] The court reasoned that any rights that Canada, Inc. might have had in the domain names could not be separated from the technical services provided by Network Solutions.[62] Under this same rationale, the court sidestepped the issue of whether a domain name is a form of intangible property, despite Network Solutions' own acknowledgement during oral argument that domain names are a form of intangible property.[63] A domain name, the court held, is solely a right granted under a contract for services between the registrant and the registrar, and a contract for services is not a "liability" as defined by the Virginia garnishment statutes.[64] Because Virginia law only allows for garnishment of "liabilities," a domain name is not a form of property subject to garnishment or sheriff's sale.[65] Following this analysis, the court buttressed its holding with a floodgates argument that allowing garnishment-type actions against this kind of service contract would support other attempts to seize service contracts outside the context of domain names, a result the court clearly wished to avoid.[66]

Umbro is often cited for the proposition that a domain name is simply a contractual arrangement and therefore cannot be a property right.[67] This assertion is a misreading of the case. The Virginia Supreme Court purposely did not consider whether a domain name should be considered a type of property.[68] Rather, it declared that a domain name contract was not a

58 *Id.*

59 *Id.* (citation omitted).

60 *Id.* at 85 (alternation in original) (citation omitted).

61 *Id.* at 86.

62 *Id.*

63 *Id.*

64 *Id.*

65 *See id.*

66 *Id.* at 86-87.

67 *E.g.*, Office Depot, Inc. v. Zuccarini, 621 F. Supp. 2d 773, 777 n.6 (N.D. Cal. 2007); Alexis Freeman, *Internet Domain Name Security Interests: Why Debtors Can Grant Them and Lenders Can Take Them in this New Type of Hybrid Property*, 10 Am. Bankr. Inst. L. Rev. 853, 859-60 (2002); Warren E. Agin, *I'm a Domain Name. What Am I? Making Sense of* Kremen v. Cohen., 14 J. Bankr. L. & Prac. 73, 77 (2005).

68 *Umbro*, 529 S.E.2d at 86; *see also* Moringiello, *supra* note 52, at 108.

"liability" under the garnishment statute.[69] The court briefly acknowledged the argument that ACPA's in rem provisions could support an understanding of domain names as intangible property but did not follow the argument because ACPA does not address the contractual aspect of domain names with which the court was concerned.[70]

While the *Umbro* holding does "provide[] a consistent and structurally simple framework for determining issues surrounding domain names" in grounding them within the well-defined realm of contract law,[71] it creates more problems than it solves. First, it complicates the relationship between the registrant, who is under the impression he has purchased the domain and now "owns" it, and the registrar, who dictates all terms of the arrangement.[72] These terms are far from universal. As of 2009, there were several hundred individually-ICANN-accredited registrars, many of which are outside the United States, each of which has its own possibly unique contract provisions with registrants.[73] Many of these agreements, including Network Solutions' own service agreement, include terms that specifically restrict a registrant's right to transfer or resell the domain, though these terms are generally not enforced.[74] By the terms of these agreements, domain names are not accessible to creditors; for instance, the Network Solutions service agreement provides that any attempt by a creditor to gain rights in a domain name through judicial processes gives Network Solutions the right to cancel the domain name outright, thus depriving both the owner and the creditor of its potential value.[75] Therefore, this view of domain names as strictly contractual rights does not fit with the way domain names are actually traded in practice.

Second, the court's arguments analogizing a domain name contract to other service contracts ignore the special circumstances surrounding domain names. The court compares the domain name service contract to a contract for satellite television service, and states that allowing garnishment of a domain name would open the door to garnishment of a user's television

69 Moringiello, *supra* note 52, at 108.

70 *Umbro*, 529 S.E.2d at 86 n.12.

71 Agin, *supra* note 67, at 77.

72 *Id.*

73 *Information for Registrars and Registrants*, ICANN, http://www.icann.org/en/registrars/ (last modified Aug. 13, 2010).

74 Agin, *supra* note 67, at 79-80 ("In short, under the 'contract' theory a domain name registered with Network Solutions is not clearly transferable as a matter of law (although it is transferable as a matter of practice). . . . While, in practice, Network Solutions may never have exercised its ability to terminate a domain name under this Section 20, the legal reality is that under the 'contract' theory, a Network Solutions domain name is not freely transferable."); *see Service Agreement* § 20, Network Solutions, http://www.networksolutions.com/legal/static-service-agreement.jsp (last visited Aug. 24, 2010).

75 Moringiello, *supra* note 52, at 103; *see also Service Agreement*, *supra* note 74, § 20.

service for nonpayment.[76] This ignores the independent value that domain names have found on the secondary market. It is possible to sell a domain name on the secondary market for substantial profit.[77] The same is not true of a contract for television service. Also, a domain name can encapsulate or infringe upon trademarks or copyrights in a way that other service contracts cannot. This independent value and the possibility for infringement drive conflicts over domain names, and by attempting to reduce a domain name to a service contract, the *Umbro* court failed to address these concerns.

