

UIC John Marshall Journal of Information Technology & Privacy Law

Volume 15
Issue 3 *Journal of Computer & Information Law*
- Spring 1997

Article 7

Spring 1997

The Federal Government Giveth and Taketh Away: How NSI's Domain Name Dispute Policy (Revision 02) Usurps a Domain Name Owner's Fifth Amendment Procedural Due Process, 15 J. Marshall J. Computer & Info. L. 547 (1997)

Steven A. McAuley

Follow this and additional works at: <https://repository.law.uic.edu/jitpl>



Part of the [Computer Law Commons](#), [Internet Law Commons](#), [Privacy Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Steven A. McAuley, The Federal Government Giveth and Taketh Away: How NSI's Domain Name Dispute Policy (Revision 02) Usurps a Domain Name Owner's Fifth Amendment Procedural Due Process, 15 J. Marshall J. Computer & Info. L. 547 (1997)

<https://repository.law.uic.edu/jitpl/vol15/iss3/7>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC John Marshall Journal of Information Technology & Privacy Law by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

THE FEDERAL GOVERNMENT GIVETH AND TAKETH AWAY: HOW NSI'S DOMAIN NAME DISPUTE POLICY (REVISION 02) USURPS A DOMAIN NAME OWNER'S FIFTH AMENDMENT PROCEDURAL DUE PROCESS

I. INTRODUCTION

Sieanna Computer Systems has a \$21,000,000 problem. Sieanna Computer Systems, Inc. is an Internet Access Provider ("IAP") for 250,000 customers registered under the domain name of "sieanna.com."¹ Sieanna received an e-mail which proved to be detrimental to Sieanna's existence as an IAP. The e-mail, sent by Network Solutions Inc. ("NSI"),² states that CICKER, Inc. instituted a challenge against Sieanna's domain name under NSI's Domain Name Dispute Policy,³ based upon CICKER'S United States Trademark Registration Number

1. This is a fictitious hypothetical. Any similarity to actual individuals, places, businesses, domain names, or trademarks is purely coincidental. This hypothetical reveals the domain name registrar's inherent power to cease corporate operations simply because that corporation's domain name is similar to the trademark held by another entity. *See, e.g., Roadrunner Computer Systems, Inc. v. Network Solutions, Inc.*, No. 96-413-A (E.D. Va. filed Mar. 26, 1996) <<http://www.patents.com/nsimemo.sht>> (granting an order for a preliminary injunction). Roadrunner Computer Systems, an Internet Access Provider ("IAP"), instituted an action against Network Solutions, Inc. ("NSI") because NSI stated that it would place Roadrunner's domain name on "Hold" status (restrain the use of the domain name) in accordance with NSI's Domain Name Dispute policy. *Id.* *See also* Dinah Zeiger, *Network Solutions Pulls Plug on "Delinquent" Internet Addresses*, DENV. POST, July 1, 1996, at E5. Clue Computing Systems, an IAP, sought injunctive relief against NSI for NSI's challenge to the legitimacy of Clue's domain name via NSI's Domain Name Dispute Policy. *Id.* The court granted Clue's motion for a preliminary injunction preventing NSI from placing the domain name on "Hold" status pending a trial. *Id.*

2. *See* David Maher, *Trademarks on the Internet: Who's in Charge?* (visited May 30, 1996) <<http://aldea.com/cix.maher.html>>. NSI is a private corporation that administers domain name registration for top-level domain names that end in ".com," ".edu," ".org," ".gov," and ".net." *Id.* ¶ 7.

3. *Network Solutions' Domain Name Dispute Policy Statement Revision 02* (last modified Sept. 9, 1996) <<http://rs.internic.net/domain-info/internic-domain-4.html>> [hereinafter *Policy Statement*]. *See generally infra* APPENDIX.

2,000,000 for the trademark "sieanna" as used in connection with outdoor sports equipment. NSI informed Sieanna Computer Systems that if Sieanna fails to register a new domain name within 90 days, Sieanna will lose "sieanna.com," as well as 250,000 customers and their business.

After consulting with in-house counsel, questions such as, Who is NSI? Does NSI have the legal right to confiscate the "sieanna.com" domain name? Why are they taking our rightfully held domain name away? Where are our Fifth Amendment procedural due process rights?⁴ Without a domain name, where does this leave the business? arose.

This fictitious example represents an actual problem. How can NSI use a *Policy Statement* to seize a domain name which, legally, is a domain name owner's property? This Comment argues that NSI's present *Policy Statement*, which grants NSI the power to confiscate domain names, violates Fifth Amendment requirements of procedural due process.

The Internet,⁵ which links millions of computer networks together worldwide for the purpose of automated communication, is the forefront of communications technology.⁶ An Internet domain name, which functions as a computer user's "address" on the Internet, not only identifies individuals and organizations, but is an important commercial source designator for businesses.⁷

The Internet Network Information Center ("InterNIC")⁸ is a central

4. U.S. CONST. amend. V. The Fifth Amendment provides, "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.*

5. *The Internet: Getting Started*, 2 HIGHER EDUC. PRODUCT COMPANION 20, 20 (1993). The Internet had its origin in a project originally named ARPAnet, created in 1969, by the United States Department of Defense Advanced Research Projects Agency ("ARPA"). *Id.* The original project consisted of four computers in California and Utah, connected by the United States Department of Defense, for the purpose of sharing files between computer scientists and military personnel. Paul A. Arne, *New Wine in Old Bottles: The Developing Law of the Internet*, 416 PLI/PAT 9, ¶ 4 (1995). In the 1970's, after ARPAnet's genesis, the project expanded into academia and research areas to include academic institutions in the United States and other countries. Gary W. Hamilton, *Trademarks on the Internet: Confusion, Collusion, or Dilution*, 4 TEX. INTELL. PROP. L.J. 1, 2 (1995). Presently, the Internet is a global network of thousands of independent networks which contain several million host computers. ED KROL, *THE WHOLE INTERNET: USER'S GUIDE & CATALOG* 31-34 (2d ed. 1994). In 1981, the Internet linked approximately 300 computers, and is expected to grow to 200 million Internet users by 1999. *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996).

6. Arne, *supra* note 5, ¶ 3.

7. See generally Jonathan Agmon et al., *What's in a Name?* (visited June 27, 1996) <<http://www.law.georgetown.edu/lc/internic/domain1.html>>.

8. G. Andrew Barger, *Cybermarks: A Proposed Hierarchical Modeling System of Registration and Internet Architecture for Domain Names*, 29 J. MARSHALL L. Rev. 623, 631

resource center for Internet users that operates the Internet Domain Name System ("DNS").⁹ InterNIC, which comprises NSI and AT&T, performs various Internet services, including NSI's Internet domain name coordination and registration.¹⁰

Along with the positive effects that the Internet has on businesses and consumers,¹¹ conversely, a host of negative effects exist. For example, the current top-level domain name system ("TLD") which is governed by NSI's *Policy Statement* consistently fails to afford Internet domain name owners Fifth Amendment procedural due process as guaranteed by the Constitution.¹²

This Comment focuses on four areas of NSI's domain name registration system and *Policy Statement*. First, this Comment reviews Internet domain name structure, governance, registration, and disputes between trademark owners, domain name owners, and NSI. Second, this Comment analyzes the constitutional ramifications that NSI's present *Policy Statement* has on domain name owners. The first constitutional question addresses whether NSI is a federal-state actor which is subject to Fifth Amendment procedural due process requirements. The second constitutional question addresses whether NSI's *Policy Statement* affords a domain name owner Fifth Amendment procedural due process guaranteed under the Constitution. Last, this Comment offers a proposal and recommendation which will enable NSI's *Policy Statement* to afford Fifth Amendment procedural due process to a domain name owner.

(1996). The National Science Foundation ("NSF") provides support and monetary grants for research in networking and communications. *Id.* at 630-31. The Internet Network Information Center ("InterNIC") was created to establish order on the chaotic Internet and function as a central general information resource for Internet users. *Id.* See also G. Peter Albert, Jr., *Right on the Mark: Defining the Nexus Between Trademarks and Internet Domain Names*, 15 J. MARSHALL J. COMPUTER & INFO. L. 277 (1997).

9. See generally KROL, *supra* note 5, at 30-34 (providing a general overview of the Internet Domain Name System).

10. David E. Sorkin, *Revocation of an Internet Domain Name for Violations of "Netiquette": Contractual and Constitutional Implications*, 15 J. MARSHALL J. OF COMPUTER AND INFO. L. 587, 594 (1997). See also Barger, *supra* note 8, at 630-31. InterNIC includes the InterNIC Registration Services ("INRS"), which is operated by a commercial organization named NSI, a subsidiary of the Science Applications International Corporation ("SAIC"). *Id.*

11. Dan L. Burk, *Trademarks Along the Infobahn: A First Look at the Emerging Law of Cybermarks*, 1 RICH. J.L. & TECH. 1, ¶ 8 (Apr. 10, 1995) <<http://www.urich.edu/~jolt/vliil/burk.html>>.

