Chapter 17

Domain Names as Property

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"What is in a name? That which we call a rose,

"By any other name would smell as sweet?"

—Romeo & Juliet, Act. ii, Sc.2

§ 17:1 Introduction

The advent of the Internet has changed how individuals, companies, and organizations communicate and identify themselves in cyberspace.[1] The Internet is a worldwide network of computers that enables various individuals and organizations to share information by providing computer users access to million of web sites and web pages. A web page is a computer data file that can include names, words, messages, pictures, sounds, and links to other information. Every web page has its own web site, which is its address, similar to a telephone number or street address.[2] Companies market and advertise using these web sites to maximize their presence in the cyberspace marketplace. Individuals also use Internet web sites to create forums in cyberspace to advertise products, engage in political or social commentary, or just create a personal identity on the World Wide Web.

As such, the importance of a web site to individuals, companies, and organizations is obvious as an ever-increasing number of Internet users stake their claims on the cyber frontier. Notwithstanding the importance of a web-site, its existence is of minimal value without the use of a domain name to allow Internet users to find and access the web site.

Every Internet web site has a unique alphanumeric identifier called a "domain name" that often consists of a person's name a corporate name, or a trademark. These domain

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[Section 17:1]

[1]"'Cyberspace' refers to the interaction of people and businesses over computer networks, electronic bulletin boards, and commercial online services. The largest and most viable manifestation of cyberspace is the Internet." Blumenthal v. Drudge, 992 F. Supp. 44, 49, n. 8, 26 Media L. Rep. 1717 (D.D.C. 1998) (*quoting*, R. Timothy Muth, "Old Doctrine or a New Frontier: Defamation and Jurisdictions in Cyperspace," Wis. Law. 10, 11 (Sept. 1995)).

[2]Porsche Cars North America, Inc. v. Spencer, 55 U.S.P.Q.2d 1026, 2000 WL 641209 (E.D. Cal. 2000).

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names are issued by authorized companies, known as registrars, on a first-come, first-served basis.[3]

Domain names allow individuals and businesses to obtain their presence on the Internet by providing cyberspace travelers with a simple and memorable address on the Internet superhighway. But, domain names are more than simply computer addresses. They provide a sense of identity and an exclusive vehicle to market products and ideas. It is this sense of identity and exclusivity that has caused disputes between domain name holders, domain name registrars, and third-parties concerning the extent to which someone has a property right in a domain name.

Unfortunately, in this case, as in many others, technology preceded the development of the law. The Internet's domain-name-system-technology crafted an entity that was *sui genereis* and had never previously been seen by the legal community. As such, the use of domain names has forced courts to grapple with traditional notions of contract, trademark, and tort law to determine when, and to what extent, domain names can be considered property. Although this analysis is new to the law, it has broad implications on how domain name holders deal with their Internet presence. For example, are domain names merely a contractual benefit bestowed by the applicable Internet registrar, or are they something more tangible? Can domain names be garnished or attached? Can domain names be bequeathed to heirs? Can domain names serve as a basis for *in rem* jurisdiction? Although the case law on these questions is currently developing, the initial case law demonstrates reluctance by courts to hold that there is protectable property interest in domain names. There is one major exception: courts will treat domain names as property for the purpose of establishing *in rem* jurisdiction under the Anti-Cybersquatting Consumer Protection Act. This area of the law needs to be monitored carefully since its evolution will impact important business, estate planning, and marketing decisions that domain name holders will have to make.

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[3]Porsche Cars North America, Inc. v. Spencer, 55 U.S.P.Q.2d 1026, 2000 WL 641209 (E.D. Cal. 2000).

