



NAVIGATING THE BANKRUPTCY WATERS IN A DOMAIN NAME ROWBOAT

BEVERLY A. BERNEMAN

ABSTRACT

The combination of rapidly emerging technologies and changes in intellectual property and information technology law has resulted in new species of property and contract rights, such as Internet domain names. While some laws that were enacted before the rise of the Internet cannot be reconciled with the issues raised by domain names, the Bankruptcy Code appears to be equipped with the tools to handle most issues raised by this new species of property. This article discusses how domain names are treated during bankruptcy, how the Bankruptcy Code can be used to protect the function and value of a debtor's domain name, and finally, how a non-debtor's interests in a domain name can be protected during bankruptcy.

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BEVERLY A. BERNEMAN *

INTRODUCTION

As our society moves from an industrial based society to an information based society, the importance of the domain name to the success of emerging and existing businesses will grow. Inevitably, a certain number of companies will need to seek protection in bankruptcy when they hit a bump in the road to prosperity. In a bankruptcy proceeding, the treatment of the debtor's domain name will become a critical issue.

Domain names have sometimes been referred to as the "real estate of cyberspace."¹ A business' domain name can effect whether or not users are drawn to its website. Although it has value to a business, disputes have arisen as to whether the domain name itself constitutes "property." Other issues with domain names include: a) whether a domain name is separate from good will; b) whether a domain name is simply a component of service contracts between the registrar and registrant and thus not property; and c) whether a domain name is a license?²

Divergent views of how to characterize domain names limit the maturing process of e-commerce.³ These same divergent views can impact a bankruptcy case to the detriment of all involved. For example, if a domain name is not considered property in a bankruptcy proceeding then, a) a reorganizing debtor would be deprived of the use of a valuable identifier of its company; b) a registrar would be unable to determine if canceling a registration would violate the automatic stay in bankruptcy; c) a creditor would be unsure of whether it could proceed against a domain name without violating the automatic stay in bankruptcy; d) lenders would be unsure if their security interest in a domain name would be protected in a bankruptcy; e) the reorganizing debtor would be unsure as to whether it can continue to use the domain name without assuming the registration agreement; f) a bankruptcy trustee would be unable to sell a domain name and maximize the distribution to unsecured creditors; or g) the purchaser or assignee of a domain name from a bankruptcy trustee or debtor would be unsure of its interest in the domain name.

In order to address these issues, this article will first examine the attributes of a domain name as property, the treatment of domain names as property, and the

* Beverly Berneman, J.D., LL.M., holds a Masters of Law in Intellectual Property and is an adjunct professor at The John Marshall Law School. Her practice concentrates in the areas of bankruptcy, commercial law, and intellectual property law.

¹ Xuan-Thao N. Nguyen, *Cyberproperty and Judicial Dissonance: The Trouble with Domain Name Classification*, 10 GEO. MASON L. REV. 183, 184 (2001).

² See Alexis Freeman, LL.M. Thesis, *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, 857-60 (2002); Nguyen, *supra* note 1, at 183-84 (discussing the controversy over whether a domain name is property).

³ Nguyen, *supra* note 1, at 183-84.

treatment of domain name "registration agreements"⁴ as executory contracts. Then, the article explores how the Bankruptcy Code⁵ will handle a domain name.

I. THE ROLE OF THE "DOMAIN NAME"

A. Function of the Internet

The Internet began on a United States military computer, and now interconnects computers around the world.⁶ The Internet acquired more users faster than any other type of technology in history.⁷ Anyone connected to the Internet has wide access to information. Through email, people have access to chat rooms, and news groups, and other Internet users around the world.⁸

A basic understanding of the function of the domain name on the Internet will aid to understanding its significance to a bankruptcy estate. A "host" computer connects to the Internet on a more or less permanent basis. Each host computer has its own Internet Protocol ("IP") number or address, which specifies the location of the computer.⁹ IP numbers were difficult to remember. Therefore, early Internet innovators created a Domain Name System ("DNS") designed to relate easily remembered domain names to difficult to remember IP numbers.¹⁰

The domain name is an alphanumeric code that identifies a specific area on the Internet.¹¹ The domain name can be compared to an address, telephone or trademark. The domain name and the IP identifier are separated by a "dot."¹² The field farthest to the right is the Top Level Domain ("TLD"). The field second from the right of the TLD is the Second Level Domain. The field third from the right is the Third Level Domain.¹³ The domain name allows the Internet user to locate the website using the name. In order to maintain a presence on the Internet, the domain name holder contracts with an Internet Service Provider ("ISP"). The ISP provides the necessary services for the website's presence on the Internet, such as registration of the domain name and connection to the Internet. The registrant refers to the

⁴ As used herein, the term "registration agreement" will refer to both the agreement between the domain name owner and the registrar, as well as the agreement between the registrar and the Internet Service Provider.

⁵ 11 U.S.C. §§ 101–1330 (2000).

⁶ *Network Solutions, Inc. v. Umbro Int'l Inc.*, 529 S.E.2d 80, 82 (Va. 2000).

⁷ Francis G. Conrad, *Dot.coms in Bankruptcy Valuations Under Title 11 or www.Snipehunt in the Dark.noreorg/noassets.com*, 9 AM. BANKR. INST. L. REV. 417, 417 (2001). It took thirty-eight years for radio to capture fifty million listeners, sixteen years for personal computers to obtain 50 million users, thirteen years for television to have fifty million viewers, and 4 years for Internet to reach 50 million users. *Id.*

⁸ *Network Solutions*, 529 S.E.2d at 82.

⁹ *Id.* at 83.

¹⁰ *Id.*; *Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003).

¹¹ *Network Solutions*, 529 S.E.2d at 83.

¹² *Id.* at 82.

¹³ *Kremen*, 325 F.3d at 1038.

person or entity that registers the domain name. Often, the registrars offer ISP services as well.

In 1993, under a cooperative agreement with the National Science Foundation, Network Solutions, Inc. (“NSI”) became the exclusive registrar of domain names. NSI had the primary responsibility for ensuring the quality, timeliness, and effective management of the registration services provided under a registration agreement. For a fixed fee, a registrant could obtain the right to use a specific domain name pursuant to a registration agreement with NSI. NSI compiled and maintained a registry that contained an authoritative, reliable and up-to-date database of registered domain names and conversion tables that indexed registered domain names to IP numbers.¹⁴

Since September 20, 2000, the Internet Corporation for Assigned Names and Numbers (“ICANN”), empowered by the United States Department of Commerce, has directed the domain name system in the United States. ICANN allowed new registrars to begin offering registration services. As a result, NSI lost its monopoly on the registration of domain names.¹⁵

Since 2000, the growth of both business to business Internet commerce and business to consumer Internet commerce have suffered due to a downturn in the economy.¹⁶ However, an Internet and technology based economy continues to have potential for growth. E-commerce has the advantage of making a large number of products available in a greater number of locales at little cost to the seller. E-commerce can streamline product selection and enhance speed of delivery. Additionally, the seller can provide easier customer service access.

The growth of businesses comes with a certain number of business failures. The Chapter 11 reorganization process aids a troubled business in streamlining operations and returning to profitability. A financially distressed e-commerce business can take advantage of the same process. However, the e-commerce business has a host of issues that a bricks and mortar business does not, such as the treatment of the debtor’s domain name.

B. The Domain Name’s Value to the Debtor

The value of a domain name to a business has grown exponentially in recent years.¹⁷ Domain names play a significant roll in business branding for Internet companies.¹⁸ A company’s presence on the Internet depends upon the use of a unique domain name. An Internet user who knows a company’s domain name can access the company’s website through an Internet browser.¹⁹ If the Internet user does not know the domain name, the user can search for the domain name through the use of a “search engine.”²⁰ A web-consumer looking for a product or service can make an

¹⁴ *Id.* at 1049.

¹⁵ Freeman, *supra* note 2, at 856.

¹⁶ Conrad, *supra* note 7, at 419.

¹⁷ Nguyen, *supra* note 1, at 189.

¹⁸ Network Solutions, Inc. v. Umbro Int’l Inc., 529 S.E.2d 80, 82 (Va. 2002); Freeman, *supra* note 2, at 855.

¹⁹ Network Solutions, 529 S.E.2d at 83.

²⁰ Nguyen, *supra* note 1, at 189.

educated guess about the key words in the domain name of a sought after company. Using key words, search engines such as Yahoo! and Google can locate the domain name almost instantly. Although many domain names incorporate a business' protectable trademark, that is not always the case.

The domain name's value lies in its function as a short, easily remembered term for a website's IP. As discussed further below, recognizable domain names can increase the traffic to a website making it more valuable. Memorable domains are in high demand.²¹ Domain names must be unique in order for the Internet to function properly. Even generic words and phrases can be unique enough to become valuable domain names.²²

The domain name environment encourages the attachment of value to a business's domain name. An active market for the sale and purchase of domain names spans the Internet. Not every purchaser of a domain name uses it.²³ Sometimes domain names are purchased strictly for resale. Other times the owners sell them after finding they do not have use for them. Many websites offer to appraise a domain name. Value alone does not define property,²⁴ however, the value of a domain name drives the motivation for registrants to claim an interest in it.

Thus, for a debtor in bankruptcy, the domain name serves a valuable function as well as having intrinsic value. This function/value paradigm will determine how domain names will be treated in a bankruptcy.