12. U.S. CONST. amend. V.

II. BACKGROUND

A. INTERNET DOMAIN NAME STRUCTURE, GOVERNANCE, AND REGISTRATION

The Internet is a vast array of computer terminals and communications equipment that is a resourceful tool on the "information superhighway."¹³ The Internet is not a physical or tangible entity, but is an interconnection of linked computer networks¹⁴ which result in a decentralized, global medium of information exchange.¹⁵ The Internet links forty million people,¹⁶ 9.4 million host computers,¹⁷ and over eight thousand global networks.¹⁸ The Internet enables government entities, businesses, educators, and individuals to communicate in cyberspace¹⁹ with millions of other governments, organizations, academics, and individuals

13. Burk, *supra* note 11, ¶ 9. The business and consumer communities increasingly use the Internet as an important marketing tool. *Id.* For business, the Internet is a tool that disseminates consumer information to the public and provides the public with a direct communications link to the organization. *Id.* For the consumer, the Internet provides access to complete simple transactions, such as the purchase of magazines and newspapers, flowers, tickets, food, or even music. *Id.*

14. DANIEL P. DERN, *THE INTERNET GUIDE FOR NEW USERS* 16 (1994). Networks are a collection of several thousand local, regional, and global computers interconnected in "real time" (simultaneous communication between parties) via the Transmission Control Protocol/Internetworking Protocol ("TCP/IP") Suite. *Id.* In addition, these networks extend to more than 45 countries, including the United Kingdom, Germany, Italy, France, Netherlands, Canada, Mexico, Japan, Australia, and Russia. *Id.* at 16-17. *See also* *ACLU v. Reno*, 929 F. Supp. at 831. Some networks are "closed" networks, which are not linked to other computers or networks. *Id.* Most networks are connected in a manner that permits each computer in any network to communicate with computers on any other network, and this global web of linked networks constitutes the Internet. *Id.*

15. *See* Hamilton, *supra* note 5, at 3. Networks are connected by telephone lines, leased high speed lines, fiber optics, microwave links and satellites. *Id.* The network transfer of information across the Internet is performed by breaking up information into "packets." *Id.* The "packets" are transported via links and nodes along various routes of the Internet. *Id.* *See also* Elmer-Dewitt, *Battle for the Soul of the Internet*, *TIME*, July 25, 1994, at 54. In order to receive access to the Internet, an individual needs a personal computer ("PC"), communications software, a modem, a phone line, and a computer identifier known as an Internet domain name. *Id.* The communications software enables the PC to connect to an IAP. *Id.* A modem provides the connection and converts the Internet "packets" into audio signals which are received by other PC's over the telephone lines. *Id.* When the "packets" reach their destination, they are reassembled by the host machine and made available to the individual. *Id.*

16. *ACLU v. Reno*, 929 F. Supp. at 831.

17. *Id.*

18. DERN, *supra* note 14, at 16-17.

19. Edward J. Naughten, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 *GEO. L.J.* 409, 411-13 (1992). "Cyberspace" is merely a term of art that refers to a dimensionless forum and a place where machines communicate to each other without human intervention. *Id.* at 15-17.

through the touch of a button.²⁰ Accordingly, an Internet domain name is not only a computer user's address, but is the vehicle which enables a user to locate other Internet users. Therefore, a review of Internet domain name structure, governance, and registration provides necessary insight into the dynamics of NSI's present Domain Name Dispute Policy.

1. *Internet Domain Name Structure*

Due to the enormous number of Internet users, each computer that has access to the Internet is assigned a unique Internet site address.²¹ Every Internet site address consists of a numeric computer address.²² Many site addresses also consist of an alphanumeric Internet domain name.²³ Because numeric addresses are often difficult to remember, the current Internet system translates simple alphanumeric mnemonics into numeric IP addresses or domain names.²⁴ An example of a domain name accessed through the World Wide Web²⁵ is "http://xcs.infosystems.star.com." Read from left to right, the fields designate "http," the

20. Robert J. Raskopf, *Trademarks and the Internet*, 416 PLI/PAT 1047, 1049 (1995).

21. Barger, *supra* note 8, at 628. Technically, a computer address is called a domain name. *Id.* A domain name identifies a specific site or node on a mass of computer networks that spans the entire globe. *Id.*

22. DERN, *supra* note 14, at 70. A numeric site address is in the form of an Internetworking Protocol ("IP") address. *Id.* An IP address is made up of a network address and a local address. *Id.* The IP address is in the form of 32 bit numbers broken into four groups separated by periods, e.g., 4.23.467.36. *Id.*

23. DERN, *supra* note 14, at 65. Internet nodes are assigned an alphanumeric label or domain name which is a "computer address" that allows the networks to interface and bridges network connections by allowing "packets" of information to pass to the correct network and computer. *Id.* When a network or personal computer user requests a connection to a particular domain name, a domain name server automatically translates the domain name into an IP number to enable the computer to make an Internet connection. *Id.* at 75-76.

24. Barger, *supra* note 8, at 628. The current domain name system consists of a distributed system database that reconfigures domain names, which in turn is made up of unique alphanumeric mnemonics that can be easily remembered or researched by Internet users with an Internet search engine, into numeric Internet Protocol addresses. *Id.*

25. Barger, *supra* note 8, at 629. The World Wide Web ("Web"), which hosts 100,000 sites, is an Internet Graphical User Interface ("GUI") that links text, files and programs by way of a universal protocol known as Hypertext Markup Language ("HTML"). *Id.* at n. 16. HTML was created by Tim Berners-Le, a Swedish software engineer, and a universal protocol that the Internet community has utilized. *Id.* Uniform Resource Locators ("URL") are alphanumeric strings of text that define where to find a particular piece of information on the Internet. *Id.* at 628. The function of URLs is to define how Internet users can reference or locate specific information located at a domain name site. *Id.* In addition, URLs consist of a protocol segment and scheme-specific segment separated from the protocol portion by two forward slashes, such as http://www.xcs.com. *Id.* at 628-29.

hypertext transfer protocol,²⁶ the computer, subdomains, domains of the address in proximity to the user, and the top-level domain.²⁷ Top-level domains, including those which NSI registers, are standardized Internet designations that specify the type of organization utilizing a domain name.²⁸

26. Barger, *supra* note 8, at 629. Hypertext Transfer Protocol ("http") allows for the use of Hypertext Markup Language ("HTML") by linking different data types within one Web page to other Web pages. *Id.* at n. 17.

27. Burk, *supra* note 11, ¶ 13.

28. Jon Postel, *Domain Name System Structure and Delegation*, Network Working Group Request for Comments No. 1591, Mar. 1994, at 1-2 <<http://ds.internic.net/rfc/rfc1591.txt>>. Top-Level Domains fit into seven different categories:

Worldwide Generic Domains:

COM - This domain is intended for commercial entities, that is companies. This domain has grown very large and there is concern about the administrative load and system performance if the current growth pattern is continued. Consideration is being taken to subdivide the COM domain and only allow future commercial registrations in the subdomains.

EDU - This domain was originally intended for all educational institutions. Many [u]niversities, colleges, schools, educational service organizations, and educational consortia have registered here. More recently a decision has been taken to limit further registrations to 4 year colleges and universities. Schools and 2-year colleges will be registered in the country domains.

NET - This domain is intended to hold only the computers of network providers, that is the NIC and NOC computers, the administrative computers, and the network node computers. The customers of the network provider would have domain names of their own (not in the NET TLD).

ORG - This domain is intended as the miscellaneous TLD for organizations that didn't fit anywhere else. Some non-government organizations may fit here.

INT - This domain is for organizations established by international treaties, or international databases.

United States Uses Only Generic Domains:

GOV - This domain was originally intended for any kind of government office or agency. More recently a decision was taken to register only agencies of the US Federal government in this domain. State and local agencies are registered in the country domains . . .

MIL - This domain is used by the United States military.

Id.

