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ARE DOMAIN NAMES PROPERTY? THE SEX.COM CONTROVERSY

Introduction

Do domain names constitute tangible property? Since domain names may be purchased or transferred, the answer at first glance would appear to be "yes". Congress has also dictated that domain names corresponding closely to existing trademarks may be considered tangible property under certain circumstances.¹ However, a recent case involving the lurid and lucrative domain name "sex.com" has determined otherwise.² This iBrief examines the impact of characterizing domain names as tangible or intangible property on the causes of action available for domain name litigation.

sex.com

¶ 1 Recognizing that sex.com could be a profitable website name, Gary Kremen registered the site with domain name registrar Network Solutions, Inc. (NSI) in 1994. Because he was focused on his internet dating site, match.com, Kremen did not develop a website for the sex.com address. In 1995, convicted felon Stephen Michael Cohen noted that the sex.com space was not being utilized on the web and devised a plan to have the domain name transferred to him. After forging a letter asking NSI to transfer sex.com from Kremen to Cohen's corporation, Cohen developed a multimillion dollar pornography website at sex.com. Kremen sued under six different causes of action to reclaim the domain name sex.com in 1998, of which two were conversion claims.

Tangible or Intangible Property?

¶ 2 *Kremen v. Cohen* questioned whether domain names could be subject to common law conversion, a tort typically reserved for tangible property.³ The court determined first that domain names constitute intangible property.⁴ Reluctant to expand the traditional scope of conversion, the court then held that intangible property could not be subject to conversion unless it was represented by something tangible, such as a stock certificate.⁵ However, the court's characterization of domain names as intangible property gave Kremen a potential basis for appeal. Kremen will challenge the district court's refusal to recognize a protected property

interest in domain names by relying on the recent revival of trespass to chattels.

Trespass to Chattels

¶ 3 Recently, two courts have recognized trespass to chattels as a cause of action in intangible property cases involving telecommunications and electronic commerce.⁶ Trespass to chattels is a lesser form of conversion existing when an intentional interference with the possession of personal property has proximately caused injury to the plaintiff.⁷ Since trespass to chattels originally required physical contact with another's property, these courts have determined that electronic signals touching a server or telephone system are sufficiently tangible to support a trespass cause of action.⁸

¶ 4 Under current law, trespass to chattels will probably not extend to the sex.com case. Because a domain name is considered intangible property, it is distinguishable from a server or telephone system. Courts may find it difficult to find a possessory interest in the domain name unless a physical locus, such as a server, exists which may be trespassed by electronic signals. Cohen did not trespass on Kremen's server with electronic signals; rather, he usurped Kremen's domain name and employed his own servers to create the website. Suppose Cohen successfully convinced AT&T to reassign a 1-800 number from Kremen to Cohen. If Kremen sued Cohen for trespass of chattels regarding his telephone lines, the action would fail because Cohen used only the 1-800 number and did not touch Kremen's telephone lines with any electronic signals. Although the 1-800 number may have some intangible property value, Kremen's action would succeed only if the court chose to extend the tort to cover intangible property.

Conclusion

¶ 5 Although the District Court ultimately decided to return registration of sex.com to Kremen, he is currently seeking monetary damages on appeal, arguing that domain names do not constitute tangible property. In addition to examining whether domain names constitute tangible or intangible property, the Ninth Circuit will have the opportunity to decide whether trespass to chattels is appropriate in the domain name context. If not, it will likely remain for the legislature to determine the best cause of action for resolution of generic domain name disputes.

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Footnotes

1. David Dolkas and S. Tye Menser, *Is a Domain Name Property?* Journal of Internet Law, http://www.graycary.com/articles/interest/interest_42.html(Nov. 2000).

2. *Kremen v. Cohen*, 99 F. Supp. 2d 1168, 1173 (N.D. Ca. 2000).

3. *Id.*

4. *Id.*

5. *Id.*

6. *See Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468, 473 (Cal. App. Ct. 4th Dist. 1996); *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1069 (N.D. Ca. 2000).

7. *Thrifty-Tel*, 54 Cal Rptr. 2d at 473.

8. *Thrifty-Tel*, 54 Cal Rptr. 2d at 473; *eBay*, 100 F. Supp. 2d at 1069.