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§ 17:2 The name game—Understanding the domain name system—The technology

The modern Internet is not a single entity over which any one organization has authority or control. Rather, it is a highly diffuse and complex global network where local computer networks are connected to regional networks that combine to form national and international high-capacity-systems.[1] The modern version of the Internet is actually an outgrowth of a military program known as "ARPANET" that was designed to allow government computers to communicate with one another by redundant channels so that the main computer system would remain operational even if one portion of the network was damaged in a war.[2] In the early 1990s, the National Science Foundation, an agency of the federal government, assumed responsibility for coordinating and funding management of the nonmilitary portion for the Internet infrastructure.[3] The Internet's complex global communication system allows computers to communicate us-

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[Section 17:2]

[1]Panavision Intern., L.P. v. Toeppen, 141 F.3d 1316, 1318, 46 U.S.P.Q.2d 1511 (9th Cir. 1998); Porsche Cars North America, Inc. v. Spencer, 55 U.S.P.Q.2d 1026, 2000 WL 641209 *1*n.4 (E.D. Cal. 2000); Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 951, 44 U.S.P.Q.2d 1865, 152 A.L.R. Fed. 793 (C.D. Cal. 1997), judgment aff'd, 194 F.3d 980, 52 U.S.P.Q.2d 1481, 44 Fed. R. Serv. 3d 1207 (9th Cir. 1999); *see* Dan L. Burk, Federalism in Cyberspace, 28 Conn. L. Rev. 1095, 1097 (1996).

[2]Reno v. American Civil Liberties Union, 521 U.S. 844, 850–54, 117 S. Ct. 2329, 2334–2336, 138 L. Ed. 2d 874, 25 Media L. Rep. 1833 (1997) (providing a history and overview of the Internet in addressing the constitutionality of the Communications Decency Act). The Supreme Court has noted the Internet's extraordinary growth. The number of network computers storing and relaying communications increased from about 300 computers in 1981 to approximately 9,400,000 by 1996. Id.

[3]Seven Words LLC v. Network Solutions, 260 F.3d 1089 (9th Cir. 2001). The National Science Foundation is an independent agency of the United States government, established by the National Science Foundation Act of 1950, as amended, 42 U.S.C.§ 1861, et seq. It was given additional authority by the Science & Emergency Equal Opportunities Act, 42 U.S.C. § 1885, and Title I of the Education for Economic Security Act, 20 U.S.C. §§ 3911–3922.

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ing a language known as Transmission Control Protocol/ Internet Protocols ("TCP/IP").[4]

Under the TCP/IP system, each computer connected to the Internet is assigned one or more unique numerical addressees, analogous to a computer zip code, that is the computer's IP address.[5] The IP address contains four sets of numbers that range from 0 to 255 (example: 206.156.18.122). Rather than having a system that required users to remember these numbers, a domain name system ("DNS") was developed that allows users to locate and travel to various web sites using a familiar string of letters. The DNS then converts the domain name into the appropriate IP address.

The DNS allows users to identify websites using alphanumeric text within the Uniform Resource Locator ("URL"). For example, a user looking for the law firm of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. would type http://www.Mintz.com. The DNS establishes multiple domain levels. The top level, which is the suffix to the URL, identifies the general nature of individual or organization using the IP address. For example, commercial entities are identified with ".com"; governmental entities use ".gov"; educational entities use ".edu." The second-level domain identifies the specific person or entity holding the IP address (*e.g.*, "Mintz" in http://Mintz.com). It is the second-level domain name that is so important to individuals and businesses because it is a source of identity and often contains a trademark or other form of intellectual property. (*See* Chs 13–16).

§ 17:3 —The administrators of the domain name system past & present

Administration of Domain Names

In the early 1990's, when the National Science Foundation assumed responsibility for the management and administra-

[4]Seven Words LLC v. Network Solutions, 260 F.3d 1089 (9th Cir. 2001) (citing A Close-up of Transmission Control of Transmission Control Protocol/Internet Protocol (TCP/IP), Defamation (Aug. 1, 1988); Name. Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 576–78 (2d Cir. 2000) (antitrust case discussing the technology behind the Internet).

[5]Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 576 (2d Cir. 2000); *see also* Management of Internet Names & Addresses, 63 Fed.Reg. 31,741 (1998).

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tion of the Internet system in the United States, it decided to contract out the service of providing nonmilitary domain name registration. Through a competitive bid process, Network Solutions, Inc. ("NSI") entered into a Cooperative Agreement with the National Science Foundation "NSF".[1] From the early 1990s; until June, 1999, NSI had the exclusive authority to register second-level domain names to the public for the top-level Internet domain names: ".com," ".net," ".edu," and ".org."