II. DOMAIN NAMES AS "PROPERTY OF THE ESTATE"

A. Definition of "Property of the Estate" in Bankruptcy

Section 541(a) of the Bankruptcy Code²⁵ describes "property of the estate" as all legal and equitable interests of the debtor as of the commencement of the case wherever located and by whomever held.²⁶ Section 541 "embodies the essence of the Bankruptcy Code."²⁷ It describes rather than defines property of the estate. Congress intended section 541 to be as inclusive and broad as possible.²⁸ The section casts a wide net over both property and contractual rights no matter the location of the property or who holds the property. Any enforceable right of the debtor becomes property of the estate upon the filing of the case. The bankruptcy estate acquires only the interest held by the debtor.²⁹ Applicable non-bankruptcy law determines the

²¹ *Id.* at 186.

²² *Id.* at 188-90.

²³ The Web Host Industry Review, *Domain Name Essentials*, at <http://thewhir.com> (last visited Oct. 23, 2003).

²⁴ *Int'l News Servs. v. Associated Press*, 248 U.S. 215, 246 (1918) (Holmes, J., concurring).

²⁵ 11 U.S.C. § 541(a) (2000).

²⁶ The "by whomever held" language of the section is helpful to creditors who have the foresight to use technology escrows that specifically define who holds title to the property in escrow.

²⁷ 5 *Collier on Bankruptcy* § 541.01, (15th ed. 2003).

²⁸ *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05 (1983).

²⁹ *Collier*, *supra* note 27, at § 541.04.

nature of a debtor's property interest.³⁰ However, Bankruptcy Law determines if the debtor's interest in the property becomes property of the estate.³¹ Interpreters of section 541 agree that property of the estate will be subject to the jurisdiction of the bankruptcy court.³² Property of the estate serves two purposes: 1) in all types of bankruptcy cases, it determines the distribution to creditors; and 2) in reorganization cases, it shapes the assets that the emerging debtor will use for its fresh start.

All kinds of property fit into the broad definition of property of the estate, including both tangible and intangible property, and causes of action.³³ Congress intended the property of the estate to include intangible property such as trademarks.³⁴ "Title" to the property, or lack thereof, does not limit the definition. Thus, debtor's leasehold interest or other contract right would be considered property of the estate.³⁵ The transferability of the asset may affect its characterization as property of the estate. Under bankruptcy law as it existed prior to the enactment of the Bankruptcy Code in 1978, the definition of property of the estate was conditioned upon the transferability of the asset. The current Bankruptcy Code eliminates transferability from the analysis.³⁶

No discussion of property of the estate can be considered exhaustive because of its broad definition. The broad definition will benefit the discussion of the role of domain names as property of the estate. While bankruptcy courts regularly determine the parameters of property of the estate, the domain name will raise unique questions as property of the estate.

B. Domain Names Compared With Other Forms of Property

1. The Legal Concept of Property

Domain names cannot easily be defined as property because they exist by virtue of a combination of intangible property rights and contract rights. As the recent rise of intangible intellectual property demonstrates, property cannot be confined to corporeal or tangible objects. The term "property" refers to a "multi-lithic concept" that includes a bundle of rights, powers, privileges, and immunities that define the relationship of an individual, organization, or government to a resource.³⁷ The bundle of rights in property include the right to: a) possess; b) enjoy income from; c)

³⁰ *In re Pers. Communications Network, Inc.*, 249 B.R. 233, 237 (Bankr. E.D.N.Y. 2000).

³¹ *In re Cent. Ark. Broad. Co.*, 68 F.3d 213, 214 (8th Cir. 1995).

³² Collier, *supra* note 27, at § 541.01.

³³ *Whiting Pools*, 462 U.S. at 205 n.9 (1983).

³⁴ H.R. REP. NO. 95-595, at 367 (1977).

³⁵ Collier, *supra* note 27, at § 541.04.

³⁶ H.R. REP. NO. 95-595, at 175-76 (1977) (specifically stating that intellectual property is an asset of the estate whether or not it is transferable); *cf. Harris v. Emus Records Corp.*, 734 F.2d 1329 (9th Cir. 1984) (holding that a mechanical license of a music composition is a personal, non-transferable right that does not pass into the bankruptcy estate).

³⁷ Freeman, *supra* note 2, at 861.

alienate; d) exclude; e) dispose of; and f) recover title from one who has improperly taken it.³⁸

Domain names have virtually all of these property rights. The registrant has the right to: a) possess the domain name to the exclusion of others; b) use the domain name as its “locator” on the Internet; c) manage the domain name by designating the registrar; d) enjoy the income from the domain name; e) dispose of the domain name by sale or transfer;³⁹ and f) exclude others from using its domain name. Thus, the domain name has all of the primary attributes of property. The owner of the domain name has an exclusive interest in the domain name’s bundle of rights. This exclusivity results in utility and value to the registrant.⁴⁰

While domain names have all of the attributes of property, domain names suffer from their relatively new incarnation. When faced with issues of first impression, courts will often seek to analogize the new issue with previously addressed and resolved issues. Therefore, the following discussion compares domain names to other forms of property.

2. Attributes of Real Estate

Intellectual property has many of the same qualities as real property.

Though [intellectual property is] the most intangible form of property, it still, in many characteristics, is closer to real than to personal estate. Unlike personal property, it cannot be lost or found; it is not liable to casualty or destruction, it cannot pass by manual delivery. Like real property, it may be disposed of, territorially, by metes or bounds; it has its system of conveyancing by deed and registration; estates may be created in it, such as for years and in remainder; and the statutory action for infringement bears a much closer relation to action of trespass than an action in trover and replevin. It has too, what the law of real property has, a system of user by license.⁴¹

A domain name acts as an ‘address’ on the Internet. The domain name, like a street address, provides information about how to find a location. The Internet address helps the user find the web site just as a street address helps someone find a physical location. Once at the web site, the user and the registrant have found each other. Similarly, one who has located the street address has located the person who

³⁸ *Id.* at 862–63 (discussing whether domain names embody Tony Honore’s aspects of ownership of property as found in TONY HONORE, *MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL*, 168 (Oxford Univ. Pr. 1987).

³⁹ Numerous registration agreements permit the transfer and assignment of domain names. See, e.g., registration agreements of Network Solutions, Inc., at http://www.networksolutions.com/en_US/index.jhtml (last visited Oct. 23, 2003); 123 Registration, Inc., at <http://www.123registration.com> (last visited Oct. 23, 2003); EnCirca, at <http://www.encirca.biz/index.shtml> (last visited Oct. 23, 2003).

⁴⁰ Freeman, *supra* note 2, at 864.

⁴¹ *A.S. Solomons v. United States*, 21 Ct. Cl. 479, 483 (Ct. Cl. 1886), *aff’d*, 137 U.S. 342 (1890).

lives at the address or the business that operates from the address.⁴² The registrar, like the post office, does not maintain any control over the property at a particular address.⁴³

The similarities between a street address and a domain name end at a significant distinction. Governmental authorities assign a street address, whereas the registrant defines its domain name and the registrant can change the domain name.

Thus, while a domain name has attributes of a street address and real property, it also has some distinguishing characteristics. Those distinguishing characteristics enhance the domain name's characterization as property rather than diminish it.

3. Attributes of Telephone Numbers

Telephone numbers have long been considered property of a bankruptcy estate.⁴⁴ In *In re Personal Computer Network, Inc.*,⁴⁵ the debtor's telephone numbers had been an important asset of the debtor because a large amount of its business was based upon catalogue sales placed by telephone and the debtor had also invested greatly in the advertising of these telephone numbers.⁴⁶ When the plaintiff ("DI") bought debtor's telephone numbers from the bankruptcy estate, Illinois Bell refused to transfer the telephone numbers until DI paid the debtor's pre-petition past due bills.⁴⁷ Summary judgment against Illinois Bell was affirmed on appeal.⁴⁸

The court rejected Illinois Bell's argument that the bankruptcy court had no jurisdiction over the telephone numbers.⁴⁹ The court held that property of the estate can rest on the debtor or the trustee's possession, constructive or actual, of the property in question.⁵⁰ The court identified the right of use as the most important attribute of possession, following the United States Supreme Court precedent which held that a possessory right exists in a debtor who clearly had the right to use the telephone numbers at the time the petition in bankruptcy was filed.⁵¹ The court also relied on *In re Kassuba*,⁵² which held that phone numbers come within the jurisdiction of the bankruptcy court by virtue of the debtor's possession of them.⁵³ Illinois Bell argued that a debtor's property interest in a telephone exists only as long as the debtor continues in possession of the telephone numbers, but the court again disagreed.⁵⁴ Since the debtor had possession of the telephone numbers when its assets were sold, the bankruptcy court had summary jurisdiction over them.⁵⁵ Thus,

⁴² Freeman, *supra* note 2, at 865.

⁴³ *Id.* at 864.

⁴⁴ *In re Fontainbleau Hotel Corp.*, 508 F.2d 1056, 1059 (5th Cir. 1975).

⁴⁵ 97 B.R. 909 (Bankr. N.D. Ill. 1989).

⁴⁶ *Id.* at 910.

⁴⁷ *Id.*

⁴⁸ *Id.* at 913.

⁴⁹ *Id.* at 912.

⁵⁰ *Id.*

⁵¹ *Id.* at 911 (citing *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1940)).

⁵² 396 F.Supp. 324 (N.D. Ill. 1975).

⁵³ *Id.* at 327.

⁵⁴ *Pers. Computer Network*, 97 B.R. at 912.

