When Can A State Seize Domain Names *In Rem*?

By Kristine Fordahl Dorrain

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Editor's Note: On January 20, 2009, the Kentucky Court of Appeals granted the petitioners' and amici's requests to overturn the trial court's ruling authorizing the seizure by the Commonwealth of Kentucky of domain names owned by operators of gambling websites located outside of the Commonwealth of Kentucky. Interactive Media Entertainment and Gaming Association v. Wingate ex rel Kentucky, 08-CI-01409 (Ky. Ct. App. Jan. 20, 2009). Nonetheless, the story below remains relevant, as we cannot know that other jurisdictions, in or out of this country, will not go down this path again.

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Does a state court have jurisdiction to seize domain names registered by non-United States individuals simply because the domain name registrants have websites that are freely accessible throughout the world? Should domain name registrants be expected to face lawsuits in any locale where their website might be accessed? Which laws apply to a domain name registrant as they set up their website? These questions have been touched on, skirted, and addressed by a variety of United States courts, but none with quite so much audacity as a circuit court in Kentucky.

In September 2008, Judge Wingate for the Franklin Circuit Court in the Commonwealth of Kentucky, in *Commonwealth of Kentucky ex rel. Brown v. 141 Internet Domain Names*, No. 08-CI-1409, (KY Cir. Ct. 2008), took unprecedented steps to enforce Kentucky's statewide gambling ban. In an *ex parte* hearing, the Commonwealth requested that the Court seize 141 Internet Domain Names for alleged connections to online gambling services available to the residents of Kentucky. The Court agreed to the Commonwealth's request on September 18; the "seizure" consisted of an order to transfer registrations for the 141 Internet Domain Names to the Commonwealth's

accounts. After additional *amici* entered the litigation, further hearings were held. The court then issued its Opinion and Order on October 16, 2008, allowing the seizure.

The seizure by Kentucky raises profound implications for the concept of *in rem* jurisdiction over Internet domain names and the governance of the Internet in general. The facts, and the Court's order, have raised significant concerns among those lawyers who advise clients on Internet domain names. If allowed to proceed, the forfeiture would upset a number of commonly-held understandings about the powers of states to act on domain names, and the businesses that use them, even when located entirely outside of the state's borders.

The court, in its October 16th opinion, found that it has subject matter jurisdiction over the civil forfeiture claim because Kentucky law prohibits gambling in the Commonwealth, the 141 Internet Domain Names are being used for online gambling that is accessible within the Commonwealth, and the statute authorizes forfeiture of gambling devices.

The court further found that the 141 Domain Names are property and that they have a "presence" in Kentucky; they are therefore subject to *in rem* jurisdiction. Certainly, in this case, no domain name registries, registrars or registrants are to be found in Kentucky. Judge Wingate relies on *Shafer v. Heitner,* 733 U.S. 186 (1977), for the proposition that *in rem* jurisdiction is subject to the fairness standard articulated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and that *in rem* jurisdiction is now subject to a "minimum contacts" review. The court's logic indicates that, because domain names are property and domain name owners make those domain names resolve to content available online without restrictions, *in rem* jurisdiction exists in whatever location the website may be viewed.

Assuming that *in rem* jurisdiction, post *Shafer*, requires a “minimum contacts” analysis, a California court noted, of minimum contacts, in 1996:

> Because the Web enables easy world-wide access, allowing computer interaction via the web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently stands; the Court is not willing to take that step. Thus the fact that [defendant] has a website used by Californians cannot establish jurisdiction by itself.

McDonough v. Fallon McElligott Inc., 40 U.S.P.Q.2d 1826, 1828 (S.D. Cal. 1996).

Lawyers and governments around the world certainly act as if the court in the California case is correct. For instance regimes in the rest of the world, in seeking to prohibit access to material protected by our Constitution, but illegal elsewhere (such as political speech, women’s rights issues, pornography, and historical information) have learned to deny their citizens access to a variety of content the regimes find objectionable.

The court mentions the notion raised in *International Shoe* and again in *Shaffer* regarding a “reasonable expectation of being hauled into court,” but does not identify how a website operator halfway around the world, participating in an activity legal in his home country, could reasonably expect to be hauled into a court in the United States. Such a person would not have that “reasonable expectation” any more than a Kentucky website operator would expect to have his domain name seized by a Chinese court for posting a true historical account of the massacre at Tiananmen Square in violation of Chinese law.

On October 22, 2008, *amicus* Interactive Media Entertainment and Gaming Association filed an Appeal requesting an Original Proceeding with the Commonwealth of Kentucky Court of Appeals against Judge Wingate, the Commonwealth, and Jack Conway, Attorney General for the Commonwealth, and asking for a stay of Judge Wingate’s October 16, 2008. Amici include the Electronic Frontier Foundation, the Center for

Democracy and Technology, and the American Civil Liberties Union. On November 13, 2008, the Kentucky Court of Appeals granted the request and a hearing was set for December 12, 2008, in *Vicsbingo.com, et al. v. Wingate, et al.*, Ky. Ct. App., No. 08-2036.

About The Author: Kristine Dorrain is an attorney with Forthright and manages the domain name dispute resolution program for the National Arbitration Forum. This article reflects Kristine's views only and does not reflect the views of Forthright, the National Arbitration Forum or any ABA Committee. Kristine thanks Michael Fleming and Warren Agin for their assistance and review of the finer points of this article.