B. Domain Names as Intangible Property: Kremen v. Cohen

The majority view of domain names is that they are intangible property, separate from the contractual services that allow them to function. Congress impliedly supported this view in the ACPA's grant of in rem jurisdiction to domain name trademark-infringement actions.[78] This view is illustrated by the opinion of the Ninth Circuit in *Kremen v. Cohen*, where a dispute arose over the domain name sex.com.[79]

Stephen Cohen illegally obtained ownership of the sex.com domain from Network Solutions, who transferred it to him from Gary Kremen, the rightful owner.[80] After Kremen obtained a judgment against Cohen, Kremen

76 Network Solutions, Inc. v. Umbro Int'l, Inc., 529 S.E.2d 80, 87 (Va. 2000).

77 *See* Jothan Frakes, Domain Name Secondary Market: What Makes a Name Worth Thousands of Dollars and How Does This Market Work?, ICANN Meetings in Lisbon, Portugal (Mar. 25, 2007), http://www.icann.org/en/meetings/lisbon/transcript-tutorial-secondary-25mar07.htm.

78 Porsche Cars N. Am., Inc. v. Porsche.Net, 302 F.3d 248, 260 (4th Cir. 2002) ("Congress plainly treated domain names as property in the ACPA . . . .").

79 *See generally* Kremen v. Cohen, 337 F.3d 1024 (9th Cir. 2003).

80 *Id.* at 1026-27. Kremen registered the domain name sex.com in 1994 to his business, Online Classifieds. *Id.* at 1026. Cohen, a con man, forwarded a letter to Network Solutions in which Online Classifieds claimed to have dismissed Kremen, and to have abandoned the domain. *Id.* The letter further reported that Online Classifieds, *not having an Internet connection*, was requesting Cohen to contact Network Solutions on its behalf to transfer ownership of the domain to him. *Id.* at 1026-27. Network Solutions complied, making no attempt to contact Kremen. *Id.* at 1027. Cohen then made tremendous profits off the sex.com domain. *Id.* Kremen obtained a judgment against Cohen in district court for $65 million in compensatory and punitive damages, but Cohen ignored the court's order to freeze his assets and transferred them to offshore accounts. *Id.* Cohen even stripped his real estate of everything, including fixtures, and did not answer a court order to show cause why he should not be held in contempt. *Id.* The judge declared him a fugitive from justice. *Id.* Kremen then took matters into his own hands when he offered a $50,000 reward for Cohen's capture on the sex.com homepage; Cohen fled to Mexico, where his lawyers claimed that "gunfights between Mexican authorities and would-be bounty hunters seeking Kremen's reward money posed a threat to human life." *Id.* Cohen was finally arrested in 2005 on immigration charges by Mexican authorities in Tijuana and transferred to United States custody. Kieren McCarthy, *Sex.com Thief Arrested: Stephen Cohen Nabbed After Five Years on the Run*, The Register (Oct. 28, 2005), http://www.theregister.co.uk/2005/10/28/sexdotcom_cohen_arrested/.

was unable to enforce it because Cohen may have fled the country.[81] In Cohen's absence, Kremen sued Network Solutions for breach of contract and conversion.[82] The district court was reluctant to impose "the archaic principles governing the tort of conversion onto the nebulous realm of the Internet,"[83] recognizing that such a decision was perhaps better left to the legislature.[84] However, the district court and the Ninth Circuit agreed that Kremen's breach of contract claims were groundless, for he in fact had no contract with Network Solutions.[85] Kremen had registered the domain before Network Solutions had begun charging for registrations; therefore, the contract was invalid for lack of consideration.[86]

Because there was no contract between Kremen and Network Solutions, the court was not in a position to consider the *Umbro* reasoning regarding the contractual services behind a domain name. Instead, it seized upon Network Solutions' acknowledgement in *Umbro* that registrants have a property right in their domain names.[87] Following California law, the court applied a three-part test to determine whether a property right existed in a domain name:

> First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity. Domain names satisfy each criterion. Like a share of corporate stock or a plot of land, a domain name is a well-defined interest. Someone who registers a domain name decides where on the Internet those who invoke that particular name—whether by typing it into their web browsers, by following a hyperlink, or by other means—are sent. Ownership is exclusive in that the registrant alone makes that decision. Moreover, like other forms of property, domain names are valued, bought and sold, often for millions of dollars, and they are now even subject to in rem jurisdiction.
>
> Finally, registrants have a legitimate claim to exclusivity. Registering a domain name is like staking a claim to a plot of land at the title office. It informs others that the domain name is the registrant's and no one else's.[88]

Under this rationale, the court concluded that Kremen had an intangible property right in his domain name and a colorable claim for conversion.[89]

Treating domain names as a form of intangible property has implications that work both to the advantage and disadvantage of domain owners. If a

81 *See Kremen*, 337 F.3d at 1027.

82 *Id.* at 1027-28.

83 Kremen v. Cohen (*Kremen I)*, 99 F. Supp. 2d 1168, 1174 (N.D. Cal. 2000).

84 Moringiello, *supra* note 52, at 125.

85 *Kremen*, 337 F.3d at 1029.

86 *Id.*

87 *Id.*

88 *Id.* at 1030 (citations and internal quotation marks omitted).

89 *Id.*

domain name is intangible property, its owner can sidestep the problems created by inconsistent contractual agreements between multiple registrars as property status grants the owner well-defined rights that are more in line with his expectations.[90] It allows for some degree of consistency of legal treatment of domain names between state courts in actions for conversion and federal courts under the in rem provisions of ACPA.[91] On the other hand, this view of a domain as intangible property could be purposefully used to override the contractual obligations of a registrant or registrar, and it also makes the domain an asset that creditors or others may attach or garnish without permission of the domain owner.