In addition, part of the top-level domains, are domains based on "country codes," such as ".us" for the United States of America, ".ca" for Canada, and ".uk" for Great Britain. *Id.* See also *Blue Ribbon International Panel to Examine Enhancements to Internet Domain Name System* (visited Feb. 19, 1997) <<http://www.iahc.org/press1.html>>. In order to resolve various controversies surrounding proposals for enhancements to the Internet Domain Name System an International Ad Hoc Committee ("IAHC") was formed by the Internet Society. *Id.* The primary goal of the IAHC is to define, investigate, and resolve issues resulting from the current international debate over establishment of global registries and additional international Top-Level Domain names ("iTLDs"). *Id.* The IAHC is composed of members from the International Telecommunication Union ("ITU"), the World Intellectual Property Organization ("WIPO"), the International Trademark Association ("INTA"), the Internet Society ("ISOC"), the Internet Assigned Numbers Authority ("IANA"), and the Internet Architecture Board ("IAB"). *Id.*

2. *Internet Domain Name Governance*

The Internet is not governed by a central authority.²⁹ However, the United States Government, via the National Science Foundation ("NSF"),³⁰ maintains a substantial role in Internet governance by providing support and monetary grants for research in networking and communications.³¹ In order to carry out these functions, NSF created InterNIC³² to perform administrative functions, including domain name

29. See Barger, *supra* note 8, at 630. See also Robert Shaw, *Internet Domain Names: Whose Domain Is This?* (visited July 8, 1996) <<http://www.itu.ch/intreg/dns.html>>. A number of private entities are involved in the administration of the Internet. *Id.* The closest ruling entity is the Internet Engineering Task Force ("IETF"). *Id.* The IETF (located at <http://www.ietf.cnri.reston.va.us/>), an international organization, is comprised of Internet engineers that determine and produce Internet standards. *Id.* The IETF also approves and publishes Requests for Comments ("RFCs"), which set forth standards, protocols, and recommended practices for use of the Internet. *Id.* Other administrative organizations are the following: 1) the Federal Networking Council ("FNC") (located at <http://www.fnc.gov/>), chartered by the National Science and Technology Council's Committee on Information and Communications ("CIC"), an interagency unit of the United States government that acts as a forum for networking collaborations among Federal agencies to meet their research, education, and operational mission goals; 2) the Internet Engineering Steering Group ("IESG") (located at <http://www.ietf.cnri.reston.va.us/iesg.html>), which manages the internal activities of the IETF; 3) the Internet Society ("ISOC") (located at <http://www.isoc.org/>), a non-profit, scientific, educational and charitable Internet organization primarily concerned with the growth and evolution of the Internet; 4) the Internet Architecture Board ("IAB") (located at <http://www.iab.org/iab/>), a technical advisory group of the ISOC; and 5) the Internet Assigned Numbers Authority ("IANA") (located at <http://www.isi.edu/iana/>), chartered by the ISOC and the FNC to act as the clearinghouse to assign and coordinate the use of numerous Internet protocol parameters, and function as the overall authority for IP addresses and domain names. *Id.*

30. See Burk, *supra* note 11, ¶ 7. NSF, a federal agency, assumed responsibility for funding and management of the ARPAnet from its evolution from a military network to one primarily used for academic research. *Id.* See also DERN, *supra* note 14, at 15. Throughout the 1980's and 1990's the benefits of the Internet were revealed to the public business and consumer sector. *Id.* Private IAPs began to operate and offer high-speed links for network access and facilities for consumers. *Id.* The IAPs formed a Commercial Internet Exchange ("CIX"), which changed the restrictions set by NSF. *Id.* NSF began to retreat from its funding and management capacities and began to contract management duties to private firms. *Id.* at 12-13.

31. See generally *National Science Foundation Cooperative Agreement No. NCR-9218742*, (last modified Jan. 1, 1993) <<http://rs.internic.net/nsf/agreement/index.html>>. See also Mark Voorhees, *Network Solutions Says Name Policy Is "Not Subject to Review" by Courts*, INFO. L. ALERT, May 17, 1996 (. The United States government also exerts Internet control via the FNC, by coordinating federal funding of IANA and other organizations that perform technical and administrative functions related to the Internet. *Id.* See also Mike St. Johns, *FNC's Role in the DNS Issue, Paper Presented at the Harvard University DNS Workshop* (Nov. 20, 1995) <<http://ksgwww.harvard.edu/iip/fnc.html>> (stating that a representative of the FNC claimed that the United States Government owns the "root" space as well as the ".com," ".net," and ".org" TLDs).

32. See Barger, *supra* note 8, at 631. See also *National Science Foundation Cooperative Agreement No. NCR-9218742*, *supra* note 31. InterNIC, is the delegated authority for

registration.³³ The InterNIC Registration Services ("INRS")³⁴ performs top-level domain name registration. In turn, NSI,³⁵ a subsidiary of the Science Applications International Corporation ("SAIC"), operates InterNIC Registration Services.³⁶ Although NSF created agency divisions of Internet governance, NSF, as a federal agency, possesses direct control over all activities of the agency divisions.³⁷

3. *Internet Domain Name Registration*

NSI is under a five-year, \$5.9 million Cooperative Agreement³⁸ with

the registration of domain names and other computer addressing information. *Id.* Prior to InterNIC's establishment, the domain name and computer addressing service had been provided by the Defense Information Systems Agency Network Information Center in conjunction with IANA, an entity operated by the Information Sciences Institute of the University of Southern California. *Id.* See also Postel, *supra* note 28 (stating that InterNIC assigned IANA overall authority for IP addresses, domain names, and other parameters used in the Internet, and that day-to-day responsibility for assignment of IP addresses, autonomous system numbers, and most top-level and second-level domain names is handled by the Internet Registry "IR" and regional registries).

33. *Id.*

34. See Shaw, *supra* note 29. See also Andre Brunel, *Billions Registered, But No Rules: The Scope of Trademark Protection For Internet Domain Names*, 7 J. PROPRIETARY RTS. 2, ¶¶ 6-7 (1995) (stating that NSF created InterNIC to act as a central resource for the Internet's burgeoning on-line resources, and contracted with three commercial companies to operate three "divisions" of InterNIC of which the INRS was created and operated by NSI to register top-level domain names on a "first-come, first-served" basis).

35. *About SAIC Network Solutions* (visited June 29, 1996) <<http://www.netsol.com/lsi.html>>. NSI is a network integration company founded in 1979 in Herndon, Virginia. *Id.* NSI joined SAIC in March 1995. *Id.* NSI provides the full life cycle of engineering services for Wide Area networks ("WANs") and Local Area Networks ("LANs"), and develops and optimizes private voice, data, and video networks. *Id.* NSI employs over six hundred engineers, technicians, and professional staff throughout the United States, Europe, and the Pacific Rim. *Id.* Moreover, NSI is involved in a comprehensive information technology standardization and modernization effort with regard to the Internet. *Id.* See also *Conference Mulls Future of Domain Name System*, NETWORK WORLD, Sept. 16, 1996, at 8 (stating that Internet domain name registrations have increased from 2,500 in October 1994 to 248,000 in July 1996).

36. Glenn R. Simpson, *Internet Users Spooked About Spies' New Role*, WALL ST. J., Oct. 2, 1995, at B1. SAIC, a \$1.9 billion company, receives 85% of its business from government contracts. *Id.* Work assignments include running the FBI's Interstate Identification Index, working on a global computer network to link top commanders of all branches of the Armed Forces, and helping the Internal Revenue Service manage tax data. *Id.*

37. See generally Burk, *supra* note 11, at ¶ 6.

38. See 31 U.S.C. § 6305 (1996).

Using Cooperative agreements:

An executive agency shall use a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—

(1) the principal purpose of the relationship is to transfer a thing of value to the State, local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by

NSF to register and maintain domain names.³⁹ The Cooperative Agreement and Registration Agreement⁴⁰ provides that domain name applicants pay NSI a \$100 fee.⁴¹ This fee covers domain name registration for the first two years of service, as well as an annual \$50 fee to maintain domain name service thereafter.⁴² Under the Cooperative Agreement, NSI retains seventy percent of the revenue generated from applicant fees as consideration for providing registration services, and uses thirty percent of the fees to enhance the "Intellectual Infrastructure" of the Internet.⁴³

NSI's primary purpose as a domain name registry is to allocate domain names on a first-come, first-serve basis.⁴⁴ Under the current Registration Agreement, however, NSI does not institute trademark searches on domain names submitted for approval and registration, which in turn reduces its workload and minimizes interference with trademark rights.⁴⁵ In addition, the applicant agrees to abide by the

purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and (2) substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

Id.

39. *National Science Foundation Cooperative Agreement No. NCR-9218742*, *supra* note 31.

40. *NSI Registration Agreement* (last modified Sept. 9, 1996) <ftp://rs.internic.net/templates/domain-template.txt>.

41. *Id.*

42. *Id.*

43. *National Science Foundation Cooperative Agreement No. NCR-9218742*, *supra* note 31. The Cooperative Agreement states in pertinent part:

3. The funds collected by reason of the fee imposition will be treated as "Program Income" under the agreement. Of those funds:
 - a. 70% will be available to Awardee as consideration for the services provided.
 - b. The remaining 30% . . . will be used for the preservation and enhancement of the "Intellectual Infrastructure" of the Internet in general conformance with approved Program Plans. Awardee will develop and implement mechanisms to insure the involvement of the Internet communities in determining and overseeing disbursements from this account. Under the amended agreement, NSI must obtain the approval of NSF for any changes in the fee structure as well as for NSI's annual program plans, and must submit monthly, quarterly, and annual reports to NSF.