⁵⁵ *Id.*

the bankruptcy court had jurisdiction to order the sale.⁵⁶ Illinois Bell then argued that according to its tariffs, telephone service customers do not have ownership rights in telephone numbers.⁵⁷ Therefore, DI had no right to use the numbers without paying the price that Illinois Bell demands.⁵⁸ The court dismissed this argument and distinguished between title and possessory rights.⁵⁹ Ultimately, the bankruptcy court has jurisdiction over property as long as the debtor has a possessory right.⁶⁰ While the order approving the sale may not have transferred ownership, it transferred “certain enforceable rights to DI.”⁶¹ The court held that “[a]mong those [rights] was the right to use the phone numbers without being forced to pay [the debtor]’s pre-bankruptcy debt.”⁶²

Domain names have many of the same attributes as a telephone number. The domain name functions as the “telephone number” of the registrant on the Internet. The domain name gives the Internet user a way to reach the domain name’s holder in the same way that a owner of a telephone number can be reached. Like a telephone number that comes to be identified with a business (1-800-MATTRES or “1-800-588-2300” for Empire Carpet Company in the Chicago, Illinois area), the domain name steers the users to the registrant’s company creating a value for the registrant. The holding in *In re Personal Communications Network* applies to domain names. A debtor’s possessory rights to a domain name would be sufficient to define domain names as property of the estate. Thus, the cases that reject a registrant’s interest in a domain name on the basis of title or lack thereof would be irrelevant in the bankruptcy property analysis.

4. Attributes of Trademarks

Trademarks function as source or product identifiers. The law of trademarks arises from policies of consumer protection as well as the rights of the creators to protect their intellectual property.⁶³

Different classes of product identifiers affect the ability to register them as trademarks under the Lanham Act. The classes fit somewhere in a spectrum that ranges through 1) generic or common descriptive; 2) merely descriptive, which requires secondary meaning to be protected as a trademark; 3) suggestive; and 4) arbitrary or fanciful. The lines of demarcation for the categories are not always bright. A term that would fall into one category for a particular product may be quite a different one for another. For instance, “Ivory’ would be generic when used to describe a product made from the tusks of elephants but arbitrary as applied to soap.”⁶⁴

⁵⁶ *Id.*

⁵⁷ *Id.* at 912–13.

⁵⁸ *Id.* at 913.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*; see also, *In re Conn. Pizza, Inc.*, 193 B.R. 217, 227 (Bankr. D. Md. 1996) (finding that telephone numbers are valuable business assets, much like buildings, furniture and equipment).

⁶³ Freeman, *supra* note 2, at 867.

⁶⁴ *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 n.6 (2d Cir. 1976).

Like a trademark, a domain name can be associated with the good will of a company. The traffic generated by a website, the profits derived from website sales, and the value of the website itself often depends on the domain name.⁶⁵ The United States Patent and Trademark Office (“PTO”) permits the registration of domain names as trademarks as long as the website provides products or services.⁶⁶ Therefore, the general classifications for trademarks apply to domain names. Inherently distinctive domain names such as google.com and ebay.com qualify for trademark registration. Descriptive domain names that identify websites selling goods or providing services can be registered and acquire secondary meaning qualify for trademark registration. For instance, in *Dial-A-Mattress Franchise Corp. v. Page*,⁶⁷ the court held that a telephone number whose digits corresponded to 1-800-MATTRESS was entitled to trademark protection. The mark 1-800-MATTRESS may contain generic terms, but when taken together with the other numbers, it creates a descriptive mark that can acquire secondary meaning.

In *555-1212.com, Inc. v. Communication House International, Inc.*,⁶⁸ the parties disputed whether a generic term added to a “.com” would create a protectable trademark. The court held that the two generic terms may be combined to form a descriptive trademark once the mark acquires secondary meaning.⁶⁹

A domain name containing generic terms would qualify as property of the estate. The domain name would be property whether or not it qualified for trademark registration. The debtor would have the bundles of rights in the domain name whether or not it was a registered trademark. Each domain name is unique whether it is generic or not. The debtor will be able to exclude others from using its domain name whether it is generic or not.

Many domain names that might be considered generic for trademark purposes have sported substantial price tags. For instance, art.com sold for \$450,000 in 1999; business.com sold for \$7,500,000 in December 1999; and fly.com sold for \$1,500,000 in February 2000.⁷⁰ Both living.com (for \$71,000 on December 8, 2000) and wine.com (for \$3,300,000 in 2000) were sold through bankruptcy sales.⁷¹ TMP Worldwide, the parent company of the job site Monster.com, paid \$800,000 for jobs.com.⁷²

The same factors that weigh in favor of identifying a domain name as property will weigh in favor of the generic domain name coming within the definition of property of the estate. Thus, a domain name would be property of the estate whether

⁶⁵ Freeman, *supra* note 2, at 864.

⁶⁶ United States Patent and Trademark Office Examination Guide No. 2-99, Marks Composed, in Whole or in Part of Domain Names, at <http://www.uspto.gov/web/offices/tac/notices/guide299.htm> (Oct. 23, 2003). The PTO has divided domain names into “link providers” (those domain names that function as an Internet address only and are not suitable for trademark protection) and “content providers” (those domain names that provide a product or service and can be registered as a trademark). *Id.*

⁶⁷ 880 F.2d 675, 678 (2d Cir. 1989).

⁶⁸ 157 F. Supp. 2d 1084, 1086 (N.D. Cal. 2001).

⁶⁹ *Id.* at 1090.

⁷⁰ See Submerged Ideas.com, <http://www.submerged-ideas.com/valuation/topgomainsales.htm> (last visited Oct. 23, 2003).

⁷¹ *Id.*

⁷² See Keith Regan, *Monster Parent Pays \$800k for Jobs.com Domain Name*, E-Commerce Times, at <http://www.ecommercetimes.com/perl/story/17356.html> (last visited Oct. 26, 2003).

the courts rely on a bundle of rights theory or analogies to other types of property of the estate such as real estate, telephone numbers, or trademarks.

C. Treatment of Property

1. Market for Domain Names

Domain names have become a commodity for monetary exchange.⁷³ A domain name cannot be handed from buyer to seller like tangible property or transferred by recording a document of title like real property. The domain name market has developed its own sets of rules for the sale of a domain name. The sale of a domain name involves the following distinct steps: 1) The holder of the domain name must have registered the domain name to establish a superior right to it; 2) the holder must transfer the right to use the name to the buyer; 3) the seller must notify the registrar of the change in ownership; and 4) at the option of the buyer, the buyer can transfer registration of the domain name to a registrar of her own choosing.⁷⁴

Numerous websites that offer domain names for sale, also aid in the buying and selling of domain names⁷⁵ or aid in the transfer of ownership of a domain name.⁷⁶ These domain name brokerages have been approved by domain name panels that provide dispute resolution regarding domain names.⁷⁷

Websites offer to appraise domain names. Appraisal websites use different appraisal criteria. The most extensive appraisal model appears at Fast Domain Sales.com.⁷⁸ Fast Domain Sales uses the following appraisal criteria: 1) Dot.value: The extension after the dot can either increase or decrease the value, for instance, “.com” is more valuable than other extensions; 2) Comparison with Comparable Domains: Compares sales of the subject website with the sales of other similar websites; 3) Recognition: Plain English words spelled correctly make more sense to people and increase the value of the domain name;⁷⁹ 4) Marketability: Evaluates the number of potential customers in the world who would be potential customers for the

⁷³ Nguyen, *supra* note 1, at 187.

⁷⁴ Some websites offer to act as an escrow service to facilitate the sale and transfer of a domain name. See, e.g., The Web Host Industry Review, *Domain Name Essentials*, <http://thewhir.com> (last visited Oct. 23, 2003).

⁷⁵ <http://www.fastdomainsales.com> (last visited Oct. 23, 2003) (Fast Domain Sales.com lists domain names for sale and will appraise them and provide escrow services to facilitate sales); see also <http://www.4urls.com> (last visited Oct. 23, 2003) (offering domain names for sale); <http://www.igoldrush.com> (last visited Oct. 23, 2003) (offering to buy and sell domain names). <http://www.sedo.co.uk> (last visited Oct. 23, 2003) (stating that Sedo offers 1.6 million domain names for sale and acts as a marketplace for trading domain names).

⁷⁶ See, e.g., C I Host, at <http://www.cihost.com> (last visited Oct. 23, 2003); BulkReg, at <http://www2.bulkregister.com/index.html> (last visited Oct. 23, 2003); OnlineNIC, at <http://www.onlinenic.com> (last visited Oct. 23, 2003); 000Domains.com, at <http://www.000domains.com> (last visited Oct. 23, 2003); AIT Domains, at <http://www.aitdomains.com> (last visited Oct. 23, 2003); and Wild West Domains, Inc., at <http://www.wildwestdomains.com> (last visited Oct. 23, 2003).

⁷⁷ Nguyen, *supra* note 1, at 188-89.

⁷⁸ See Fast Domain Sales.com, at <http://www.fastdomainsales.com> (last visited Oct. 18, 2003).

⁷⁹ For the appraisal of a domain name, genericness can increase its value.

website;⁸⁰ 5) Development of Potential: A domain that is relevant to what is being sold on the website increases its value;⁸¹ 6) Length: The shorter the better; 7) Likely Buyer: Assesses the size of the group of likely buyers; and 8) Traffic and Revenue: An existing website using the domain name that can track good revenue would be more valuable.

Other appraisal websites use other criteria such as the number of hits on the website⁸² and previous domain registration history.⁸³ Even NSI⁸⁴ offers to sell domain names. NSI also offers pendent services such as appraisal, reports on offers, secure transfers, fast sales (with a non-negotiable price), and negotiated sales.

In this market driven arena, domain names have developed into a hybrid, part property right and part contract right. The registrant owns the exclusive right to the domain name as long as the registration remains current. The registrant can sell the right to use the name. The buyer purchases the right to use the name. However, in order to use the domain name on the Internet, the seller and buyer must have a valid contractual agreement with an authorized registrar. Thus, the active market for and the ability to obtain an appraisal of the domain name lends to its characterization as property of the estate.