In assuming without question that the property right in a domain name was in fact intangible, the court created another problem. The *Restatement (Second) of Torts*, in section 242, addresses conversion actions for intangible property and provides:

> (1) Where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights.
> (2) One who effectively prevents the exercise of intangible rights of the kind *customarily merged in a document* is subject to a liability similar to that for conversion, even though the document is not itself converted.[92]

A strict application of the *Restatement* precludes a conversion action for intangible property that is not "customarily merged in a document."[93] While the *Kremen* court found that this merger requirement had not been adopted in California, and thus was not a bar to its holding,[94] it addressed the merger requirement in dicta, agreeing with Kremen that a domain name is indeed merged in a document:

> We agree that the DNS is a document (or perhaps more accurately a collection of documents). That it is stored in electronic form rather than on ink and paper is immaterial. It would be a curious jurisprudence that turned on the existence of a *paper* document rather than an electronic one. Torching a company's file room would then be conversion while hacking into its mainframe and deleting its data would not.[95]

States that follow the *Restatement's* approach have not accepted this

90 Agin, *supra* note 67, at 79-80.

91 *See id.* at 82.

92 Restatement (Second) of Torts § 242 (1965) (emphasis added).

93 *Id.* 242(2).

94 *Kremen*, 337 F.3d at 1033 ("In short, California does not follow the *Restatement*'s strict requirement that some document must actually represent the owner's intangible property right. On the contrary, courts routinely apply the tort to intangibles without inquiring whether they are merged in a document and, while it's often possible to dream up *some* document the intangible is connected to in some fashion, it's seldom one that represents the owner's property interest.").

95 *Id.* at 1033-34 (internal citations omitted).

view.[96] The United States District Court for the Northern District of Texas, in *Emke v. Compana, L.L.C.*, chose to apply California law to a similar conversion action in 2007 because neither of the other viable choices, Texas or Nevada law, would allow for conversion of intangible property of this type.[97] The court held that "[t]o hold otherwise would encourage . . . cybersquatters . . . to reside and operate in states, such as Texas, where intangible intellectual property receives little or no protection from a conversion claim."[98] As demonstrated by this line of reasoning, the problems with the *Kremen* holding do not stem from the domain name system itself, but from the tort law of the states.

III. A Curious Jurisprudence: *In re* Paige

The bankruptcy court in *Paige* faced an issue similar to that in *Kremen*. Steve Paige registered freecreditscore.com in his own name with Network Solutions in May 2000.[99] Paige entered into multiple business ventures between 2002 and 2005 with different partners, doing business primarily as CCS, LLC.[100] Over the course of these partnerships, the various contract assignments for the domain name were changed from Paige to his business partners, though Paige remained the registered owner.[101] In June 2005, the registrant changed to Randy Conklin, who was under the impression that he was holding the domain for Paige.[102] Paige filed for bankruptcy in September 2005 but did not list the domain name among his assets.[103] Over the next two years, Paige entered into negotiations to sell the domain to Stephen May.[104] Unbeknownst to Paige, a third party, doing business as Promarketing, obtained ownership of the domain name and later sold it to May.[105] Gary Jubber, the liquidating trustee in Paige's bankruptcy, brought a conversion action against May and the other involved parties in order to recover the domain name for Paige's estate.[106] Jubber urged the court to accept the *Kremen* view and thereby validate the

96 *See, e.g.*, Emke v. Compana, L.L.C., No. 3:06-CV-1416-L, 2007 WL 2781661, at *3 (N.D. Tex. Sept. 25, 2007) (finding that Texas conversion law applies only to physical property).

97 *Id.* at *4, *5.

98 *Id.* at *5.

99 Jubber v. Search Mkt. Direct, Inc. (*In re* Paige), 413 B.R. 882, 888 (Bankr. D. Utah 2009).

100 *Id.* at 889-90.

101 *Id.* at 890-91.

102 *Id.* at 891.

103 *Id.*

104 *Id.* at 892.

105 *Id.* at 896-99.

106 *Id.* at 899.

estate's conversion claim.[107] The defendants pushed their view of *Umbro*, which specified that a domain name was purely a contractual right, not a property right, a conclusion that would invalidate the estate's claim.[108]

A. A Domain Name Is Tangible Property?

The *Paige* court declined to define the domain name as either a purely contractual arrangement or as intangible property.[109] The court relied in part upon the Supreme Court's ruling in *Butner v. United States*, which mandated that bankruptcy courts defer to state property laws.[110] Because the conclusions in *Umbro* and *Kremen* were based on applications of Virginia and California law, respectively, and because Utah had not adopted the same property law principles as either of those states, the court declined to apply either view to the facts at hand.[111] In a footnote, the court dismissed the *Umbro* view in responding to the defendants' assertion that Virginia law should apply under the choice of law provisions in the service contract: "[t]his would be the case if the Court were to find that domain name rights are contract rights and, therefore, governed by the Network Solutions service agreement, which the Court does not."[112] The court did not further explain why it dismissed the idea of a domain name as a contract right. The only reason given by the *Paige* court to explain its dismissal of *Kremen*'s holding was simply that a domain name is intangible property and that "Utah does not appear to have followed the same path as California on this issue."[113]

Instead, the court relied on a June 2009 decision of the United States District Court for the District of Utah in *Margae, Inc. v. Clear Link Technologies, LLC*.[114] In *Margae*, the court was asked to determine the property status of a website for purposes of a conversion action.[115] Utah law, which follows the *Restatement (Second) of Torts*,[116] restricts claims for conversion of intangible property to "intangible rights of the kind customarily merged in a document."[117] The *Margae* court held that because it was "not customary" for a website to be merged in a document, unlike a stock certificate or

107 *Id.* at 916.