As the exclusive registrar of domain names, NSI, in exchange for a small registration fee, would register domain names on a first-come, first-served basis. Although NSI would ensure that no two parties registered the same domain name, it would not check to see if a domain name request was related to an existing trademark, nor would NSI determine that the applicant had the right to use the domain name.[2]

In September, 1998, NSF transferred responsibility for administering the Cooperative Agreement with NSI to the Department of Commerce due to the rapid growth of the Internet as business medium. Two months later, in response to a presidential initiative to privatize, increase competition, and promote international participation in the domain name system, the Department of Commerce transferred control of Internet domain names from the government to a private, nonprofit corporation, Internet Corporation for Assigned Names and Numbers ("ICANN"). ICANN was then responsible for overseeing the transition from a sole-registrar to a multiple-registrar system.[3]

(*See* Ch 16).

However, once a user has registered a domain name on the Internet, does he/she have a property right in that domain name separate and apart from any intellectual property rights under applicable trademark or copyright law?

[Section 17:3]

[1]Seven Words LLC v. Network Solutions, 260 F.3d 1089 (9th Cir. 2001).

[2]Seven Words LLC v. Network Solutions, 260 F.3d 1089 (9th Cir. 2001); Panavision Intern., L.P. v. Toeppen, 141 F.3d 1316, 1318–1319, 46 U.S.P.Q.2d 1511 (9th Cir. 1998); Porsche Cars North America, Inc. v. Spencer, 55 U.S.P.Q.2d 1026, 2000 WL 641209 (E.D. Cal. 2000).

[3]Seven Words LLC v. Network Solutions, 260 F.3d 1089 (9th Cir. 2001); 63 Fed. Reg. 31741, 31744, 31749 (June 10, 1998); 63 Fed. Reg. 8826; 8826–27 (Feb. 20, 1998).

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The answer is far from clear and often depends upon the context in which the question arises.

§ 17:4 To be or not to be—Domain names as property in various contexts—Garnishment

Garnishment is a statutory remedy that allows a creditor to satisfy a debt using property or money in the possession of, or owing to, a third party. In 2000, the Virginia Supreme Court was faced with an issue of first impression: Can a contractual right to use a domain name be garnished?[1] In *Umbro*, Umbro International, Inc. had obtained a default judgment and permanent injunction against a Canadian corporation and its owner based on its use of the domain name "http://umbro.com." Umbro International, Inc. then sought to garnish thirty-eight domain names that the Canadian corporation had registered with Network Solutions, Inc. Network Solutions, Inc. asserted that it possessed no money or other garnishable property and that Umbro International, Inc. was seeking to garnish domain name registration agreements. Network Solutions, Inc. asserted that a domain name "is simply a reference point in a computer database."

The trial court held that domain names were a valuable new form of intellectual property that is subject to garnishment.[2] The Virginia Supreme Court disagreed and reversed the trial court. Although the Court recognized that domain names may constitute a form of intellectual property, such a classification was not dispositive of the garnishment issue. Rather, the Virginia Supreme Court focused on the Virginia garnishment statute holding that the contractual right to exclusively use a domain name for a set period of time does not exist separate and apart from the services that make a domain name an operational Internet address. In short, the Court stated, "If we allow the garnishment of

[Section 17:4]

[1]Network Solutions, Inc. v. Umbro Intern., Inc., 259 Va. 759, 529 S.E.2d 80, 54 U.S.P.Q.2d 1738 (2000).

[2]Because of the intangible nature of domain names, the trial court directed the sheriff's office to sell the domain names and then inform Network Solutions, Inc. of the names of the new owners so that new domain name registrations could be completed. Network Solutions, Inc. v. Umbro Intern., Inc., 259 Va. 759, 529 S.E.2d 80, 82, 54 U.S.P.Q.2d 1738 (2000).