Id.

44. *See Raskopf, supra* note 20, ¶ 9 (stating because NSI registers Internet domain names on a "first-come" "first-served" basis, numerous "squatters," both individuals and companies, have rushed to register trademarks of popular companies and products including, "esquire.com," "hertz.com," "trump.com," "coke.com," "startrek.com," "nasdaq.com," "cosmo.com," and "windows.com").

45. *See Raskopf, supra* note 20, ¶ 8 (stating that InterNIC does not run trademark searches on domain names submitted for approval and registration, but merely checks its records to ensure that an identical domain name has not already been issued). *See also NSI Registration Agreement, supra* note 40. The Registration Agreement specifies that

procedures specified in the *Policy Statement*—which NSI may arbitrarily change at any time—and agrees that disputes relating to the Agreement and *Policy Statement* shall be governed under the laws of the United States and California.⁴⁶

4. *NSI's Domain Name Dispute Policy (Revision 02)*

NSI published a *Domain Name Dispute Policy Statement* to minimize the possibility of interference with legitimate trademark rights, as well as its involvement in lawsuits concerning domain names.⁴⁷ The September 9, 1996 *Policy Statement*⁴⁸ requires the domain name applicant to certify that the domain name is not being registered for an “unlawful purpose” and that the applicant is not infringing upon third party use of a domain name as a trademark.⁴⁹ Moreover, if a dispute between a trademark owner and a domain name owner arises, the applicant agrees to defend, indemnify, and hold NSI harmless.⁵⁰ Accordingly, if such a dispute arises, NSI will place the domain name owner’s domain name on “Hold”⁵¹ after the trademark owner provides notice to the domain name owner regarding infringement of trademark.⁵² The domain name “Hold” status will take effect after the domain name owner subsequently fails to provide evidence of trademark registration in conjunction

“[t]he party requesting registration of this name certifies that, to her/his knowledge, the use of this name does not violate trademark or other statutes.” *Id.*

46. See *NSI Registration Agreement*, *supra* note 40. The Registration Agreement states that in the process of “[A]pplying for the domain name and through the use or continued use of the domain name, the applicant agrees to be bound by the terms of NSI’s then current domain name policy The applicant acknowledges and agrees that NSI may change the terms and conditions of the Policy Statement” *Id.* Accordingly, a domain name owner “[A]grees that if the use of the domain name is challenged by any third party, or if any dispute arises under this Registration Agreement, as amended, the applicant will abide by the procedures specified in the Policy Statement.” *Id.* The applicable federal and state law that the Registration Agreement applies is “[I]n all respects by and construed in accordance with the laws of the United States of America and of the State of California, without respect to its conflict of law rules.” *Id.*

47. Raskopf, *supra* note 20, at ¶ 10.

48. See generally *infra* APPENDIX. NSI first published the Policy Statement in July 1995, then revised it in November 1995, and also in September 1996. *Id.* NSI’s *Policy Statement*, Revision 02 (effective Sept. 9, 1996), replaces all previous domain name dispute policies. *Id.*

49. See *infra* Clause I-2 of APPENDIX .

50. See *infra* Clause II-3 of APPENDIX.

51. See *infra* Clause II-6(e) and (f) of APPENDIX. A domain name placed on “Hold” status prohibits any person or entity from using the domain name. *Id.* A domain name remains on “Hold” status until a dispute between the domain name owner and a third party or NSI is complete. *Id.* NSI reinstates a domain name if it is presented with a court order or evidence of dispute resolution that states which party is entitled to the domain name. *Id.*

52. See *infra* Clause II-5(b) of APPENDIX.

with the use of the domain name.⁵³ Thus, this Comment argues that NSI's *Policy Statement*, apparently adequate on its face, usurps a person's procedural due process rights guaranteed under the Fifth Amendment by reallocating the domain names from a domain name owner to a trademark owner.

B. INTERNET DOMAIN NAME DISPUTES

NSI's Internet domain name registration system has instigated a number of legal disputes between the domain name owner and the trademark owner over the right to use a domain name. Specifically, disputes arise in two areas. First, between trademark owners and domain name owners, most of which the parties settled out of court because of the complex issues involved. The parties also settled out of court due to the lack of legal precedent and the expense of litigation. Second, between domain name owners and NSI. All challenges by domain name owners against NSI sought preliminary injunctive relief, but to date, no court has ruled upon a challenge to the constitutionality of NSI's *Policy Statement* based on Fifth Amendment procedural due process analysis.

1. *Disputes Between the Trademark Owner and the Domain Name Owner*

*MTV Networks v. Curry*⁵⁴ signified the beginning of disputes between trademark owners and domain owners concerning the use of domain names as trademarks.⁵⁵ In *Curry*, MTV Networks ("MTV") sued Adam Curry, a former video-jockey for trademark infringement, breach of contract, fraud/negligent misrepresentation, and unfair competition for Curry's use of "mtv.com" which Curry registered as a domain name.⁵⁶ Curry began use of "metaverse.com" pending trial but, in March 1995, relinquished "mtv.com," in a settlement with MTV.⁵⁷

In a similar trademark infringement suit, Stanley H. Kaplan sued—then settled with—Princeton Review over Princeton Review's registra-

53. See *infra* Clause II-6(e) of APPENDIX.

54. 867 F. Supp. 202 (S.D.N.Y. 1994).

55. *Curry*, 867 F. Supp. at 204. See also Mark Voorhees, *Avon Retrieves Domain Name from Name Hijacker*, INFO. L. ALERT, Apr. 5, 1996 (noting that Avon Products, Inc. retrieved "avon.com" from Carnetta Wong, by persuading NSI that Wong and an associate, David Lew, violated NSI's Policy Statement in which an applicant affirms that a domain name does not violate a third party's trademark or other intellectual property or otherwise interfere with a third party's business). See also *Comp Examiner Agency v. Juris Inc.*, No. 96-CV2138 (C.D. Cal. Apr. 26, 1996) (granting an order for a preliminary injunction). This represents the first case of quasi-precedential value where a court granted an injunction for a trademark owner against a domain name owner for the use of "juris.com". *Id.*

56. *Id.*

57. Mark Voorhees, *MTV, Curry Settle*, INFO. L. ALERT, Mar. 24, 1995.

tion of "kaplan.com."⁵⁸ Likewise, Josh Quittner relinquished "mcdonalds.com" to McDonalds Corporation after McDonalds made a \$3,500 contribution to a New York grade school for the purchase of computer equipment.⁵⁹

*KnowledgeNet, Inc. v. D.L. Boone*⁶⁰ is the first case in which NSI was a named defendant. KnowledgeNet sued Boone for trademark infringement⁶¹ after Boone registered "knowledgenet.com" for use in connection with marketing computer consulting services.⁶² The parties settled the case because Boone agreed to transfer "knowledgenet.com" to KnowledgeNet, Inc.⁶³ The facility with which trademark owners and domain name owners settle these disputes indicates that domain names possess significant commercial value in Internet commerce.⁶⁴

2. Disputes Between the Domain Name Owner and NSI

The *KnowledgeNet* case prompted NSI to adopt its first *Policy Statement* in July of 1995.⁶⁵ The *Policy Statement* attempted to shield NSI from disputes with *trademark owners*, but instead prompted several lawsuits from *domain name owners*. For example, in *Roadrunner Computer Systems, Inc. v. Network Solutions, Inc.*,⁶⁶ NSI sent Roadrunner Com-

58. See Burk, *supra* note 11, ¶¶ 18-20. In 1994, Princeton Review, a test preparation company for standardized aptitude tests such as the SAT, LSAT, and GRE, registered and began using the Internet domain name "princeton.com," "review.com," and "kaplan.com." *Id.* ¶ 19. Princeton Review used "kaplan.com" to offer information that disparaged the quality of Kaplan Review's services and discussed the comparative advantages of Princeton Review's services, which were directed at Internet users that wanted to receive information about its competitor, Stanley H. Kaplan Educational Centers. *Id.* Kaplan brought suit, the parties submitted to arbitration, and the arbitrator ordered Princeton Review to relinquish its rights to "kaplan.com," and to transfer the domain name to Kaplan Review. *Id.* ¶ 20.