108 *Id.* at 917.

109 *Id.* at 917 & n.168.

110 *Id.* at 917 n.169 (citing Butner v. United States, 440 U.S. 48, 55 (1979)) ("Property interests are created and defined by state law.").

111 *Id.* at 917.

112 *Id.* at 917 n.168.

113 *Id.* at 917.

114 *Id.*; *see* Margae, Inc. v. Clear Link Techs., LLC, 620 F. Supp. 2d 1284 (D. Utah 2009).

115 *Margae*, 620 F. Supp. 2d at 1287.

116 *Id.*

117 Restatement (Second) of Torts § 242(2) (1965).

promissory note, Utah law would not allow for conversion of a website as intangible property.[118] The court found the possibility of printing out a website to be insignificant, and it is not clear from the court's explanation whether it considered a merger in digital documents in its analysis.[119]

The plaintiff's claim, however, was not altogether defeated. The *Margae* court took the unusual step of declaring that under Utah law, a web page was tangible property.[120] The court held that like software

> a web page has a physical presence on [sic] computer drive, causes tangible effects on computers, and can be perceived by the senses. . . . Further, web pages can be physically altered by authorized users and access to web pages can be physically restricted by the use of passwords and other security measures.[121]

The court also emphasized the "distinction between the information displayed on the web page, which is intangible, and the web page itself, which acts as the medium for transmitting the information," and compared both to a memorized song, that it characterized as "truly intangible" property.[122] Because the defendant had deprived Margae of access to the web page, and because a web page was tangible property, the court held that Margae's conversion claim was valid under Utah law.[123]

The *Paige* court adopted the reasoning from *Margae* in holding that domain names were also tangible property; the court asserted that "domain names can be perceived by the senses and access to them can be physically restricted by the use of passwords and other security measures."[124] The ability to exclude others from access seemed to be the key to the court's reasoning, as the court specifically referred to the trustee being "locked out" of the domain.[125] The court invoked *Margae*'s memorized song analogy, stating that "unlike a mere idea that can only be stored in a person's mind, domain names can and do have a physical presence on a computer drive."[126] Based on this finding that a domain

118 *Margae*, 620 F. Supp. 2d at 1287.

119 *Id.*

120 *Id.* at 1287-88; *see also* Conwell v. Gray Loon Outdoor Mktg. Grp., 906 N.E.2d 805, 812 (Ind. 2009); *c.f.* Soverain Software L.L.C. v. Amazon.com, Inc., 383 F. Supp. 2d 904, 909 (E.D. Tex. 2005) (holding that a website is tangible property for purposes of a patent marking statute, where the court defined tangible items as things that can be marked with a patent notice, and intangible items as things that cannot be marked).

121 *Margae*, 620 F. Supp. 2d. at 1288 (citing S. Cent. Utah Tel. Ass'n v. Auditing Div., 951 P.2d 218, 223-24 (Utah 1997) (finding software to be tangible property)).

122 *Id.*

123 *Id.*

124 Jubber v. Search Mkt. Direct, Inc. (*In re* Paige), 413 B.R. 882, 918 (Bankr. D. Utah 2009).

125 *Id.*

126 *Id.*

name is tangible property, the court went on to find that conversion had taken place and ordered the domain turned over to the trustee.[127]

B. But Does the Paige *Court's Reasoning Make Sense?*

While a bankruptcy court's ruling is not binding on other courts, the *Paige* court's holding adds a new voice to the long-running discussion of the nature of domain names and how they fit into existing conceptions of property. Unfortunately, the reasoning it shares with *Margae* betrays a misunderstanding of the nature of the technology at issue. The *Margae* court found that a website is tangible property because it has physical presence on a disk drive, it can be perceived by the senses, and it is possible for its owner to exclude others from it.[128] The *Paige* court imported this reasoning directly into its opinion without considering whether the analogy between websites and domain names is appropriate.

Domain names and websites are interrelated, but they are by no means inseparable. Just as a call number in a library catalog is not a book itself, a domain name is not a website. The two are independent entities with different underlying technologies. A website is a collection of data files which can be stored on a single hard drive in a single computer.[129] Each of these files is uniquely identifiable, and apart from having a "physical presence"[130] on the drive, each file can be separately edited, saved, copied, and otherwise used as an independent component part of the website.[131] A website as a whole may be a complex configuration of these different files and data that are reliant upon server software,[132] but each aspect of it is usually under the control of the creator of the website. As long as one has the appropriate server software, these files can be viewed offline, individually, or in tandem, and they are not governed by sophisticated contractual or technical arrangements like the DNS. While the *Margae* court mentioned the *Restatement's* merger requirement in its opinion, it did not follow through in analyzing websites under the doctrine as the *Kremen* court did.[133] Had it done so, it easily could have found that a website, being a collection of electronic documents, indeed satisfied the

127 *Id.* at 919.

128 Margae, Inc. v. Clear Link Techs., LLC, 620 F. Supp. 2d 1284, 1288 (D. Utah 2009).

129 There are websites where files are distributed between many computers, but they are the exception rather than the norm. *See* Barroso et al., *supra* note 24, at 22.

130 *Margae*, 620 F. Supp. 2d at 1288.