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NSI's services in this case because those services create a contractual right to use a domain name, we believe that practically any service would be garnishable."[3] In rejecting Umbro's focus on the domain name itself, separate and apart from the right to use the service established by Network Solutions, Inc., the Court adopted the analogy that domain names were similar to telephone numbers. The Court reasoned that while a phone number might constitute a unique property interest for a business in that it helps customers locate the business through its publication in phonebooks and billboards, a phone number's value cannot be separated from the business' contract for service with the telephone company.[4] While acknowledging that domain names are commonly sold as assets, the court was unwilling to hold that they could be garnished. "Although, as Umbro points out, domain names are being bought and sold in today's marketplace, we are not willing to sanction the garnishment of NSI's services under the terms of our present garnishment statutes."[5]

Both Chief Justice Carrico and Senior Justice Compton dissented in a strongly-worded opinion. The dissent noted that domain names are clearly a form of intangible property in which Umbro International, Inc. had an immediate possessory interest. The dissent vigorously attacked the majority's adoption of Network Solutions, Inc.'s assertion on domain names. "However, NSI contends that the judgment debtor's contractual rights are not subject to garnishment because they allegedly are contingent, dependent on unperformed conditions, or are like personal services. The major-

[3]Network Solutions, Inc. v. Umbro Intern., Inc., 259 Va. 759, 529 S.E.2d 80, 86–87, 54 U.S.P.Q.2d 1738 (2000). Other courts have also adopted the analogy between telephone numbers and domain names. *See* Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 957–958, 44 U.S.P.Q.2d 1865, 152 A.L.R. Fed. 793 (C.D. Cal. 1997), judgment aff'd, 194 F.3d 980, 52 U.S.P.Q.2d 1481, 44 Fed. R. Serv. 3d 1207 (9th Cir. 1999) (holding that registration of a domain name, like a vanity telephone number, without more, does not constitute use of the name as a trademark).

[4]*See* Network Solutions, Inc. v. Umbro Intern., Inc., 259 Va. 759, 529 S.E.2d 80, 87, 54 U.S.P.Q.2d 1738 (2000) ("We are cognizant of the similarities between a telephone number and an Internet domain name and consider both to be products of contracts for services.").

[5]Network Solutions, Inc. v. Umbro Intern., Inc., 259 Va. 759, 529 S.E.2d 80, 88, 54 U.S.P.Q.2d 1738 (2000).

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ity erroneously has bought into this idea."[6] The dissent focused on Network Solutions, Inc.'s full performance under the contract. It accepted the registration fee for the domain name and provided the judgment debtor with the current exclusive right to use the domain name. As such, the dissent reasoned that the judgment creditor had a right to garnish the judgment debtor's valuable intangible property right.

But, while the trial court's decision in *Umbro* was on appeal to the Virginia Supreme Court, the District Court for the Eastern District of Virginia also had the opportunity to address the question of whether domain names were garnishable.[7] In *Dorer v. Arel*, a trademark holder sued an alleged infringer and obtained a default judgment along with statutory damages. When the money judgment remained unsatisfied, the plaintiff sought to garnish the defendant's Internet domain name. The court ultimately held that it did not need to decide the issue because the domain name registrar provided a method for obtaining the infringing domain name. Nevertheless, in dicta, the court remained very skeptical of the theory that a domain name constitutes property.

While recognizing the trial court's ruling in *Umbro*, the court found the notion of placing a lien on domain names problematic for numerous reasons. First, as a practical matter, it is unclear what system the executing sheriff would be required to take in order to seize a domain name.[8] Second, a domain name that is not a trademark is essentially a computer address and obtains its value from the registration agreement entered into between the domain name holder and the registrar.

> Thus, a judgment debtor "owns" the domain name registration in the same way that a person "owns" a telephone number. A telephone number can be a valueless means of reaching a party, or it can be an extremely valuable commercial tool. In most cases, a domain name registration is valueless apart from the way it is used by the entity with rights to it, and if the only value that comes from transfer of the domain name is from the value added by the user, it is

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[6] Network Solutions, Inc. v. Umbro Intern., Inc., 259 Va. 759, 529 S.E.2d 80, 89, 54 U.S.P.Q.2d 1738 (2000).

[7] Dorer v. Arel, 60 F. Supp. 2d 558 (E.D. Va. 1999).