59. Bruce P. Keller, *Electronic Property Rights and Licensing On-line Uses of Intellectual Property*, 421 PLI/PAT 7, ¶ 14 (1995). Josh Quittner, a reporter for *Newsday*, registered the Internet address "ronald@mcdonalds.com," while in the course of writing an article for *Wired* magazine about businesses that have failed to protect their trademark as an Internet domain name. *Id.* McDonalds Corporation initially pressured NSI to revoke Quittner's domain name registration, but eventually settled with Quittner. *Id.*

60. *KnowledgeNet, Inc. v. D.L. Boone*, No. 94-CV-7195 (N.D. Ill. filed Dec. 2, 1994).

61. *Id.*

62. *Id.*

63. Raskopf, *supra* note 20, ¶ 23.

64. See Burk, *supra* note 11, ¶ 15.

65. See *Network Solutions' Domain Name Dispute Policy Revision 01* (last modified July 28, 1995) <ftp://rs.internic.net/policy/internic/internic-domain-1.txt.>.

66. *Roadrunner*, No. 96-413-A (granting an order for a preliminary injunction). See also Mark Walsh, *New Wrinkle in Internet Domain Name Dispute*, RECORDER, June 21, 1996, at 1 (reporting on *Giacalone v. Network Solutions Inc.*, No. 96-20434 (N.D. Cal., filed May 30, 1996)). In a domain name hijacking suit, Giacalone filed a declaratory judgment action against both Ty, Inc. and NSI for attempted withdrawal of his domain name "ty.com." *Id.* Giacalone alleged intentional interference with advantageous business rela-

puter Systems, an IAP, a notice stating that Roadrunner had thirty days to respond to a trademark infringement complaint by Time Warner, Inc. otherwise, NSI would place Roadrunner's domain name, "roadrunner.com," on "Hold" status.⁶⁷ NSI failed to acknowledge Roadrunner's Tunisian trademark simply because Roadrunner was delinquent in submitting the trademark to NSI within thirty days from the initial complaint.⁶⁸ Because NSI's demand would require Roadrunner Computer Systems to forfeit its domain name, Roadrunner filed for a preliminary injunction to enjoin NSI from placing "roadrunner.com" on "Hold" status.⁶⁹ The court enjoined NSI from placing Roadrunner's domain name on "Hold."⁷⁰ Following the settlement with Time Warner, Inc., Roadrunner regained lawful use of "roadrunner.com."⁷¹ The benefit of *Roadrunner* is the court's recognition, for the first time, of the valuable property right inherent in a domain name. The disputes between domain name owners and NSI indicate not only the commercial value of domain names, but also the growing hostility of domain name owners toward the Domain Name Registration System.

III. ANALYSIS

A viable argument for domain name owners is that NSI's *Policy Statement* violates a domain name owner's Fifth Amendment procedural due process rights. In accordance with the due process analysis, this sec-

tionships, trademark misuse, and sought a preliminary injunction. *Id.* NSI agreed to an order not to withdraw the domain name if it did not have to be a part of the suit. *Id.* The parties eventually settled and agreed that Ty, Inc. would purchase the rights to the domain name from Giacalone. *Id.* See also *Network Solutions, Inc. v. Clue Computing, Inc.*, No. 96-1530 (D. Colo. filed June 21, 1996) (involving a domain name hijacking suit in which Clue Computing brought an action against NSI for injunctive relief against NSI for the termination of Clue Computing's domain name of "clue.com"). The suit in *Clue Computing* arose after a manufacturer, Hasbro, Inc., contacted NSI to challenge the domain name "clue.com." *Id.* Preliminary injunctive relief was granted and the suit is currently pending. *Id.* See also *Data Concepts, Inc. v. Digital Consulting*, No. 96-429 (M.D. Tenn., filed May 8, 1996). Data Concepts named both Digital Consulting, which own the trademark DCI, and NSI in a lawsuit, arising out of a dispute with the use of "dci.com." *Id.* Data Concepts sought a permanent injunction to prohibit NSI from interfering with the use of "dci.com" as an Internet domain name. *Id.* Data Concepts and NSI agreed to a stipulation which provided that NSI would not interrupt Data Concepts' use of "dci.com" until the District Court enters an order permitting such an interruption. Mark Voorhees, *Information Law Alert Source Documents* (visited June 20, 1996) <http://infolawalert.com/source/src061496_dc_motion.html>.

67. See *Roadrunner*, No. 96-413-A (granting an order for a preliminary injunction).

68. *Id.*

69. *Id.*

70. Evan Ramstad, *The Net's Traffic Cop // Network Solutions has Gained Influence and Enemies with its Domain Registry // Network Solutions Rules in Cyberspace*, AUSTIN AMERICAN-STATESMAN, Sept. 2, 1996, available in 1996 WL 3442640.

71. *Id.*

tion first demonstrates that NSI is a state actor, and as a state actor must provide a domain name owner procedural due process. Next, this section shows that NSI, as a state actor, must afford a domain name owner a hearing before it can confiscate a domain name.

A. NSI'S CONNECTION TO THE UNITED STATES GOVERNMENT VIA NSF

The Fifth Amendment mandates that "no person shall . . . be deprived of life, liberty, or property, without due process of law."⁷² Thus, procedural due process applies only to acts of the federal government, and does not offer a shield against private conduct.⁷³ Moreover, as a private party, NSI's conduct is federal action only if the federal government's involvement is "substantial."⁷⁴

This section analyzes NSI's link to the federal government. First, this section establishes attributes of government controlled corporations, and then applies those attributes to NSI's relationship with NSF. Second, this section introduces the "Federal/State Actor" doctrine, and then analyzes NSI's connection with NSF under this doctrine.

1. *Government-Controlled Corporations Generally and Application to NSI*

As InterNIC's domain name registrar, NSI's connection to the United States government yields the conclusion that NSI is a government controlled corporation. A government controlled corporation is a private entity in which the federal government couches its authority and control.⁷⁵ The United States Supreme Court has long warned that "if

72. U.S. CONST. amend V.

73. See *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 462 (1952) (stating that the government must adhere to Fifth Amendment procedural due process, and unless there is a substantial connection to the government, a private individual will not be subjected to Fifth Amendment analysis). See also *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926) (stating that the Fifth Amendment is a limitation only on the powers of the general government, and is not directed against the action of private individuals); *Talton v. Mayes*, 163 U.S. 376, 382 (1896) (stating that the Fifth Amendment is limitative of the powers granted in the instrument itself and not of distinct governments framed by different persons and for different purposes, and if these propositions are correct, the Fifth Amendment must be understood as restraining the power of the general government, not applicable to the states); *State of Va. v. Mives*, 100 U.S. 313, 318 (1879) (stating that provisions of the Fourteenth Amendment have reference to state action exclusively, and not to any action of private individuals).

74. *Pollak*, 343 U.S. at 462-65. In this case, the Supreme Court held that radio programs in streetcars and buses consisting of music, announcements, and short commercials did not violate Fifth Amendment rights. *Id.* at 465. The Court determined that the street car railway system operates its services under the regulatory supervision of the Public Utilities Commission which is an agency authorized by Congress, and is thus, subject to Fifth Amendment provisions. *Id.* at 462.

75. *Lebron v. Nat'l R.R. Passenger Corp.*, 115 S. Ct. 961, 973 (1995).

the government can escape its constitutional obligations by resorting to the corporate form, then constitutional values are of little value"⁷⁶ In theory, "the government does not cease to be the government simply because it has assumed the form of a corporation, any more than a vampire ceases to be a vampire because it has assumed the form of a bat."⁷⁷ Thus, transportation entities incorporated for shipment of goods,⁷⁸ public transportation,⁷⁹ and securities companies which control federal deposits are government controlled corporations.⁸⁰ Consequently, a government controlled entity that does not act and operate like a private corporation must observe procedural due process rights afforded by the Fifth Amendment.⁸¹

The United States government via NSF, cannot utilize NSI as a corporation in order to escape Fifth Amendment procedural due process requirements. In *Lewis v. Northern Indiana Commuter Transportation District*,⁸² an Illinois District Court questioned whether NICTD, a municipal corporation, is similar to a government entity by considering

76. *Id.*

77. *Id.*

78. See *Emergency Fleet Corp. v. Western Union Tel. Co.*, 275 U.S. 415, 421-22, 426 (1928) (holding Fleet Corporation, a ship manufacturing corporation, and a department of the United States, was eligible for discounted telegraph rates, reserved for the United States government); *United States Grain Corp. v. Phillips*, 261 U.S. 106, 113 (1923) (stating that United States Grain Corporation was an agency for public service, incorporated by the federal government, and used as a shipper for gold); *United States v. Walter* 263 U.S. 15, 17-18 (1923) (holding that because fraud against the shipping corporation would have diminished the value of the federal government's investment in the shipping corporation, conspiracy to commit fraud against the shipping corporation was within a statute punishing conspiracy to defraud the United States).