131 *See* Dave Raggett, *Getting Started with HTML*, W3C, http://www.w3.org/MarkUpGuide/ (last updated May 24, 2005).

132 Such server software can be run on a web developer's individual computer as easily as on a dedicated webserver. *See, e.g.*, *About the Apache HTTP Server Project*, Apache, http://httpd.apache.org/ABOUT_APACHE.html (last visited Aug 29, 2010).

133 *Margae*, 620 F. Supp. 2d at 1287-88.

Restatement's requirement that intangible property be merged in a document.

A domain name, on the other hand, encapsulates a complex interaction between different computers and different organizations, from ICANN all the way to the registrant and end user. It is a distributed database, and no one computer contains more than a small portion of it. A domain name cannot function without this online context, and is functionally dependent on it. In this respect, the *Umbro* court was correct—a domain name cannot be separated from the services of the registrar, the TLD administrator, and the DNS as a whole—regardless of whether a contract exists between the registrant and registrar. Also, it is incorrect to treat a domain name as a document. While the *Kremen* court did find, in dicta, that the DNS is a document for purposes of the Restatement's merger requirement, it is unclear if it considered whether an individual domain name could also be a document.[134] While a database is indeed a type of document, it would be improper to consider each datum in the database a document of itself, just as it would be improper to consider each word in an essay as an individual document. A domain name is, in function, a single data point in the distributed database that makes up the DNS.[135] Thus, analogizing between a website and a domain name on the basis of technological similarity is inappropriate.

These technological differences are not all that distinguish domain names from websites. Their purposes and functions are entwined but completely different. An analogy to a library call number and a book is also apt here. A book contains information, and its primary purpose is to convey information to its reader. This content is what makes a book valuable, no matter what that content might be. A website is the same—websites are valuable only for the information they provide to their audience. The purpose of the call number, on the other hand, is to direct a reader to a certain book. The information contained in the call number is aimed solely towards locating a certain book among millions of others. A domain name serves the same purpose, in that it directs a user towards information and the websites that convey it. Even well-crafted domain names, such as freecreditscore.com, do not themselves necessarily convey trustworthy information,[136] but they only serve to direct people to the websites where the information is located. This is why there is such conflict over the use of trademarks as domain names. Without the protections Congress put in place with ACPA, there would be no reason to believe that a domain that used a famous mark is actually associated with

134 Kremen v. Cohen, 337 F.3d 1024, 1033-34 (9th Cir. 2003) ("We agree that the DNS is a document (or perhaps more accurately a collection of documents). That it is stored in electronic form rather than on ink and paper is immaterial.") (citations omitted).

135 *See* Struve & Wagner, *supra* note 25, at 1019.

136 A user has no guarantee that any given domain name is going to direct him or her to a website with valuable information. Freecreditscore.com could take a user to a website with information on obtaining a credit score for free, but it could as easily take the user to a website on a completely unrelated topic, a phishing website, or it could lead nowhere.

the owner of that mark. Therefore, drawing an analogy between a website and a domain name based on their purpose or function is also misleading.

The *Paige* court does not elaborate on how a domain name can be "perceived by the senses."[137] One can read a domain name in the location bar of a web browser, but this alone is not enough to create a property right, much less to create a tangible property right. One can read an IP address in the same manner and IP addresses, like latitude and longitude coordinates, are not property and cannot be owned.[138] The *Margae* court did not elaborate on what it means for a website to be perceived by the senses either. If one assumes, however, that "perceived by the senses" means that one can view or listen to the content of a website, this is another area where the analogy between a website and a domain name breaks down. Perception of a website involves the transfer of knowledge from the website to the viewer, whether that information is conveyed in words, images, video, or sounds. There is no comparable transfer of knowledge when a user reads a domain name. A user may associate information with a domain; for instance, a user typing freecreditscore.com into a web browser may expect to find a website that will provide his or her credit score for free, but this is only an assumption on the user's part. Until the user reaches the website in question, there is no actual transfer of knowledge, and therefore, no "perception" in any meaningful sense.

For all of these reasons, the *Paige* court's determination that a domain name is tangible property is not supported by the court's reasoning. The only remaining argument that a domain name is property because one can exclude others from access to it applies equally to tangible and intangible property. The court relied on the *Butner* principle that a bankruptcy court must defer to non-bankruptcy law, i.e., state property and tort law, when determining a debtor's interests in property,[139] as a reason not to consider *Umbro* and *Kremen* in its analysis.[140] A strict application of *Butner* to the facts of *Paige* should have precluded finding a property interest in the domain name based on the court's interpretation of Utah law regarding the application of the *Restatement's* merger requirement.[141]

IV. *Paige's* Logic is Flawed, But the Court May Have Reached the Right Conclusion Regardless

Despite the flaws in the *Paige* court's reasoning, its holding that a domain name is tangible property is still potentially useful. There is a great deal of

137 Jubber v. Search Mkt. Direct, Inc. (*In re* Paige), 413 B.R. 882, 918 (Bankr. D. Utah 2009).

138 Ryan et al., *supra* note 20, at 340.

139 Butner v. United States, 440 U.S. 48, 55 (1979).

140 *In re Paige*, 413 B.R. at 917 n.169.