2. Security interests in domain names

Domain names fall into the category of general intangibles under Revised Article 9 of the Uniform Commercial Code.⁸⁵ A debtor can grant a security interest in collateral to the extent that the debtor has a transferable property right in the collateral.⁸⁶

Some registration agreements prohibit a creditor's right to obtain an interest in a domain name.⁸⁷ However, section 9408 of Revised Article 9 allows for the creation of a security interest in a general intangible notwithstanding a contractual restriction of the assignment of the debtor's rights.⁸⁸

A growing body of commercial lenders will allow a borrower to use its domain name as collateral. For instance, the Industrial Bank of Korea has established a

⁸⁰ Again, the genericness of the domain name will increase value rather than hamper it. For instance, *cola.com* (assuming it does not violate a trademark) could attract people from many different parts of the world who like cola.

⁸¹ Thus, genericness will increase the market potential and value rather than hamper it.

⁸² See Vizacc ERP (Enterprise Resource Planning) System, at <http://www.vizacc.com> (last visited Oct. 23, 2003).

⁸³ See Webmaster Expert.com, at <http://www.webmasterexpert.com/domainappraise.htm> (last visited Oct. 23, 2003).

⁸⁴ Network Solutions, Inc. could be called the poster child for the proposition that "domain name is not property" as will be discussed further below. Yet, it has been actively involved in the buying and selling of domain names.

⁸⁵ Warren E. Agin, *Domain Names: Obtaining and Perfecting a Security Interest*, Bankruptcy and Secured Lending in Cyberspace, *The RMA Journal* 79 (2000).

⁸⁶ U.C.C. §9-102, cmt. 5(d) (2001).

⁸⁷ Network Solutions, at http://www.networksolutions.com/en_US/legal/static-service-agreement.jhtml (last visited Oct. 20, 2003); 123 Registration.com, at <http://www.123registration.com> (last visited Oct. 23, 2003).

⁸⁸ One author suggests that the lender should require the debtor to use a registrar that does not prohibit assignment of a domain name to a creditor. Freeman, *supra* note 2, at 886.

program to lend against domain names. The bank uses an eight member appraisal group to establish a domain name's value. The bank will then lend up to 30% of the domain name's appraised value.⁸⁹

Thus, the ability to obtain a security interest in a domain name lends to its characterization as property of the estate.

3. Domain Names as Property of a Judgment Debtor

Once a party obtains a judgment against a debtor, the successful party can execute on the debtor's property and liabilities owed to the debtor by third parties in order to collect the judgment. Most states have a specific set of rules that govern the marshaling of assets that can be sold and used to pay the judgment.⁹⁰ The same assets that a judgment creditor seeks to levy upon constitutes property of the estate if the judgment debtor files bankruptcy. This almost universal concept was called into question with regards to domain names in two cases decided by courts in Virginia.

In *Dorer v. Arel*,⁹¹ the plaintiff argued that the defendant's domain name could be the subject of a judgment lien. The court acknowledged that a judgment creditor could execute on the debtor's personal property in order to satisfy the judgment. However, the court doubted that a domain name constituted personal property for two reasons. First, like a trademark, the domain name registrant does not own the words but only the right to enjoin others from using them.⁹² In a footnote, the court rejected the comparison between a domain name and a patent. The court described the domain name as an address whereas a patent was a right to exclude.⁹³ Second, the court held that a domain name is a product of a contract for services between the registrar and the registrant. The contract for service produces benefit and value depending on how the party receiving the service exploits it. While acknowledging that some domain names have intrinsic value and can be bought and sold, the court held that a debtor no more owns the domain name than he can own a telephone number.⁹⁴ In the end, the court chose not to decide and directed the plaintiff to seek its remedy through the alternative dispute resolution provisions of the domain name registration agreement.

One year after *Dorer v. Arel*, the Supreme Court of Virginia rendered its decision in *Network Solutions, Inc. v. Umbro International Inc.*⁹⁵ Umbro obtained a judgment against a Canadian citizen who registered Umbro's name as a domain name. In order to execute on the judgment, Umbro domesticated the judgment in Virginia and sought to garnish thirty-eight other domain names that the judgment debtor had registered with NSI. NSI answered the garnishment stating that it was holding no property on behalf of the judgment debtor. NSI maintained that the

⁸⁹ Agin, *supra* note 85, at 79.

⁹⁰ For example, in Illinois, post-judgment activity is governed by 735 ILCS 5/12-1401 (2003).

⁹¹ 60 F. Supp.2d 558 (E.D. Va. 1999).

⁹² *Id.* at 560.

⁹³ *Id.* at 561 n. 9. As discussed in Section III.B.3, *supra*, the domain name has developed into something more than a mere "address."

⁹⁴ *Id.* at 562.

⁹⁵ 529 S.E.2d 80 (Va. 2000).

domain name cannot function outside of the services NSI provided as a registrar. The trial court held that the judgment debtor had a possessory right in the domain name and that NSI was not being forced to perform services for entities with whom it does not desire to do business.

Describing the domain name as a new form of intellectual property, the trial court ordered NSI to deposit the domain names with the sheriff for sale. After the sale, the court ordered NSI to transfer the domain name to the successful bidder at the sheriff's sale. On appeal by NSI, the Supreme Court of Virginia overturned the trial court's decision. The Supreme Court of Virginia first agreed with Umbro that a domain name registrant acquires the contractual right to use a unique domain name for a specified period of time. However, the Court held that the contractual right was inextricably bound to the domain name services that NSI provides. The Court concluded that since a domain name registration is a matter of contract, not a liability owed to the judgment debtor, it was not subject to garnishment.⁹⁶ To support its holding, the Court compared domain names to a satellite television service agreement or the registration of a corporate name with a governmental unit. The Court rejected the line of cases that hold that a possessory interest in a telephone number can be property.⁹⁷ The Court also distinguished some contractual rights that would be subject to garnishment such as insurance policies or the money proceeds of a contractual right to which the debtor may be entitled.⁹⁸

Justice Compton's dissent in *Network Solutions* pointed out the defects in the majority's analysis.⁹⁹ NSI acknowledged that a right to use a domain name is a form of intangible personal property. Justice Compton believed that the trial court ruled correctly that the judgment debtor's possessory interest in the domain name was subject to execution.¹⁰⁰ The judgment debtor had a contractual right to the exclusive use of the domain name. NSI's contractual obligation to the judgment debtor was presently due, not contingent or akin to a personal service agreement. Because NSI has received everything required to give the judgment debtor a possessory interest in the domain name, the right to the domain name is a liability within the meaning of Virginia statutes.¹⁰¹ Therefore, the domain name could be garnished.

In both *Network Solutions* and *Dorer*, the courts failed to properly classify domain names because they overlooked the reality of cyberspace. Domain names have become valuable, exchangeable commodities in the open market. Many domain names command high price tags because they have the capability of generating more traffic to a particular web site. Domain names are unique and scarce Internet resources.¹⁰² The Supreme Court of Virginia's analysis particularly failed to acknowledge the unique attributes of a domain name that distinguish it from a satellite television subscription. A domain name identifies the owner of the website. It gives the Internet user a way to find the website. A satellite television subscription does nothing more than beam signals to the satellite dish. The satellite television subscriber does not seek to use the satellite dish as a presence on the Internet.

⁹⁶ *Network Solutions, Inc.*, 529 S.E.2d at 87.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 88—89 (Compton, J. dissenting).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Nguyen, *supra* note 1, at 203 (2001).

The Supreme Court of Virginia's analysis of the legal concept of property was flawed. The Court rejected the characterization of telephone numbers as property despite the fact that this concept has been generally accepted among courts.¹⁰³ The Supreme Court of Virginia's use of a corporate name registration to support its position failed to distinguish between the formalities required to maintain a corporate name and the function of a domain name. A corporate name gives the owner a franchise conferred by law. The corporate name holder must comply with the state's applicable laws in order to maintain its identity. While the domain name holder must register the name to use it, no governmental entity confers a domain name upon its owner. NSI did not bestow the right for a domain name to exist the way the state authorizes a corporation to function.

Since these two decisions were rendered, ICAAN rules were changed to allow more registrars. Both courts based their decisions upon the "unique" services provided by NSI. NSI's services are no longer "unique". With the advent of more registrars, a registrant can freely transfer registration of the domain name from one registrar to another. In reality, domain names are not inextricably bound by one particular registrar.¹⁰⁴ If *Dorer* and *Network Solutions* were decided today, a domain name would be considered property separate and apart from the services provided by the registrar.

4. Domain Names as Converted Property

Whether or not a domain name can be converted has been the subject of aggressive litigation in California for approximately four years. The dispute revolves around the ownership of the domain name "sex.com". Industry experts estimate that "sex.com" earns about \$400 million per year.¹⁰⁵ Therefore, it comes as no surprise that the first to register the domain name would vehemently protect the right to use it.

Entrepreneur and Stanford School of Business graduate, Gary Kremen, registered the domain name "sex.com" on behalf of his company, Online Advertising in the early 1990's. A few years later, pornography impresario Stephen Michael Cohen forged a letter from Online Advertising to NSI in which the company purported to abandon any interest in the domain name and authorized the transfer of the domain name to Cohen's company.¹⁰⁶ Acting on the forged instructions, NSI

¹⁰³ See discussion *supra* Section III.B.3.

¹⁰⁴ Richard L. Ravin, *Is My Domain Name Property, And Can I Own It?* New York State Bar Association News (Dec. 2000), available at http://www.hartmanwinnicki.com/domain_ownership_pub.html (last visited Oct. 18, 2003); see also C I HOST website, *supra* note 76 (listing registrars that specifically offer transfer of domain name services).