79. See *Lebron*, 115 S. Ct. at 973. In this case, Lebron instituted a First Amendment challenge against Amtrak's decision that refused an advertisement which parodied the Coors family support of right-winged political groups. *Id.* at 964. Lebron purchased the right to display a work of art depicting Nicaraguan villagers being menaced by a silver Coors beer can missile. *Id.* at 963-64. Amtrak's agent accepted Lebron's purchase of advertising space to display the picture, but Amtrak refused the advertisement. *Id.* at 964. Lebron sued, claiming violation of First Amendment rights. *Id.* The court inquired into whether Amtrak constituted a private entity which was separate and distinct from the federal government. *Id.* 962-68. The court concluded that if the government creates a corporation in order to promote governmental objectives and retain effective control over the corporation, the corporation is a component of the government itself. *Id.* at 974-75.

80. See *Cherry Cotton Mills v. United States*, 327 U.S. 536, 539 (1946) (holding that Reconstruction Finance Corporation ("RFC") made a claim on the part of the federal government and that the government could therefore apply the tax refund to the sums owed to RFC); *Inland Waterways Corp. v. Young*, 309 U.S. 517, 523 (1940) (holding that banks which were wholly owned federal government corporations could give security for all federal deposits because the deposits were government funds, and the losses, if any, were the government's losses).

81. *Pollak*, 343 U.S. at 462-65.

82. 898 F. Supp. 596 (N.D. Ill. 1995).

three specific factors: 1) the extent of the entity's financial autonomy from the state; 2) the entity's general legal status; and 3) whether the entity serves the state as a whole or only a region."⁸³ The court held that NICTD is a government-controlled corporation because of the substantial financial assistance it receives from Indiana and the large geographical area that NICTD's services cover.⁸⁴

NSI's substantial financial assistance, similar to that granted to NICTD by the state of Indiana, satisfies the factors distinguished in *Lewis*.⁸⁵ First, like NICTD, NSI receives substantial financial assistance from the government.⁸⁶ For example, since 1993, NSF, a federal agency, granted NSI more than six million dollars each year, and this amount is subject to negotiation on an annual basis.⁸⁷ Second, since NSF substantially monitors NSI's domain name registration process, this diminishes NSI's autonomy.⁸⁸ Third, NSI serves millions of Internet users nation-

83. *Id.* at 596-602. While working as a car man for Northern Indiana Commuter Transportation District ("NICTD"), Lewis was injured in the course of his employment. *Id.* at 598. Lewis claimed that NICTD's negligent failure to maintain a reasonably safe workplace was the cause of his injury. *Id.* NICTD, a municipal corporation, argued that it was immune from suit in federal courts because it was a government agency under the Eleventh Amendment. *Id.* The Illinois District Court concluded NICTD was immune from suit under the Eleventh Amendment because of the financial assistance it collected from the state and the large geographical area its services covered. *Id.* at 602.

84. *Lewis*, 898 F. Supp. at 602.

85. *Id.*

86. See *National Science Foundation Cooperative Agreement No. NCR-9218742*, *supra* note 31. The Agreement states in relevant part:

ARTICLE 8: FUNDING

A. Agreement Amount (Amendment 1)

The current total estimated amount of this Cooperative Agreement, exclusive of such amounts as may be provided in connection with Directed Activities provided pursuant to Article 11 is \$5,998,374.

.....

E. Compensation and Expenditures

1. As compensation for its performance under this agreement, Awardee shall be compensated for its direct and indirect costs (see Article 8.E.3) and shall be paid a fixed fee as provided in this agreement.
2. The Awardee shall also be reimbursed for such travel and related costs as may be specifically required and approved by the NSF Program Director pursuant to Article 11. Expenditures under this agreement must be in accordance with a current Budget or Program Plan which has been approved by the NSF Grants Officer and no reallocation of funds in excess of \$10,000 between budget line items is permitted without prior written (or e-mail) approval of the NSF Program Official.

F. Future Allotments

The actual level of continued NSF support for future years will be negotiated annually with the Awardee and will depend upon annual review of progress, the proposed Program Plan and the availability of funds. The actual funding of such allotments may be provided unilaterally by NSF on an incremental basis.

Id.

87. *Id.*

88. *Id.* In relevant part:

wide and throughout the world,⁸⁹ which constitutes a large geographical area, thus similar to the large geographical area serviced by NICTD.⁹⁰ Clearly, NSF's link to NSI establishes NSI's status as a government controlled corporation.

2. *Federal/State Action Analysis Tests*

Likewise, an analysis of NSI's relationship with NSF under the "federal/state action" doctrine yields the same conclusion—NSI is substantially connected to the federal government. Generally, under the federal/state action doctrine, "the action of a putatively private party may be ascribed to the state when there is a sufficiently close nexus between the government and the challenged action of the regulated entity so that the action of the later may be fairly treated as the government itself."⁹¹ Accordingly, the Supreme Court applies the symbiotic relationship, nexus, and public function doctrines to measure a corporate actor's connection to the federal or state governments.⁹²

ARTICLE 5: ESTIMATED REQUIREMENTS AND REVIEW

B. Performance Review

By December 31, 1994, the Foundation will review the project to determine whether to continue funding and to provide general direction as to the continuation and contemplated level of future support to be provided for the remainder of the Agreement.

ARTICLE 6: RESPONSIBILITIES

B. NATIONAL SCIENCE FOUNDATION

NSF has responsibility for registration services support, support planning, oversight, monitoring, and evaluation. NSF will make approvals required under the General Conditions and, where necessary and appropriate, NSF will contact and negotiate with Federal agencies and other national and International members of the International community to further the efforts of this project.

Id.

89. See *ACLU v. Reno*, 929 F. Supp. at 831.

90. See *National Science Foundation Cooperative Agreement No. NCR-9218742*, *supra* note 31. In relevant part:

ARTICLE 1: BACKGROUND AND PURPOSE OF AGREEMENT

"Today more than 5,000 networks comprise the Internet. These networks link together hundreds of thousands of computers and millions of users throughout the world. The domestic, non-military portion of the Internet includes NSFNET."

Id.

91. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 563 (1995). Professor Froomkin stated that the current test of whether a private entity has substantial ties to the government is determined by three factors: 1) the breadth of the actor's reliance on government assistance and benefits; 2) whether the actor performs a government function which is specifically reserved for the government; and 3) whether the injury that is aggravated by the governmental authority. *Id.* at 563-64.

92. *Weaver v. AIDS Servs. of Austin, Inc.*, 835 S.W.2d 798, 800 (Tex. App. 1992). The court stated that even though the United States Supreme Court has not formulated a precise test for identifying what degree of state involvement is sufficient to convert a private party's conduct into state governmental action, three lines of state action doctrines have

However, even when utilizing these doctrines, a court determines whether state action exists only "by sifting facts and weighing circumstances."⁹³ Although the three tests primarily focus on the "state action" doctrine, the standards for determining *federal* action under the due process clause of the Fifth Amendment are identical to those used for finding *state* action.⁹⁴ Accordingly, because NSF is a federal agency, this analysis focuses on the federal action doctrine rather than the state action doctrine.

a. The Symbiotic Relationship Doctrine (Government Funding)

A court applies the "symbiotic relationship" doctrine when the federal government has "insinuated itself into a position of interdependence with the private party that it must be recognized as a joint participant in the challenged activity."⁹⁵ Under this analysis, NSI has a symbiotic relationship with the federal government because of its financial and supervisory interdependence with the federal government.

For example, in *International Olympic Committee v. San Francisco Arts & Athletics*,⁹⁶ the Ninth Circuit stated that in order for San Francisco Arts & Athletics ("SFAA") to prove that the United States Olympic

emerged from Supreme Court cases: the "symbiotic relationship" doctrine, the "public function" doctrine, and the "nexus theory." *Weaver*, 835 S.W.2d at 801.

93. *Id.* at 801. In order to provide both the general public and target groups with information about AIDS prevention, Aids Service of Austin ("ASA") contracted with Travis County and the City of Austin. *Id.* Mark Weaver, a well-known opponent of homosexuality, wanted to attend these functions but ASA felt his presence would discourage others from attending. *Id.* Nevertheless, Weaver attended an event and was removed by the police. *Id.* After ASA initiated a declaratory judgment suit to exclude Weaver and an injunction to exclude Weaver and an injunction to preclude Weaver from attending further events, Weaver argued that ASA was substantially tied to state activity. *Id.* Here, the Texas Court of Appeals found the nexus between the private party and that of the government did not exist because no government officials "coerced, encouraged or even suggested the actions taken by ASA representatives." *Id.*

94. See *Myron v. Consol. Rail Corp.*, 752 F.2d 50, 54 (2d Cir. 1985) (stating that in examining allegations of "federal action" the court has employed the same standards applicable to "state action" cases). See also *Gerena v. Puerto Rico Legal Serv.*, 697 F.2d 447 (1st Cir. 1983) (discussing that federal government action under the Fifth Amendment are identical to those for finding state action under the Fourteenth Amendment); *Miller v. Hartwood Apartments, Ltd.*, 689 F.2d 1239 (5th Cir. 1982) (stating that determination of federal action rests on the same principle as state action); *Holodnak v. Avco Corp.*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975) (stating that links between the employer and federal government were such that an employer's action in discharging an employee was "state action" in purview of the Fourteenth Amendment); *Geneva Owners Tenants Org. v. Federated Mortgage Investors*, 504 F.2d 483 (9th Cir. 1974) (stating that standards utilized to find federal action for purposes of the Fifth Amendment are identical to those employed to detect state action subject to the Fourteenth Amendment).

95. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

96. 781 F.2d 733 (9th Cir. 1986).

Committee is a state actor, SFAA must establish a mutually beneficial relationship between the government and the private entity which reaches beyond mere government funding or contracts.⁹⁷ The Olympic Committee, the court held, failed to satisfy this test because state funding of a privately operated program without any other substantive state connection does not constitute state action.⁹⁸

A symbiotic relationship exists between NSI and the federal government because independent of funding,⁹⁹ NSF requires that NSI submit annual reports, program plans, budget requirements, verbal reports, and monthly letter reports which document domain name registration operations.¹⁰⁰ Moreover, NSF reviews NSI's performance and monitors the registration fee structure.¹⁰¹

The cooperative agreement between NSF and NSI, likewise establishes the symbiotic relationship contemplated by the Supreme Court in *Burton v. Wilmington Parking Authority*.¹⁰² In *Burton*, a restaurant owner paid rent to support a state funded parking structure intended for

97. *Id.* The United States Olympic Committee ("USOC") and the International Olympic Committee ("IOC") initiated a lawsuit to restrain the use of the word "Olympics" to describe an event sponsored by the respondent, San Francisco Arts & Athletics ("SFAA"). *Id.* SFAA, who sponsored the "Gay Olympics," argued that the federal government financed the IOC and USOC and jointly marketed medals with them, thereby constituting government involvement in the discriminatory act of denying SFAA the use of the right to use the word "Olympics." *Id.* at 736. The Ninth Circuit determined that "neither financing or contractual relationships by themselves suffice to make a private entity a governmental actor" and, therefore, held that IOC and USOC were not state actors. *Id.* at 737. *See also* Rendell-Baker v. Kohn, 457 U.S. 830 (1982). In this case, former employees at a nonprofit, privately operated school brought a civil rights action against the school for violations of their constitutional rights in connection with their discharge. *Id.* The petitioners asserted that because the school performed services for the government by taking students referred to them by city committees, and because these cities paid for the students' education, the petitioners sought to tie the receipt of these funds by the school to state action. *Id.* The United States Supreme Court did not agree and stated that this relationship was no different than any other private contractor performing services for the government. *Id.* at 830-31. Therefore, the court held that no "symbiotic relationship" existed between the school and the state. *Id.* at 831.

98. *Id.*

99. *See National Science Foundation Cooperative Agreement No. NCR-9218742, supra* note 31.

100. *See National Science Foundation Cooperative Agreement No. NCR-9218742, supra* note 31.

101. *See National Science Foundation Cooperative Agreement No. NCR-9218742, supra* note 31.

102. *Burton*, 365 U.S. at 725. The United States Supreme Court held that the exclusion of African-Americans, solely on account of color, from a restaurant operated by a private owner under lease in a building financed by public funds, and owned by the parking authority, which is a state agency of Delaware, was discriminatory and the owner was held to be violative of the Fourteenth Amendment. *Id.*

restaurant patron use.¹⁰³ The restaurant engaged in discriminatory practices by excluding a patron from the restaurant based upon his race.¹⁰⁴ Thus, because the restaurant paid rent for the state funded parking lot, the state profited from the discriminatory practices of the restaurant, the Court held that a symbiotic relationship existed between the state and the restaurant.¹⁰⁵

Similar to the restaurant's financial connection to the state in *Burton*, the Cooperative Agreement between NSF and NSI states that NSI must invest thirty percent of the user fees for the preservation and enhancement of the "Intellectual Infrastructure" of the Internet.¹⁰⁶ Moreover, the agreement between NSI and the federal government is not a procurement contract¹⁰⁷ or a grant agreement,¹⁰⁸ but is a cooperative agreement.¹⁰⁹ The definition of a "cooperative agreement" supports a finding that NSI is a federal actor because the federal cooperative agreement statute states that these agreements are applicable when "substantial involvement is expected between the executive agency and the . . . recipient when carrying out the activity contemplated in the agreement."¹¹⁰ This language suggests an interdependence and joint partici-

103. *Id.* at 723.

104. *Id.*

105. *Id.*

106. See *National Science Foundation Cooperative Agreement No. NCR-9218742*, *supra* note 31.

107. 31 U.S.C. § 6303 (1996). The statute defines a procurement contract:

Using Procurement Contracts:

An executive agency shall use a procurement contract as the legal instrument reflecting a relationship between the United States Government and a State, or a local government, or other recipient when—

- (1) the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; or
- (2) the agency decides in a specific instance that the use of a procurement contract is appropriate.

Id.

108. 31 U.S.C. § 6304 (1996). The statute defines a grant agreement:

Using Grant Agreements:

An executive agency shall use a grant agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—

- (1) the principal purpose of the relationship is to transfer a thing of value to the State, local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and
- (2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

Id.

109. See *supra* note 39. See also 31 U.S.C. § 6305, *supra* note 38 (defining cooperative agreement).

110. See *supra* note 38.

pation between the federal government and NSI.¹¹¹ Therefore, the Cooperative Agreement between the federal government and NSI satisfies the symbiotic relationship doctrine.

b. The Nexus Doctrine

Under the "nexus" doctrine, "if the government is sufficiently involved in, encourages, or benefits from the actor's conduct, the private party's conduct is a state action subject to governmental review."¹¹² Accordingly, when NSI confiscates a domain name pursuant to its *Policy Statement*, a "nexus" exists between the federal government and NSI because of the federal government's ratification of NSI's conduct.

For example, in *Lugar v. Edmondson Oil Company*,¹¹³ the Supreme Court held that a debtor could challenge, as a violation of due process, the procedure utilized by a creditor under a state property attachment statute.¹¹⁴ Specifically, the Court found that the statutory scheme appeared to be the obvious product of joint action between the state and the creditor because the judiciary provided a writ of attachment against the property which the local sheriff executed.¹¹⁵ Therefore, when the credi-

111. *Burton*, 365 U.S. at 725.

112. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 615-16 (1989) (holding that the actions of a private railroad were sufficiently connected to the federal government to subject the private railroad's drug testing policies and procedures to the restrictions of the Fourth amendment); *Robinson v. Fla.*, 378 U.S. 153, 156-57 (1964) (holding that state legislation may encourage state action by having a regulation that requires restaurants to have racially restrictive practices of separate toilet facilities for minorities); *Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948) (holding that state action is present when a judicial order enjoins the sale of land and enforcement of a restrictive covenant because the order violates the Fourteenth Amendment). But see *Polk County v. Dodson*, 454 U.S. 312, 326-27 (1981) (holding that a public defender did not act under color of state law when performing a lawyer's traditional functions as counsel for a defendant in a criminal proceeding); *Martinez v. Cal.*, 444 U.S. 277, 285 (1980) (holding that a state parole board was not liable under federal civil rights acts for the death of a girl killed by a parolee because there was no state action); *Moose Lodge Number 107 v. Irvis*, 407 U.S. 163, 178-79 (1972) (holding insufficient state action, because of no official aid or encouragement of the club's decisions, connected with a private social club to review the club's racially restrictive policies).

113. 457 U.S. 922 (1982).

114. *Id.* at 922-23.

115. *Id.* A debtor argued that a corporate creditor and its president had attached his property before a court rendered a hearing and judgment in violation of his Fifth Amendment procedural due process rights. *Id.* The state procedure by which a creditor secured a pretrial writ of attachment against a debtor was challengable because of the involvement of the state judicial system in the issuance of the writ, and the involvement of the county sheriff in the execution of the writ. *Id.* Therefore, the defendants acted in concert with the State of Virginia to deprive him of his property without due process of law. *Id.* The Supreme Court held that there was a "nexus" between Virginia and the corporate creditor, thus, mandating that the creditor afford due process of law. *Id.*

tors acted in concert with the State of Virginia to deprive the debtor of his property without due process of law, the Court found that a nexus existed between the creditor and the state.¹¹⁶

NSI, like the creditor in *Lugar*, is substantially connected to NSF under the nexus doctrine. The United States Department of Defense is the federal governmental entity whose initial policy toward Internet governance is the foundation and building block upon which NSI patterned its current regulations and *Policy Statements*.¹¹⁷ Moreover, NSI's rules and regulations are similar to Virginia's procedure for property attachment in *Lugar*.¹¹⁸ Therefore, the performance and reporting requirements imposed on NSI by the NSF Cooperative Agreement meets the nexus test because the federal government is sufficiently involved in and encourages NSI's conduct as a state actor.¹¹⁹

c. *The Public Function Doctrine*

Under the "public function doctrine," the federal or state government entrusts a private entity with traditional governmental functions, which in turn clothes the individual with federal or state action.¹²⁰ Accordingly, NSF entrusts NSI with domain name registration responsibilities—a governmental function—which clothes NSI with federal action.