141 *See id.* at 917-18.

scholarship on the exact legal status of domain names, but the claim that a domain name could be tangible property seems to be truly novel. Most courts that have considered the property implications of domain names have assumed they are intangible without considering that there could be a plausible alternative. This default assumption makes sense, as domain names cannot be held, they cannot be touched, and they can be created with a few keystrokes and a small registration fee, but that does not mean it is correct. First, a domain name does not fit well into the doctrine of intangible property as it has developed in equity. Second, the in rem provisions of ACPA seem to treat a domain name as a type of tangible property. Finally, there is a public policy argument that treating domain names as tangible property would allow for a consistent application of laws among the several States.

A. A Domain Name Does Not Have the Characteristics of Intangible Property

A domain name is incorporeal, but this may be all that a domain name has in common with most other forms of intangible property. Traditionally, property rights were vested only in real property and in tangible personal property.[142] Such rights are sometimes referred to in property scholarship as "usable wealth,"[143] a term meaning property that is "inherently exclusive and physically useful."[144] This usable wealth can be consumed, used, or traded for other goods and services. At common law, there was a strong division between property of this kind and obligations between individuals, which were not seen as conveying a property interest on the parties involved.[145] Courts of equity blurred this line by allowing the assignment of personal obligations, such as debts and corporate shares.[146] Other courts extended these intangible property interests to allow capitalization of future interests in such obligations.[147] Of course, only the benefit of these obligations was practically assignable so the property interest in such assignments was held to vest in the benefitted party rather than the burdened party.[148] Courts in equity also began allowing for division of rights in tangible property, creating, for instance, assignable future interest rights in real property.[149] Thus, new forms of intangible property rights were created by pulling

142 Sarah Worthington, *The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation*, 42 Tex. Int'l L. J. 917, 920 (2007).

143 *Id.*

144 Noah M. Schottenstein, Note, *Of Process and Product:* Kremen v. Cohen *and the Consequences of Recognizing Property Rights in Domain Names*, 14 Va. J.L. & Tech. 1, 5 (2009).

145 Worthington, *supra* note 142.

146 *Id.*

147 *Id.*

148 *Id.*

149 *See id.* at 921.

sticks from the bundle of existing tangible property rights.[150]

These circumstances surrounding the development of the intangible property doctrine have given rise to defining characteristics that are incompatible with domain names. Intangible property does not have "intrinsic and marketable value" but is only representative of the value of the obligation or information that it represents.[151] The value of intangible property is not readily evident, nor is it easily ascertained.[152] Such property is held in secret, in that existence and ownership of intangible property is not obvious to others.[153] The situs of intangible property is wherever the owner is located or domiciled.[154] These aspects of intangible property are inherent in its character as assignable personal obligations or future interests in real property.

Unlike things usually considered to be intangible property, "such as certificates of stock, bonds, and promissory notes,"[155] a domain name has intrinsic value. The large secondary market in domain names[156] and the awesome damage awards in cases such as *Kremen* prove this. While stocks are also primarily traded on a secondary market, the value of a share of stock on the market is based upon the perceived value of its issuing corporation. Domain names are independent of any entity. Their value is not strictly reliant on a website that might be tied to a domain but is solely invested in the domain name itself. Like a trademark, the domains become invested with the good will of the public so that a successor to a famous domain would benefit from using it, even if the successor's website had nothing in common with the original. Sex.com, the domain at stake in *Kremen*, was assigned to one website when Cohen controlled it, and to another once Kremen recovered it, but its value remained the same.[157] Nor is the value of a domain name in any way linked to the services provided by the registrar or the TLD administrator. These services, which involve the registry and distribution of the domain name through the DNS, are the same for a valuable domain name such as freecreditscore.com as they are for any other domain name one might register. The value is accrued and vested in the domain name itself. In this respect, domain names have more in common with chattels and other tangible property than they do with

150 *Id.*

151 *In re* Estate of Berman, 187 N.E.2d 541, 544 (Ill. App. Ct. 1963); *see also* Capital City Country Club, Inc. v. Tucker, 613 So.2d 448, 452 (Fla. 1993); Schottenstein, *supra* note 144.

152 Roth Drugs, Inc. v. Johnson, 57 P.2d 1022, 1028 (Cal. Dist. Ct. App. 1936).

153 Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 205 (1905); Rounds & Porter Lumber Co. v. Livesay, 66 F.2d 298, 299 (10th Cir. 1933).

154 *Union Refrigerator*, 199 U.S. at 205 (1905).

155 *Berman*, 187 N.E.2d at 544.

156 *See* Frakes, *supra* note 77.

157 The court in *Kremen v. Cohen* ordered only the transfer of the domain name, not the website Cohen had created. *See* Kremen v. Cohen, 337 F.3d 1024, 1027 (9th Cir. 2003).

intangible property.

Unlike intangible property, a domain name is not held secretly. The identity of the owner may not be obvious, but the fact that a domain name is owned by someone is not secret. Tangible property cannot be held in secret: the combined facts of its corporeal existence and an observer's knowledge that he is not the owner indicate to any observer that such property is either entirely un-owned, or must be owned by someone. It is not at all apparent to an observer, however, that a given individual might be the beneficiary of a debt or some other form of intangible property. Because such property rights exist only between the parties involved, they are not apparent to outsiders and are thus secret from the world at large. A domain name is not held secretly in this sense. If a person attempts to register a domain name that has already been registered, he will not be permitted to register it.[158] This denial indicates that the domain is owned by another, even if it is not actively associated with a website. This aspect of a domain name alone is more akin to tangible property than intangible property. In addition to this, one can look up the owner of a domain name in the same way one might look up the owner of real property in a community's property records. Any person can perform a WHOIS search, which searches through the records of registrars, to learn the identity and contact information of a domain name's registered owner.[159] Ownership of a domain name is thus a public action, much like ownership of real property. These comparisons demonstrate how much a domain name has in common with tangible property and how different it is from intangible property.