¹⁰⁵ Jon Swartz, *Eminent Domain Name*, *Forbes.com* (Feb. 7, 2000), available at <http://www.Forbes.com/2000/02/07/feat.html> (last visited Oct. 18, 2003).

¹⁰⁶ *Id.* In February 2000, the reporter reached Cohen at his office in Tijuana, Mexico by telephone for an interview for this article. Cohen characterized Kremen as a lawsuit-happy nut who missed the dot.com boom. Cohen dismissed Kremen as a "Johnny-come-lately" who falsified paperwork and made up a story full of scandalous inaccuracies. Kremen threatened defamation litigation. By time of the interview, Cohen already had a checkered history. From 1993 to 1995, Cohen had served time in Lompoc, California Federal Correctional Institution for bankruptcy fraud, obstruction of justice, and charges related to impersonating a bankruptcy lawyer. Ultimately the

transferred the domain name to Cohen's company. Kremen filed suit in the federal district court for the Northern District of California against Cohen and NSI.

In the first *Kremen v. Cohen* ("*Kremen I*") decision,¹⁰⁷ the court held that the forged letter was void *ab initio*. Cohen tried to argue that the domain name was not a form of intangible personal property. The court rejected the argument. The court held that a person's property extends to every species of right and interest capable of being enjoyed and upon which it is practicable to place a money value.¹⁰⁸

[I]f that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purposes of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say it is too fugitive or evanescent to be regarded as property.¹⁰⁹

Thus, according to the district court, 'property' can have the following attributes: a) something that can be acquired; b) something that can be bought and sold; and c) something a competitor can use to the owner's disadvantage. The court in *Kremen I* found that Cohen used the domain name "sex.com" to Kremen's disadvantage. The court entered an injunction and a six million dollar judgment against Cohen.

Unfortunately, Kremen's odyssey did not end there. After the judgment was entered, Cohen moved his assets offshore, left the country, and remains at large.¹¹⁰ In the next *Kremen v. Cohen* decision ("*Kremen II*"),¹¹¹ Kremen sought to hold NSI liable for his losses. Kremen used a series of theories including breach of contract, breach of intended third-party beneficiary contract, conversion and conspiracy to convert personal property, conversion to bailee, breach of fiduciary duty, and negligent misrepresentation. The court focused on whether a domain name could be subject to conversion. The court held that California law recognizes conversion of intangibles represented by documents such as bonds, notes, bills of exchange, stock certificates, and warehouse receipts.¹¹² Intangible property such as the good will of a business, trade secrets, a newspaper route, or laundry list of customers are not subject to conversion.¹¹³ The court noted that the common law rule has been relaxed somewhat and the tort may now reach the misappropriation of intangible rights customarily merged in or identified with some document but has not yet been

court found that Cohen had forged documents to "steal" the sex.com domain name from Kremen. Cohen had signed his girlfriend's name to the forged letter. Incidentally, Cohen had misspelled her name in the process. Cohen is now a fugitive having fled the United States with a substantial portion of his assets.

¹⁰⁷ 2000 WL 1811403 *1 (N.D. Cal. 2000).

¹⁰⁸ *Kremen v. Cohen*, 2000 WL 1811403 *1, *3 (N.D. Cal. 2000).

¹⁰⁹ *Id.* at *3 (quoting *McCord v. Plotnick*, 108 Cal.App.2d 392, 395 (Cal. App. 1952)).

¹¹⁰ Kieren McCarthy, *Sex.com Case Heralds End of Internet – NSI*, *The Register* (February 3, 2003), available at <http://www.theregister.co.uk/content/6/29152.html> (last visited Sept. 26, 2003).

¹¹¹ 99 F.Supp.2d 1168 (N.D. Cal.2000).

¹¹² *Kremen v. Cohen*, 99 F. Supp. 2d 1168, 1172 (N.D. Cal. 2000).

¹¹³ *Id.* The court's analysis failed to recognize that owners of goodwill have a remedy on tortious interference theories and that most states have either statutes or common law remedies to protect against misappropriation of trade secrets such as customer lists.

extended further.¹¹⁴ However, the court held that the domain name is not merged in or identified with a document or other tangible object and is therefore too intangible to be subject to conversion.

The court in *Kremen I* discussed *Network Solutions* and found it inapplicable. “The Court finds merit in the dissent’s position that the right to use domain names exists separate and apart from NSI’s various services that make the domain names operational Internet addresses. These services . . . are mere conditions subsequent”¹¹⁵ The court retreated into the safe harbor of putting the issue before the legislature to change the law. The court recognized that the issue of domain names encompasses a type of property that did not exist when the rules for conversion were being formed.¹¹⁶ The court believed that holding NSI liable would be untenable because NSI was performing a purely ministerial function.¹¹⁷

Kremen appealed to the Ninth Circuit Court of Appeals (“*Kremen III*”).¹¹⁸ The Ninth Circuit certified two questions to the California State Supreme Court: 1) Whether the rights to intangible property must be reflected in some documentary form as defined by the Restatement (Second) of Torts §242 (1965);¹¹⁹ and 2) if the California Supreme Court determined that intangible property must be merged with a document or something tangible, whether the tort of conversion applied to an Internet domain name.¹²⁰ The Ninth Circuit acknowledged that the parties agreed that domain names fall within the broad definition of property under California law, but disagreed on whether the domain name is too intangible to be subject to conversion.¹²¹

Justice Kozinski’s dissent admonished the majority for its antiquated view that intangible property had to be merged into a document to be subject to conversion.¹²² The dissent had no trouble recognizing the domain name as a form of intangible property. If merger of domain into a document was necessary, then the registry, as an electronic document, filled the documentary requirement.¹²³ The dissent argued that the intangible nature of domain names should not bar a conversion action. One who alters title to a registered domain name has fair notice that his actions affect someone else’s property.¹²⁴ Some intangibles are “non-exclusive.” For instance, the conversion of a trade secret does not prevent the plaintiff’s continued use. In contrast, domain names are exclusive. When a defendant converts the plaintiff’s domain name, the plaintiff is deprived of its use.¹²⁵ The dissent likened domain names to corporate shares. A share register qualifies as a document in which the

¹¹⁴ *Berger v. Hanson*, 129 F.3d 505, 517 (9th Cir. 1997); and RESTATEMENT (SECOND) OF TORTS § 242 and comments (1965).

¹¹⁵ *Kremen*, 99 F.Supp.2d. at 1173 n. 2.

¹¹⁶ *Id.* at 1173.

¹¹⁷ *Id.* at 1174.

¹¹⁸ *Kremen v. Cohen*, 325 F.3d 1035 (9th Cir. 2003).

¹¹⁹ *Id.* at 1037.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² “The quaintness of the question, couched in language more reminiscent of postillions than POP servers, gives a pretty good clue that the majority is disinterring legal arcana long since laid to rest.” *Id.* at 1045 (Kozinski, J. *dissenting*).

¹²³ *Id.*

¹²⁴ *Id.* at 1046–47.

¹²⁵ *Id.* at 1047.

shares are merged. The certificate acts only as evidence of the shares of stock, but not the only one.¹²⁶ A transfer on the books of the corporation, even without the issuance of a certificate, vests title in the shareholder. The certificate is merely evidence of title.¹²⁷ California courts have long held that a shareholder can sue a corporation for conversion if it wrongfully refuses to transfer title to shares on its books.¹²⁸ A corporation that actually gives away someone's stock by wrongfully amending its share register is liable for conversion. Therefore, Justice Kozinski would have held that the owner of a domain registry who wrongfully gives away a registrant's domain name would be liable for conversion.¹²⁹

The Supreme Court of California refused to decide the certified questions.¹³⁰ Therefore, the Ninth Circuit Court of Appeals was forced to decide the matter in "*Kremen IV*".¹³¹ With Justice Kozinski writing for the majority this time, the Court held that a domain could be the subject of conversion. The Court described "property" as a broad concept that includes every tangible benefit and prerogative susceptible of possession or disposition.¹³² The Court applied a three-part test to determine whether a property right exists: 1) there must be an interest capable of precise definition; 2) it must be capable of exclusive possession or control; and 3) the putative owner must have established a legitimate claim to exclusivity. The Court found that a domain name has all of these elements.¹³³ The Court adopted Judge Kozinski's dissent in *Kremen III* with additional analysis. The Court concluded that California law does not follow the strict merger requirement contained in the Restatement (Second) of Torts §242 (1965).¹³⁴ As to Kremen's conversion claim, the judgment of the trial court was reversed and the cause was remanded to the trial court for further proceedings. Thus, a domain name can be the subject of conversion.¹³⁵

5. *In Rem Protection for Domain Names*

The ingenuity of those who illegitimately profit from another's labor grew concurrently with the growth of the Internet. As the Internet grew, opportunists would register a domain name using the trademark of an established company and hold it hostage.¹³⁶ In order to protect its interest, the company would be forced to purchase the name from that person. The crafty appropriators, however, made themselves invulnerable to service of process by giving the registrar fictitious

¹²⁶ One website allows customers to order a "Domain Name Certificate," indicating that the registrant is the owner of the domain name. See #1 Accredited Registrar Premium Services, at <http://www.1accredited.com/premium.htm> (last visited Oct. 18, 2003).

¹²⁷ *Kremen*, 325 F.3d at 1046.

¹²⁸ *Ralston v. Bank of Cal.*, 112 Cal. 208, 213 (Cal. 1896).

¹²⁹ See *Kremen*, 325 F.3d at 1047.

¹³⁰ *Kremen v. Cohen*, No. S112591 (Cal. Feb. 25, 2003)

¹³¹ 337 F.3d 1024 (9th Cir. 2003).

¹³² *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003).

¹³³ *Id.*

¹³⁴ *Id.* at 1031-33.