[8] Dorer v. Arel, 60 F. Supp. 2d 558, 560 n.8 (E.D. Va. 1999) (comparing the seizure of intangible personal property, such as stock, which is accomplished by taking control of the stock certificates).

inappropriate to consider that an element subject to execution.[9]

Ultimately, the *Dorer* Court declined to resolve the ultimate issue, holding that, the knotty issue of whether a domain name is personal property subject to the lien of fieri facias ultimately need not be resolved because there is a more readily available, practical solution to the problem found in NSI's policies. This "knotty issue" was resolved, at least for Virginia courts, by the appellate decision in *Umbro*.[10]

The questions whether a domain name constitutes personal property has also arisen in lawsuits between domain name holders and their registrars based upon the registrar's administration of registered domain names.

§ 17:5 —Conversion

The tort of conversion exists where an individual intentionally exercises dominion or control over the property of another that substantially interferes with the rights of the true owner.[1] Individuals who have had their domain names given to other entities have sued the registrars and others under a tort theory of conversion arguing that their domains constitute property that can be converted. Courts have been split on this issue.[2]

In *Kremen v. Cohen*, Gary Kremen registered the domain name http://sex.com with Network Solutions, Inc. Subsequently, Network Solutions, Inc. assigned the domain name

[9]Dorer v. Arel, 60 F. Supp. 2d 558, 561 & n.13 (E.D. Va. 1999) (analogizing domain names to alphanumeric phone numbers, such as "1-800-COLLECT" or "1-800-FLOWERS").

[10]Before the Virginia Supreme Court issued its decision in *Umbro*, the District Court for the Northern District of California relied on the trial court's decision in *Umbro* holding in a Lanham Act case that an infringing domain name was subject to an equitable lien since "a domain name is intellectual property and may be attached under the law." Online Partners.Com, Inc. v. Atlanticnet Media Corp., 2000 WL 101242, * 9 (N.D. Cal. 2000) (citing Network Solutions v. Umbro Intern., 50 U.S.P.Q.2d 1786, 1999 WL 117760 (Va. Cir. Ct. 1999), rev'd, 259 Va. 759, 529 S.E.2d 80, 54 U.S.P.Q.2d 1738 (2000)).

[Section 17:5]

[1]Restatement (Second) of Torts § 222A.

[2]Kremen v. Cohen, 99 F. Supp. 2d 1168 (N.D. Cal. 2000) (holding that domain name was not property capable of being converted).

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to another individual, which caused Mr. Kremen to bring an action against Network Solutions, Inc. alleging, *inter alia*, conversion. The Court focused on California conversion law which recognized that conversion applied to tangible property as well as intangible property represented by documents, such as bonds, notes, and stock certificates.[3] In granting summary judgment to Network Solutions, Inc., the Court refused to extend the law of conversion to cover intangible property never contemplated by the tort. Rather, the Court stated that the legislature was in a better position to fashion remedies to protect domain names otherwise unprotected by trademark law.[4]

Registered domain name holders have also pursued contract theories of recovery against their registrars for the alleged misuse of their property interest in their domain name.

§ 17:6 —Breach of implied duty of good faith & fair dealing

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[1] In *Zurakov v. Register.Com*, a domain name holder attempted to recover under this contract theory.[2] Mr. Zurakov, who had registered his domain name "Laborzionsit.org" with http://Register.Com, alleged that Register had breached its duty of good faith and fair dealing under its registration agreement by failing to inform him that his domain name would be linked to Register's "Coming Soon Page" while the "Laborzionist" web page was being built. Mr. Zurakov alleged that since Register's "Coming Soon Page" contained advertisements for Register and other businesses, it had interfered with his exclusive property right in his domain name and deprived him of benefits under his registration agreement.

[3]California conversion law does not recognize intangible property such as "good will of business, trade secrets, a newspaper route, or a laundry list of customers." Kremen v. Cohen, 99 F. Supp. 2d 1168, 1172–1173 (N.D. Cal. 2000).

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

[Section 17:6]

[1]Restatement (Second) Contracts § 205 (1979).

[2]Zurakov v. Register.Com, 8 Internet L. & Reg. 312 (N.Y. Sup.Ct. Aug. 2001).

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In this case of first impression for New York, the New York Supreme Court dismissed Mr. Zurakov's claims adopting the Virginia Supreme Court's reasoning in *Umbro* that domain names are products of registration contracts. As such, a domain name holder has a contract right, but no property right unless trademark or patent issues are implicated. Since Mr. Zurakov's registration agreement made it clear that his domain name would be linked to the "Coming Soon Page", he lacked any basis for a contract claim against Register.