B. ACPA Treats Domain Names as Tangible Property

ACPA allows for in rem actions against cybersquatters to establish jurisdiction when the owner of the offending domain cannot be located.[160] Under ACPA, "[i]n an in rem action . . . a domain name shall be deemed to have its situs in the judicial district in which the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located."[161] As in rem actions can be brought against property, many courts have cited this provision of ACPA as evidence that Congress intended domain names to be treated as a type of property.[162]

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158 *Registering Domain Names*, Network Solutions, http://www.networksolutions.com/support/registering-domain-names (last visited Aug. 21, 2010).

159 *WHOIS Search for Domain Registration Information*, Network Solutions, http://www.networksolutions.com/whois/index.jsp (last visited Aug. 22, 2010). It is possible to hide this information, but this is generally accomplished through a separate, paid service on behalf of a registrar. *Id.*

160 15 U.S.C.A. § 1125(d)(2) (2009).

161 *Id.* § 1125(d)(2)(C)(i) (2009).

162 *See, e.g.*, Porsche Cars N. Am., Inc. v. Porsche.Net, 302 F.3d 248, 260 (4th Cir. 2002).

Congress did not have to provide in rem jurisdiction to allow actions against cybersquatters.[163] Even before the enactment of ACPA, the Ninth Circuit used the *International Shoe* standard to find the requisite minimum contacts for exercise of personal jurisdiction over a cybersquatter who lived outside the state.[164] The majority rule regarding minimum contacts for cases involving the Internet is a purposeful direction test, which requires that "the defendant 'must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state.'"[165] ACPA defines a cybersquatter as one who in bad faith "registers, traffics in, or uses a domain name that" is similar to an existing mark,[166] and it equates bad faith with intent.[167] For a registrant to be found to have registered a domain name in bad faith, the purposeful direction test would necessarily have to be satisfied because the registrant's actions would necessarily have to be intentional, expressly aimed at a trademark owner, and motivated by a desire to draw internet traffic from the trademark holder through consumer confusion, or to extort the trademark holder into purchasing the domain name at a large markup. It was unnecessary for Congress to provide an in rem action against cybersquatters themselves because the requirements for personal jurisdiction over such individuals are clearly met under the terms of the statute.

Congress specifically intended to legally separate a domain name from its owner by providing for an in rem action against the domain. The Senate Report that accompanied the passage of ACPA expressed Congress's intent to deal with the problems that arise when a domain registrant cannot be located:

> A significant problem faced by trademark owners in the fight against cybersquatting is the fact that many cybersquatters register domain names under aliases or otherwise provide false information in their registration applications in order to avoid identification and service of process by the mark owner. The bill, as amended, will alleviate this difficulty, while protecting the notions of fair play and substantial justice, by enabling a mark owner to seek an injunction *against the infringing property* in those cases where, after due diligence, a mark owner is unable to proceed against the domain name registrant because the registrant has provided false contact information and is not otherwise to be found.[168]

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163 *See* Allen, *supra* note 34, at 297.

164 *See* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998).

165 Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1156 (9th Cir. 2006) (quoting Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1087 (9th Cir. 2000)).

166 § 1125(d)(1)(A).

167 *See id.* § 1125(d)(1)(B)(ii).

168 S. REP. NO. 106-140, at 10 (1999) (emphasis added). Congress's goal in providing for an in rem action against a domain name itself was specifically to address the problem that

Finally, ACPA, on its face, provides for in rem jurisdiction where the registrar or registry, but not the owner, is located. The domain name, for purposes of an in rem action, stays with the registrar, not with the buyer or subsequent owner. This is a stark contrast to the classical conception of intangible property, which provides that intangible property follows its owner.[169] A domain name has a definite location for jurisdictional purposes under ACPA. A federal judge in Virginia recently ordered the transfer of a domain name where the plaintiff was not only unable to serve the defendant personally, but where the very identity of the defendant was unknown.[170] This exercise of in rem jurisdiction, where the owner of the infringing domain was unknown but unimportant to the outcome of the case, would be impossible to analogize to any common type of intangible property, but is an accepted practice with regard to real property.[171]

Congress could have provided for a domain name to follow its owner without disrupting the in rem jurisdiction of state courts. The Supreme Court has held that a state's in rem jurisdiction applies to both tangible and intangible property,[172] and a state's inability to manually seize an intangible right is not a bar to the exercise of in rem jurisdiction.[173] Courts have consistently been able to justify in rem actions against intangibles such as stock, insurance policies, and other obligations.[174] Against this background, Congress had no need to provide any situs for a domain name in ACPA because one could simply bring an in rem action against the domain name itself without regard to where it is located, and a court could determine proper jurisdictional issues and venue based on the parties involved. If one assumes arguendo that Congress considered the application of in rem jurisdiction to both tangible and intangible property when drafting ACPA, then this stands as evidence that Congress intended domain names to be treated like tangible property rather than intangible property.

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arises when one cannot sue the cybersquatter himself. Accordingly, Congress intentionally uncoupled the domain owner from the domain itself, to allow injured trademark holders "to seek an injunction against the infringing property." *Id.* The report confirms that Congress, in including the in rem provisions of ACPA, did not intend domain names to be treated under the law as contractual agreements, but rather as some type of property.