¹³⁵ *Id.* at 1036.

¹³⁶ The most prevalent of these opportunists was one Toeppen, who was the subject of many lawsuits resulting from his activities. See *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998); *Intermatic, Inc. v. Toeppen*, 947 F. Supp.1227 (N.D. Ill. 1996).

information about themselves.¹³⁷ This type of activity became known as “cybersquatting.”¹³⁸ Cybersquatting became the Internet version of a land grab. The term’s roots come from the word “squatter” which means one who settles on unoccupied land without a legal claim.¹³⁹ Therefore, the term itself imbues a domain name with some sort of property right.

To address the unfortunate consequences of cybersquatting, Congress passed the Anticybersquatting Consumer Protection Act (“ACPA”).¹⁴⁰ Congress defined cybersquatting as the “bad faith and abusive registration of distinctive marks as Internet domain names with the intent to profit from the goodwill associated with such marks.”¹⁴¹ In response to the inability to gain personal jurisdiction over illusive cybersquatters, Congress included in rem actions against the domain name itself.¹⁴²

In rem is Latin for “against a thing”.¹⁴³ In an action in rem, a valid judgment may be obtained without personal service of process.¹⁴⁴ An in rem action typically involves a suit to enforce a lien or claim to real or personal property found within the district of the sitting court. Jurisdiction depends not on the citizenship of the parties, but solely on the location of the property within the district. Federal grants of in rem jurisdiction are limited to adjudicating rights in property.¹⁴⁵

The in rem provisions of the ACPA permit an action to be filed in the judicial district in which the registrar of the domain name is located.¹⁴⁶ In rem proceedings allow the owner of a trademark to avoid the necessity of identifying and service of process upon a cybersquatter who deliberately has made himself untraceable. The remedies are limited to deleting the registration of the domain name or transferring the domain name to the plaintiff.¹⁴⁷

Nowhere in the legislative history did Congress explicitly evaluate the appropriateness of an in rem proceeding as applied to domain names. The legislative purpose for the ACPA was to protect against designations of origin and false or misleading representation and other infringements occurring on the Internet.¹⁴⁸ Congress limited the in rem provisions of the ACPA to cases where domain name registrants are not subject to personal jurisdiction or cannot reasonably be found by the trademark holder.¹⁴⁹ Thus, some commentators insist that in rem proceedings

¹³⁷ Nguyen, *supra* note 1, at 208.

¹³⁸ *Id.* at 206.

¹³⁹ your Dictionary.com, at <http://www.yourdictionary.com/ahd/s/s0683500.html> (last visited Oct. 18, 2003).

¹⁴⁰ 15 U.S.C. § 1125(d) (2000).

¹⁴¹ S. REP. NO. 106-140, at 4 (1990); *see also* *Sporty’s Farm L.L.C. v. Sportsman’s Market, Inc.*, 202 F.3d 489, 495–96 (2d Cir. 2000).

¹⁴² 11 U.S.C. § 1125(d)(2)(A) (2003); *see also* Nguyen, *supra* note 1, at 208.

¹⁴³ David Henry Dokas and S. Tye Menser, *Is A Domain Name “Property”?*, Findlaw Corporate Counsel Center, 2000, available at http://www.graycary.com/gcc/GrayCary-C/News-Arti/Articles/112000.1.doc_cvt.htm (last visited Oct. 25, 2003).

¹⁴⁴ 35A C.J.S. *Federal Civil Procedure* § 236 (2003).

¹⁴⁵ 36 C.J.S. *Federal Courts* § 25(2) (2003).

¹⁴⁶ 15 U.S.C. § 1125(d)(2)(C) (2000).

¹⁴⁷ *Id.*; *see also* S. REP. NO. 106-140, at 10 (1990); *Harrods v. Sixty Internet Domain Names*, 302 F.3d 214, 224 (4th Cir. 2002).

¹⁴⁸ H.R. CONF. REP. NO. 106-464, at 109 (1990); *see also* H.R. REP. NO. 106-412, at 5 (1990).

¹⁴⁹ 145 CONG. REC. S14714 (daily ed. Nov. 17, 1999) (material of Sen. Lott).

can only be used as a remedy and not in support of the characterization of a new form of property.¹⁵⁰

However, the availability of an in rem action cannot be ignored in analysis of domain names as property. The court in *Caesar's World, Inc. v. Caesar's Palace.com*.¹⁵¹ rejected the contention that a domain name is merely data and cannot be property. Citing the ACPA, the court held that Congress can make data into property by assigning its place of registration as its situs for an in rem proceeding. Practically, the ACPA treats domain names as property, whether or not Congress intended the result. Domain names could not invoke in rem jurisdiction unless they were property. While the ACPA protects against customer confusion on the Internet, it also protects the property rights of the domain name holder. Therefore, Congress apparently considered a domain name to be a res of some kind, otherwise Congress would not have included in rem jurisdiction in the ACPA.¹⁵² The ability to bring an in rem action against a domain leads to the conclusion that a domain would be considered property in a bankruptcy.

6. Domain Names as the Subject of Alternative Dispute Resolution

An entire dispute resolution industry has grown around domain names.¹⁵³ Each registration agreement requires a registrant to submit disputes ICANN's alternative dispute resolution policy.¹⁵⁴ The availability of dispute resolution regarding the parties' interests in a domain name denotes some sort of protectable property interest.

The above discussion leads to the inevitable conclusion that domain names have all of the attributes of property and, in most cases, are treated like other forms of property. Therefore, domain names would be considered property of the estate in bankruptcy. Additionally, the domain name registration agreement involves an ongoing relationship between the registrar and the registrant. No discussion of domain names in bankruptcy can be complete without also examining the role of the registration agreement in bankruptcy.

¹⁵⁰ Dokas and Menser, *supra* note 140.

¹⁵¹ No. 99-55-A (E.D. Va. 2000).

¹⁵² Ravin, *supra* note 101.

¹⁵³ Nguyen, *supra* note 1, at 188-89.

¹⁵⁴ In addition to ICAAN's dispute resolution panel under the auspices of the WIPO, the following websites also provide dispute resolution for domain names alternative: WIPO Arbitration and Mediation Center, *Domain Name Dispute Resolution Service*, at <http://www.arbiter.wipo.int> (last visited Oct. 25, 2003); eResolution, at <http://www.eresolution.com>; and The Arbitration Forum, at <http://www.arbitrationforum.com> (last visited Oct. 25, 2003). For such language in registration agreements, see, e.g., Domain Zoo Registration Agreement, at <http://www.domainzoo.com> (last visited Oct. 25, 2003) and Domain Registry.com, Inc. Registration Agreement, at <http://www.domainregistry.com> (last visited Oct. 23, 2003).

III. DOMAIN NAMES AS “EXECUTORY CONTRACTS”

A. Definition of “Executory Contract”

Section 365 of the Bankruptcy Code governs the treatment of executory contracts.¹⁵⁵ The Bankruptcy Code provides no express definition of an executory contract. The legislative history of §365 indicates that executory contracts require ongoing performance from both sides of a contract.¹⁵⁶ A majority of courts accept Professor Vern Countryman’s definition of an executory contract as:

A contract under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.¹⁵⁷

Contingent obligations can render a contract executory as long as the breach of the obligation would be considered material by both parties.¹⁵⁸ As will be discussed further below, the registration agreement requires sufficient mutual ongoing obligations to be considered executory.

The debtor can assume or reject an executory contract.¹⁵⁹ Assumption or rejection allows the debtor to use valuable contractual benefits or reject burdensome contractual obligations.¹⁶⁰ The debtor’s business judgment governs the decision to assume or reject an executory contract.¹⁶¹

Once the debtor assumes the executory contract, it becomes property of the estate.¹⁶² Under section 541(c)(1), licenses can become property of the estate notwithstanding restrictions on transfer within the license.¹⁶³ Application of the rule varies depending on the type of license involved.¹⁶⁴

Assumption carries with it two substantial burdens to the estate. First, the estate takes on the debtor’s obligations under the contract and these obligations become administrative expenses which must be paid as a priority before the debtor’s pre-bankruptcy obligations. Second, pursuant to §365(b), the trustee or debtor in possession may only assume the contract after demonstrating that the estate is able

¹⁵⁵ 11 U.S.C. § 365 (2000).

¹⁵⁶ H.R. REP. NO. 95-595, at 347 (1977); S.REP. NO. 95-989, at 58 (1977). See also *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, n. 6 (1984).

¹⁵⁷ Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973). Some courts have adopted a result oriented definition of an executory contract that focuses on the benefit of the contract to the debtor as the sole criterion. See *In re Jolly*, 574 F.2d 349, 351 (6th Cir. 1978). However, this minority view has failed to gain acceptance. See *In re Resource Tech. Corp.*, 254 B.R. 215, 223 n. 6 (Bankr. N.D. Ill. 2000).

¹⁵⁸ *In re Richmond Metal Fasteners, Inc.*, 256 F.2d 1043, 1046 (4th Cir. 1985).

¹⁵⁹ 11 U.S.C. § 365(a) (2000).

¹⁶⁰ *In re Orion Pictures Corp.*, 4 F.3d 1095, 1098–99 (2d Cir. 1993).

¹⁶¹ *In re Blackstone Potato Chip Co.*, 109 B.R. 557, 560 (Bankr. R.I. 1990).

¹⁶² *In re Quintex Entm’t, Inc.*, 950 F.2d 1492, 1495 (9th Cir. 1991).

¹⁶³ Collier, *supra* note 27, at § 541.07.