§ 17:7 Property by any other name—*In rem* property

Although courts have been reluctant to hold that domain names constitute property for the purposes of garnishment, conversion, or breach of contract claims, they have been willing to recognize them as a form of intangible property for the purposes of establishing *in rem* jurisdiction under the Anti-Cybersquatting Consumer Protection Act ("ACPA").[1]

In *Lucent v. Lucentsucks.com*, the Court dismissed an *in rem* action brought by Lucent Technologies against an Internet domain name holder under ACPA because Lucent had located the registered domain name owner, but did not attempt to obtain personal jurisdiction over the individual defendant.[2] Although the Court dismissed the action based on Lucent's failure to comply with the jurisdictional requirements of ACPA, it summarily rejected the registered domain name owner's argument that Lucent could not maintain an *in rem* action because an Internet domain name is not a tangible "thing" capable of constituting a *res* for purposes of

[Section 17:7]

[1]Online Partners.Com, Inc. v. Atlanticnet Media Corp., 2000 WL 101242 (N.D. Cal. 2000); Lucent Technologies, Inc. v. Lucentsucks.com, 95 F. Supp. 2d 528, 54 U.S.P.Q.2d 1653 (E.D. Va. 2000).

[2]The ACPA amended the Lanham Act, 15 U.S.C. § 1125, to provide that a plaintiff may proceed with an in rem action against a domain name if and only if the Court finds that either the plaintiff is unable to obtain in personam jurisdiction over the domain name registrant, or that the plaintiff is unable to find the domain name registrant. Lucent Technologies, Inc. v. Lucentsucks.com, 95 F. Supp. 2d 528, 531, 54 U.S.P.Q.2d 1653 (E.D. Va. 2000); *see also* 15 U.S.C. § 1125(d)(2)(A)(ii). In this case, the Court found that Lucent had initiated the in rem action too hastily after mailing and e-mailing the notice of the proposed action to the registrant of http://Lucentsucks.com.

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establishing *in rem* jurisdiction.[3] The Court stated that the very terms of the statute dispose of the issue.

> There is no prohibition on a legislative body making something property. Even if a domain name is no more than data, Congress can make data property and assign its place of registration as its situs.[4]

Other courts have come to similar conclusions.

In *Caesars World, Inc. v. Caesars-Palace.Com*, the plaintiff trademark owner brought an *in rem* action under the ACPA seeking cancellation of infringing Internet domain names.[5] The domain holders moved to dismiss the complaint asserting ACPA's *in rem* provisions were unconstitutional because domain names are not a proper kind of entity to serve as a *res*. The domain name holders argued that domain names were merely data that forms the part of an Internet addressing computer protocol, and as such, does not constitute property. The Eastern District Court of Virginia disagreed. "There is no prohibition on a legislative body making something property. Even if a domain name is no more than data, Congress can make data property and assign its place of registration as its situs."[6]

§ 17:8 Conclusion

Courts have been both inconsistent and reluctant in analyzing whether Internet domain names constitute property. Unless, there is specific statutory authority establishing the status of domain names as a form of property, courts are apt to find a way to either avoid the issues or draw arbitrary distinctions between domains names and other forms of property. However, given the growth and expansion of the Internet and Domain Names System, courts will continue to be faced with this interesting and developing issue.

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[3]Lucent Technologies, Inc. v. Lucentsucks.com, 95 F. Supp.2d 528, 534–535 (E.D. Va. 2000).

[4]Lucent Technologies, Inc. v. Lucentsucks.com, 95 F. Supp. 2d 528, 535, 54 U.S.P.Q.2d 1653 (E.D. Va. 2000).

[5]Caesars World, Inc. v. Caesars-Palace.Com, 112 F. Supp. 2d 502, 54 U.S.P.Q.2d 1121 (E.D. Va. 2000).

[6]Caesars World, Inc. v. Caesars-Palace.Com, 112 F. Supp. 2d 502, 504, 54 U.S.P.Q.2d 1121 (E.D. Va. 2000)

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