169 *See, e.g.*, Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 205 (1905).

170 Dominion Enters. v. Dominionenterprisesco.com, No. 1:09-CV-634, 2010 WL 395951, at *2 (E.D. Va. Feb. 2, 2010).

171 *See, e.g.*, Combs v. Combs, 60 S.W.2d 368, 370 (Ky. 1933).

172 Pennington v. Fourth Nat'l Bank of Cincinnati, Ohio, 243 U.S. 269, 271 (1917) (holding that "[i]ndebtedness due from a resident to a nonresident" is property to which in rem jurisdiction extends).

173 Thomas R. Lee, *In Rem Jurisdiction in Cyberspace*, 75 Wash. L. Rev. 97, 134 (2000) (citing Jellenik v. Huron Copper Mining Co., 177 U.S. 1, 14 (1900)).

174 *Id.*

C. Public Policy Encourages Domain Names to Be Treated as Tangible Property to Ensure Consistent Application of Justice Among the Several States

The court in *Paige* was faced with a difficult decision. Under Utah law, intangible property, which is not merged in a document, cannot be converted.[175] But the facts clearly established that freecreditscore.com had been effectively stolen from Paige's estate and used by Promarketing and May.[176] If the court followed the majority view that domain names are intangible property, Paige's estate would be without a remedy, and Promarketing and May would be free to profit from their ill-gotten gains. The court chose to ignore precedent and held that the conversion action was valid because a domain name is tangible property.[177] Though the reasoning the court employed to justify this holding is flawed, it is easy to understand why the court chose to find the way it did, as a matter of public policy. Disagreements over the proprietary nature of domain names, in the absence of binding authority, should not be allowed to stand in the way of providing a remedy for an obvious wrong.

This is clearly the view taken by the court in *Emke*. In *Emke*, the United States District Court for the Northern District of Texas chose to apply California conversion law to a domain dispute, though the alleged injury occurred in Texas, solely for public policy reasons.[178] Texas follows the *Restatement's* merger requirement for intangible property.[179] If the court did not apply California law, the differences in applications of tort law among the several States could provide a safe harbor for clever domain name abusers, defeating both equitable principles and Congress's intent in federalizing the cybersquatting cause of action. Treating domain names as tangible property eliminates this problem, while retaining all of the benefits domain name owners enjoy in the regularization of rights and obligations under the *Kremen* precedent. The *Restatement's* merger requirement does not apply to tangible property; there are no logical gymnastics necessary to find conversion of tangible property if the facts support such a claim. In addition to buying and selling domain names, people regularly use them in ways similar to the way they use tangible property, such as collateral for loans.[180] Holding domain names to be tangible property simplifies all of these transactions and supports the uses to which domain names are put in practice.

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175 Margae, Inc. v. Clear Link Techs., LLC, 620 F. Supp. 2d 1284, 1287 (D. Utah 2009).

176 *See* Jubber v. Search Mkt. Direct, Inc. (*In re* Paige), 413 B.R. 882, 896-98 (Bankr. D. Utah 2009).

177 *Id.* at 918.

178 *See* Emke v. Compana, L.L.C., No. 3:06-CV-1416-L, 2007 WL 2781661, at *5 (N.D. Tex. Sept. 25, 2007).

179 *Id.*

180 Freeman, *supra* note 67, at 853.

Conclusion

It is obvious from the myriad conflicts surrounding the issue of the legal status of a domain name that existing property doctrines are ill-equipped to address the Internet and the particular issues it brings before the courts. These issues are far afield from what was conceived to be possible even fifty years ago, yet courts persist in applying doctrines of law that are hundreds of years old. As the district court in *Kremen I* wrote, "[it would be imprudent for courts to] superimpos[e] the archaic principles governing the tort of conversion onto the nebulous realm of the Internet."[181] Until lawmakers decide to create a new body of law to address these issues, courts will continue to disagree as they are forced to apply archaic property concepts to these new innovations. The general lack of agreement surrounding applications of law to domain names only illustrates this need.

Treating domain names as if they are tangible property for purposes of conversion and similar claims is a reasonable stop-gap in this jurisprudential environment. Though the fit is not perfect, this approach is more advantageous to both domain name owners and courts than treating domain names as intangible property or as strictly contractual rights. The complexities of the DNS and its related technologies are arguably beyond the expertise of both the courts and juries, and the placement of domain names into a well-understood classification simplifies these issues. Despite their incorporeal nature, domain names have far more in common with tangible property than intangible property, as the latter doctrine has developed over the past century. This Note compared domain names repeatedly to different types of real and personal property, and the comparison is apt: a domain name on the Internet is like an object or a plot of land, in that it is obvious evidence of owned property to outside observers and has intrinsic value regardless of whether it has been developed or utilized. Congress also appears to endorse this view of domain names as tangible property in ACPA, and the Utah legislature, in passing the Utah E-Commerce Integrity Act, has followed Congress's lead, which may be indicative of the trends of future legislation in this area. And finally, treating domain names as tangible property makes sense from a public policy standpoint, particularly in terms of enabling an even application of law to domain names among the several States. Until legislatures specifically address the issues and problems unique to the Internet, courts should treat domain names as tangible property.

181 Kremen v. Cohen, 99 F. Supp. 2d 1168, 1174 (N.D. Cal. 2000).