¹⁶⁴ *Id.*

to meet the debtor's obligations by promptly curing any existing defaults and giving adequate assurance of future performance.¹⁶⁵

The Bankruptcy Code has built in other obstacles to assumption. The debtor cannot assume an executory contract while in default unless the debtor can arrange to cure the defaults and provide adequate assurance of future performance.¹⁶⁶ Additionally, under the Bankruptcy Code, a debtor may not assume or assign an executory contract without the consent of the non-debtor if non-bankruptcy law excuses the other party from accepting performance from a substitute for the debtor.¹⁶⁷ Two lines of cases have evolved regarding whether a debtor can assume an executory contract if it cannot be assigned. The "hypothetical assignment test" line of cases prohibit assumption if the debtor could not assign the contract to a hypothetical third party.¹⁶⁸ The "actual performance test" line of cases split the inquiry into two parts. The debtor may assume the contract if the debtor will not be assigning the contract but rather performing the executory contract itself. If the debtor wishes to assume and assign the executory contract, the court will only prohibit assignment if the proposed assignee was so different from the debtor that post-bankruptcy performance by the assignee would eviscerate the non-debtor's contractual expectations.¹⁶⁹ The dispute rages on and has yet to be resolved. However, when the debtor intends to perform the contract, assumption should not be contingent upon the debtor's ability to assign it. Since the debtor will be performing the executory contract, the non-debtor will continue to accept performance from its original contracting party.

The Bankruptcy Code treats rejection of an executory contract as a breach. Rejection gives the non-debtor party to the contract a general unsecured pre-petition claim for damages.¹⁷⁰ When the executory contract involves intellectual property licenses, the Bankruptcy Code has built in protections for the non-debtor licensee.

Fueled by a line of cases that left non-debtor intellectual property licensees without the benefit of their bargain,¹⁷¹ Congress enacted section 365(n)¹⁷² under the Intellectual Property Licenses in Bankruptcy Act in 1988.¹⁷³ Section 365(n) allows the non-debtor licensee to treat rejection as abreach or retain its rights to the use and access of intellectual property.¹⁷⁴ Trademark licenses are specifically excluded from treatment under section 365(n).¹⁷⁵ Congress understood that the debtor licensor would be required to continue obligations of quality control even after rejection, thereby destroying any advantage to rejecting the license.¹⁷⁶ Instead of being subject

¹⁶⁵ *In re Res. Tech. Corp.*, 254 B.R. 215, 221 (Bankr. N.D. Ill. 2000).

¹⁶⁶ 11 U.S.C. § 365(b)(1) (2000).

¹⁶⁷ 11 U.S.C. § 365(c) (2000).

¹⁶⁸ *In re Catapult Entm't, Inc.*, 165 F.3d 747, 749–50 (9th Cir. 1999); *In re CFLC, Inc.*, 89 F.3d 673, 679 (9th Cir. 1996).

¹⁶⁹ *Institut Pasteur v. Cambridge Biotech Corp.* 104 F.3d 489, 493–94 (1st Cir. 1997).

¹⁷⁰ 11 U.S.C. § 365(g) (2003).

¹⁷¹ *Lubrizol Enters., Inc. v. Richmond Metal Finishers*, 756 F.2d 1043; *In re Whitcomb & Keller Mortgage Co.*, 715 F.2d 375 (7th Cir. 1983).

¹⁷² 11 U.S.C. § 365(n) (2000).

¹⁷³ PL 100-506, 102 Stat. 2538 (1988).

¹⁷⁴ 11 U.S.C. § 365(n) (2000).

¹⁷⁵ 11 U.S.C. § 101(35A) (2000).

¹⁷⁶ *In re Centura Software Corp.*, 281 B.R. 660, 670 (Bankrt. N.D.Cal. 2002).

to sale under §363 of the Code,¹⁷⁷ an estate's rights under executory contracts can only be transferred by assignment after the contract is assumed.¹⁷⁸

The function of a domain name depends upon its registration agreement. Without the registration agreement, the domain name has no method of asserting its presence on the Internet. However, the nature of the registration agreement will affect its treatment in bankruptcy.

B. Contractual Aspects of a Domain Name

1. Attributes of a License

In a license, the licensor grants the licensee the right to do something that the licensee would not have a right to do without the license.¹⁷⁹ The original registration system under NSI had aspects of a license. The domain name does not become usable until it is registered. The registrar grants the registrant the privilege to use the domain name for a period of time agreed upon by the registrant and the registrar at the time of registration. The privilege expires if not renewed.¹⁸⁰

However, the relationship between the registrar and the registrant does not track the classic relationship between the licensor and the licensee in significant ways. In the usual intellectual property license, the licensor grants the licensee the right to use the intellectual property belonging to the licensor. In a domain name registration, the registrar enables the registrant to use the registrant's domain name as an Internet address. Unlike a licensor, the registrar does not "own" or have "rights" to the domain name. The registrant and not the registrar creates the subject res and the registrar merely provides the service allowing the use of the domain name (discussed further below). The right to use domain names exists separate and apart from the registrant's various services that make the domain names operational Internet addresses.¹⁸¹ This hybrid nature of a domain name supports the *Kremen II* court's description of the services as conditions subsequent.¹⁸² Thus, while the owner of a domain name needs the services of the registrant to use his property, the registration agreement cannot be characterized as a license.

2. Attributes of a Service Contract

To a certain degree, the court in *Network Solutions*¹⁸³ was correct when it described the relationship between the registrar and the registrant as a service contract. A registrar provides a critical service to the registrant by enabling the registrant to have a presence in the Internet. As discussed above, with the active

¹⁷⁷ 11 U.S.C. § 363 (2000).

¹⁷⁸ 11 U.S.C. § 365(f)(2)(A) (2000).

¹⁷⁹ Anne M. Payne, *Licenses and Permits*, 51 AM.JUR. 2d §1 (2003).

¹⁸⁰ Conrad, *supra* note 7, at 430.

¹⁸¹ *Id.* at 429–30.

¹⁸² *Kremen v. Cohen*, 99 F. Supp. 1168, 1173 n. 2 (N.D. Cal. 2000).

¹⁸³ *Network Solutions, Inc. v. Umbro Int'l, Inc.* 529 S.E.2d. 80 (2000).

market for domain names, the domain name itself has a life outside of the service agreement. Since NSI no longer has a virtual monopoly on providing registration services, the domain name itself is no longer tied to one particular service provider. The domain name holder can pick and choose the registrar. This easy transferability suggests that the registration agreement compares more to a service agreement than a license agreement. However, the service agreement has sufficient performance obligations on both sides to render it executory.

3. Attributes of an indirect government grant

The debtor's interest in a government grant constitutes a property right that becomes property of the estate within the reach of section 541 of the Bankruptcy Code.¹⁸⁴ Government grants such as liquor licenses,¹⁸⁵ brothel licenses,¹⁸⁶ licenses to operate nursing homes,¹⁸⁷ and Federal Communications Commission licenses¹⁸⁸ are considered property of the estate. Government grants have attributes of executory contracts and therefore require assumption by the debtor to become property of the estate. Some commentators liken a domain name registration to an indirect government grant.¹⁸⁹ Like a government grant, the registrar derives its power to register domain names from a higher authority. However, as discussed above, the domain name itself is a creation of the registrant and belongs exclusively to the registrant. The registrar acts more as a service provider than a grantor of the power to use the domain name.

Whether the registration agreement can be characterized as a license, service agreement, or indirect government grant, the debtor would have to be a party to a registration agreement in order to reap the benefits of the domain name. Section 365 of the Bankruptcy Code will govern the registration agreement because of its executory nature.

IV. TREATMENT OF A DOMAIN NAME IN A BANKRUPTCY CASE

Domain names have the attributes of property but require a registration agreement and an ISP to be functional. Thus in a bankruptcy case, the domain name will occupy a hybrid position of a) property of the estate and b) the subject of an executory contract. Having reconciled the divergent views regarding the treatment of domain names in a bankruptcy estate, we can now reach the initial issues raised in this article.

¹⁸⁴ *In re Barnes*, 276 F.3d 927, 928 (7th Cir. 2002).

¹⁸⁵ *In re Amasya*, 234 B.R. 224 (Bankr. Mass. 1999).

¹⁸⁶ *In re Burgess*, 234 B.R. 793 (D.C. Nev. 1999).

¹⁸⁷ *In re Braeview Manor, Inc.*, 151 B.R. 448 (Bankr. N.D. Ohio, 1993).

¹⁸⁸ *In re Cent. Ark. Broad. Co.*, 68 F.3d 213 (8th Cir. 1995).

¹⁸⁹ Agin, *supra* note 85.

A. Protecting the debtor's domain name in bankruptcy.

The domain name, as the reorganizing debtor's valuable identifier on the Internet, would be protected as property of the bankruptcy estate. Since the debtor must disclose all of its assets in its bankruptcy petition,¹⁹⁰ the debtor's domain name should be identified as a general intangible in the bankruptcy schedules. The debtor must also disclose the value of the asset. The debtor could use any of numerous domain name appraisal websites for this purpose.

In a typical Chapter 11 plan of reorganization, the debtor keeps its property and continues to operate while formulating a plan of reorganization.¹⁹¹ The plan must propose to pay unsecured creditors at least what they would have received in a Chapter 7 liquidation case. The lower the value of the debtor's assets, the less the debtor has to pay the unsecured creditors in the Chapter 11 plan. Thus, the debtor must disclose the liquidated value of the domain name in the disclosure statement accompanying the plan.¹⁹² The Chapter 11 debtor may find that the liquidated value of a domain name is difficult to ascertain. As discussed above, most appraisal websites base their models on the going concern value of the domain name. If a creditor challenges the debtor's valuation of the domain name, the debtor may be hard pressed to justify a low valuation in the face of the appraisal websites. The optimum solution would be to find an appraisal website that would be willing to give the debtor both a "going concern" valuation and a "fire sale" valuation of the domain name.

If the debtor wishes to retain the domain name for use in its reorganization, the registration agreement between the debtor and the registrar should be assumed under section 365(a) of the Bankruptcy Code. To date, no court has determined whether domain name registration agreements are executory contracts.¹⁹³ However, a registration agreement has all of the earmarks of an executory contract. The registrant may have ongoing obligations to: 1) indemnify the registrar for claims, losses or liabilities arising out of use of the domain name; 2) pay a service fee; 3) submit to alternative dispute resolution; and 4) in many registration agreements, indemnify the registrar.¹⁹⁴ The registrar may have the ongoing obligations to: 1) provide the exclusive right to use the domain name; and 2) maintain records between the domain name and the corresponding numerical Internet address. The obligations on both sides are material ongoing obligations sufficient to render registration agreement executory. Thus, the debtor should assume the registration agreement in order to protect its rights in the domain name for reorganization purposes.¹⁹⁵

¹⁹⁰ Bankruptcy Official, Schedule A (real property) and Schedule B (personal property), available at <http://www.uscourts.gov/bankform/index.html>.

¹⁹¹ 11 U.S.C. § 1107 (2000).

¹⁹² 11 U.S.C. § 1125 (2000).

¹⁹³ Freeman, *supra* note 2, at 880–81.

¹⁹⁴ See, e.g., registration agreements of 123 Easy Domain Names, Domain Monger.com, <http://www.domainmonger.com> (last visited Oct. 23, 2003); 4Domains.com, <http://www.4domains.com> (last visited Oct. 23, 2003); 123 Registration, Inc., <http://www.123registration.com> (last visited Oct. 23, 2003).

¹⁹⁵ 11 U.S.C. §§ 365, 1123 (2000).

B. The Domain Name and the Automatic Stay

Section 362(a) of the Bankruptcy Code,¹⁹⁶ stays any act of debt collection against the debtor or the debtor's property. The stay goes into effect the moment the debtor files bankruptcy. Thus, the automatic stay in bankruptcy protects both the domain name as property of the estate and the registration agreement as potential property of the estate once it is assumed. Creditors could not proceed against the domain name without violating the automatic stay. Registrars could not cancel registration agreements without violating the automatic stay.

Under section 362(d)(1),¹⁹⁷ a creditor may obtain relief from the stay for cause. The Bankruptcy Code does not define the term "cause" leaving courts free to decide its parameters on a case by case basis.¹⁹⁸ In the context of a domain name, cause could be determined by the debtor's failure to pay the registration fee to a registrant or monthly payments to a secured creditor.

C. Adequate Protection of a Creditor With a Security Interest in the Domain Name

Under section 362(d)(2),¹⁹⁹ a creditor may obtain relief from the stay to proceed against property when the debtor has no equity in the property and the property is not necessary to an effective reorganization. A creditor moving for a relief from the stay under this section usually has an interest in the subject property. Thus, the creditor seeks a modification of the stay to foreclose its interest in the property. If the debtor is in Chapter 11, the domain name may be critical to the debtor's reorganization. Thus, a creditor would be unlikely to use section 362(d)(2) in a Chapter 11 case. A creditor will more likely obtain relief under this section in a Chapter 7 liquidation case. The creditor will likely be challenged by the Chapter 7 trustee. The trustee liquidates the assets for distribution to the creditors. If the domain name has any value or equity the trustee will not permit the creditor from modifying the automatic stay. Thus, the value of the domain name will play a critical roll in whether a stay would be modified to allow a creditor to foreclose its interest in a domain name.

A creditor who has a security interest in general intangibles such as a domain name will be protected in a bankruptcy. Generally, secured creditors acquire their interests in a debtor's property pre-petition. A secured loan arises when the debtor grants a lien on its property to a lender and the lender perfects the lien. Most lenders obtain a lien on the assets plus the proceeds, which is defined by the Bankruptcy Code as cash collateral.²⁰⁰ If the debtor defaults, then the lender can foreclose its lien, sell the property, and apply the proceeds to the outstanding sums due.

¹⁹⁶ 11 U.S.C. § 362(a) (2000).

¹⁹⁷ 11 U.S.C. § 362(d)(1) (2000).

¹⁹⁸ *In re Mazzo*, 167 F.3d 139, 142 (2d Cir. 1999).

¹⁹⁹ 11 U.S.C. § 362(d)(2) (2000).

²⁰⁰ 11 U.S.C. § 363(a) (2000).

The filing of a case repositions the rights of the parties. The bankruptcy court may hold a hearing to determine the value of a creditor's interest in property.²⁰¹ A creditor whose claim exceeds the value of the collateral, or an undersecured creditor, has a lien to the extent of the value of the collateral and an unsecured claim for the rest. A secured party may recover attorneys' fees and interest only if the value of the collateral exceeds the secured party's claim.²⁰²

Pursuant to Section 363(b)(2) of the Bankruptcy Code,²⁰³ the debtor may not use cash collateral unless: 1) the entity that has an interest in the cash collateral consents; or 2) the court after notice and a hearing, authorizes the use of cash collateral. A secured party must be adequately protected. Adequate protection is not defined by the Bankruptcy Code. Rather, the Bankruptcy Code provides alternative types of adequate protection in Section 361, which include: 1) cash payments; 2) additional or replacement liens; or 3) the indubitable equivalent of the creditor's interest in the property. Thus, the creditor who had a security interest in a domain name could be assured of retaining the value of its collateral during the pendency of the bankruptcy.

The value of the domain name will be critical to determining adequate protection for the secured creditor. Under section 506(a) of the Bankruptcy Code,²⁰⁴ the valuation of property can shift depending upon the context. For the secured creditor seeking adequate protection in a Chapter 11 case, the domain name would most likely be given its going concern value rather than its liquidation value. The debtor and the secured creditor can draw on the numerous websites offering appraisal services for domain names to determine the value of the domain name.

D. The Sale of a Domain Name in a Bankruptcy

The sale of a domain name in a bankruptcy will involve mixed issues of property of the estate and executory contracts. The sale of the domain name itself would be treated as a sale of property under section 363 of the Bankruptcy Code.²⁰⁵ If a willing buyer cannot easily be found, the debtor or trustee can utilize the services of various auction websites to facilitate the sale of the domain name. As long as the sale order provides that the sale is free and clear of all liens, the purchaser of the domain name can be confident in its title to the domain name.

The debtor must also decide how to treat the registration agreement connected with the domain name. The debtor should not reject the registration agreement. Rejection of the agreement would allow others to register the domain name. Thus, the debtor should assume and assign the registration agreement to the purchaser. After the assignment, the purchaser could change registrar's at its own discretion.

Debtors and the purchasers of their domain names should be aware of section 365(f) of the Bankruptcy Code.²⁰⁶ The assignment of an executory contract under

²⁰¹ 11 U.S.C. § 506(a) (2000).

²⁰² 11 U.S.C. § 506(b) (2000).

²⁰³ 11 U.S.C. § 362(b)(2) (2000).

²⁰⁴ 11 U.S.C. § 506(a) (2000).

²⁰⁵ 11 U.S.C. § 363 (2000).

²⁰⁶ 11 U.S.C. § 363(f) (2000).

section 365(f) is subject to section 365(c). Section 365(c) prohibits the assumption or assignment of an executory contract when non-bankruptcy law would not require the non-debtor to accept performance from anyone other than the debtor. A registrar may attempt to block the assignment of its agreement by arguing that it cannot be required to accept performance from anyone other than the debtor. However, the registration agreement has none of the attributes of the type of contract that would prohibit assignment, such as a personal service contract,²⁰⁷ patent licenses,²⁰⁸ certain franchise agreements,²⁰⁹ and golf club memberships²¹⁰. In each case that prohibited assignment pursuant to section 365(c), the court held that the executory contract permitted the non-debtor to reject performance from an entity or person other than the debtor. The registrar of a domain name does not discriminate against possible registrants but instead accepts performance from anyone willing to pay the registration fee. Therefore, a registrar could not rely on section 365(c) to prohibit assignment. Thus, the domain name can be easily assimilated into the bankruptcy culture. The result protects the debtor, its creditors, other parties in interest such as purchasers of the domain name.

V. CONCLUSION

To paraphrase Shakespeare, “Oh brave new world”²¹¹ that has such legal issues in it. With emerging technologies and the advances in intellectual property and information technology, new species of property and contract rights such as Internet domain names materialize. In some cases, the current laws cannot be reconciled with the issues raised by the new species of property. As demonstrated above, a careful analysis of the Bankruptcy Code can help the debtor protect the function of its domain name as well as its value to the bankruptcy estate. The non-debtor can also apply the pertinent provisions of the Bankruptcy Code to protect its interests in the domain name during bankruptcy. The Bankruptcy Code was enacted before the rise of the Internet, yet it appears to be equipped with the tools to handle most issues raised by new species of property, such as Internet domain names.

²⁰⁷ *In re Sunrise Rest., Inc.*, 135 B.R. 149, 153 (Bankr. M.D. Fla. 1991); *In re Cardinal Indus., Inc.*, 116 B.R. 964, 979 (Bankr. S.D. Fla. 1990).

²⁰⁸ *In re Catapult Entm't, Inc.*, 165 F.3d 747 (9th Cir. 1999).

²⁰⁹ *In re Pioneer Ford Sales, Inc.*, 729 F.2d 27 (1st Cir. 1984).

²¹⁰ *In re Magness*, 972 F.2d 689 (6th Cir. 1992).

²¹¹ WILLIAM SHAKESPEARE, *THE TEMPEST*, act 5, sc. 1.