In *Marsh v. Alabama*,¹²¹ the Supreme Court found that since the state permitted a company town to have private land ownership rights,

116. *Id.*

117. DERN, *supra* note 14, at 8.

118. *Lugar*, 457 U.S. at 922-23.

119. See *National Science Foundation Cooperative Agreement No. NCR-9218742*, *supra* note 31.

120. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). Here, the United States Supreme Court held that a proposed sale by a warehouseman of goods in storage was not properly attributable to the state, for purposes of establishing state action under the Fourteenth Amendment. *Id.* The Court found that state action is not established simply on the basis that the state authorizes and encourages such action via its promulgation of the Uniform Commercial Code, which allows for the sale of goods by warehouseman under certain circumstances. *Id.* Moreover, a state's mere acquiescence in a private action does not convert that action into that of the state. *Id.* See also, *Evans v. Newton*, 382 U.S. 296 (1966) (holding state action in connection with a municipal park); *Terry v. Adams*, 345 U.S. 461 (1953) (holding state action in connection with an election process). *But see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). Here, a user of utility services argued that the utility company was a state actor because the utility was extensively regulated by the state. *Id.* at 449, 451. The petitioner wanted the utility company to continue to provide her with power until she was afforded not only notice, but a hearing and the opportunity to pay off any amounts due. *Id.* She argued that "the utilities regulatory ties to the state constituted state action in depriving her of property in violation of the Fourteenth Amendment." *Id.* at 453. The Supreme Court stated that the mere fact that a business is subject to extensive regulation does not in itself convert its action into state action. *Id.*

121. 326 U.S. 501 (1946).

the company town's denial of First Amendment rights to a Jehovah's witness is governmental action if the company town acts in a manner consistent with an exclusive function of a municipality.¹²² The Court concluded that because the company town controlled the functions and activities which normally belong to a city, the town is justifiably a state actor.¹²³

Similar to the company town in *Marsh*, NSI's registration of ".com," ".net," and ".org," which are top-level domain names, is an exclusive function of the federal government because of the government's historical origins in the formation of the Internet.¹²⁴ Thus, because NSI's registration of top-level domain names is an exclusive function of the United States government, NSI meets the requirements of the "public function" doctrine, pursuant to *Marsh*.¹²⁵

B. NSI'S DUTY TO AFFORD A DOMAIN NAME OWNER FIFTH AMENDMENT PROCEDURAL DUE PROCESS OF LAW

Fifth Amendment procedural due process analysis requires, NSI, as a federal actor, to afford a domain name owner a hearing before a neutral decisionmaker, prior to confiscating an Internet domain name. First, this section outlines the necessary elements of the Fifth Amendment procedural due process analysis. Second, this section analyzes the meaning of "property" under the Fifth Amendment, then applies those characteristics to Internet domain names. Third, this section outlines NSI's current *Policy Statement*, and then proposes an appropriate procedure that

122. *Id.* at 509. This case involved a company town, which is a privately owned and privately governed area. *Id.* at 503. Agents of the corporation ordered a Jehovah's Witness to leave the privately owned business district and refrain from distributing religious leaflets, or the leafleter would be subject to state trespass laws. *Id.* The court held that the company town was subject to First and Fourteenth Amendment provisions because the state allowed private ownership of land and property to a degree that allowed the corporation to replace the functions and activities of a city. *Id.* at 509. *But see* *Cyber Promotions, Inc. v. American Online, Inc.*, 948 F. Supp. 436, 1996 WL 633702, at *7 (E.D. Pa. Nov. 26, 1996) *Cyber Promotions, Inc.* alleged that American Online, Inc. is a state actor that exercises municipal powers similar to a company town. *Id.* The Pennsylvania District Court stated that American Online, Inc., which provides its members with access to the Internet through its e-mail system, does not exercise municipal powers traditionally exercised by a state actor. *Id.*

123. *Marsh*, 326 U.S. at 509.

124. See Mark Voorhees, *Network Solutions Says Name Policy Is "Not Subject to Review" by Courts*, INFO. L. ALERT, May 17, 1996; Mike St. Johns, *FNC's Role in the Paper Presented at the Harvard University DNS Workshop* (Nov. 20, 1995) <<http://ksgwww.harvard.edu/iip/fnc.html>>. FNC, which coordinates federal funding of IANA and other organizations that perform technical and administrative functions related to the Internet, stated that the United States Government owns "root" (space between various domains) space as well as the ".com," ".net," and ".org" top-level domain names. *Id.*

125. *Marsh*, 326 U.S. at 509.

NSI should implement under its *Policy Statement* to insure that NSI's process comports with procedural due process requirements under the Fifth Amendment.

1. *"Life, Liberty or Property": Procedural Due Process under the Fifth Amendment*

The Fifth Amendment due process clause prohibits governmental action which would deprive an individual of "life," "liberty," or "property" absent due process of law.¹²⁶ In effect, due process is satisfied when an individual receives a fair hearing prior to governmental impairment of interests falling within the definitional scope of "life," "liberty," or "property."¹²⁷ Conversely, when "life," "liberty," or "property" are not at stake, the federal government may act in an arbitrary manner because procedural due process is not a free standing human interest.¹²⁸

Prior to 1970, the Supreme Court liberally construed procedural due process requirements by utilizing a "right-privilege" distinction,¹²⁹ which prohibited the federal government from denying an individual a constitutional "right."¹³⁰ Conversely, the Court upheld governmental action that deprived an individual of an interest which categorically fell under the auspices of a "privilege."¹³¹ For example, an occupational license¹³² or an individual's choice of public schools.¹³³

126. U.S. CONST. amend. V.

127. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 488 (4th ed. 1991).

128. *Id.* at 491. See also Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 *CORNELL L. REV.* 405, 415 (1977). Professor Monaghan presents the argument that "life," "liberty," and "property" include all generic aspects of an individual's life in society. *Id.* However, he also argues that it may refer to a limited group of interests. *Id.*

129. See *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517-18 (Mass. 1892). Here, Justice Holmes noted the "right-privilege" distinction by stating, "The Petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* Justice Holmes noted that there are few employment positions in which a worker does not agree to suspend his or her constitutional rights of free speech as well as the idleness of implied contract terms. *Id.* Thus, an employee cannot complain about the terms of the employment offered to him or her. *Id.*

130. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1667, 1717-19 (1975). Professor Stewart describes constitutional "rights" as the common law causes of action that are regarded as defining the fundamental rights of liberty and property, which are the natural law entitlements to individuals. *Id.*

131. *Barsky v. Bd. of Regents*, 347 U.S. 442, 451 (1954). In this case, the Supreme Court reviewed a New York statute that authorized disciplinary action against physicians upon the conviction of a crime. *Id.* at 443. The court held that the statute was constitutional on its face and that a physician, who was convicted of the crime of failing to produce subpoenaed papers could have his or her occupational license suspended for a period of six months. *Id.*

132. *Id.*

133. *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 265 (1934). In this case, the Supreme Court surveyed an application of a student for readmission into the University of

In the early 1970's, the Court enlarged the scope of due process rights for "privileges," such as welfare benefits,¹³⁴ a driver's license,¹³⁵ and a debtor's right.¹³⁶ After 1972, however, the Supreme Court embraced a conservative view of procedural due process which limited the definition of "life," "liberty," and "property."¹³⁷ Generally, a survey of post 1972 decisions reveals that unless a benefit affords a concomitant due process protection, the Court will not afford an individual procedural due process.¹³⁸ This applies, unless informal practices or customs are sufficient to create a claim of entitlement to a benefit.¹³⁹ Therefore, under current Supreme Court jurisprudence, Internet domain names fall within the definitional scope of "property" under the Fifth Amendment.¹⁴⁰

2. *What is "Property" Under Fifth Amendment Procedural Due Process Analysis?*

Generally, property is considered "a creature of the state because each government is free to define or limit property rights."¹⁴¹ Tradi-

California. *Id.* at 250. The university required the student to take a course in military science, but because of the student's religious beliefs, he objected to the requirement. *Id.* The court held that requiring military science does not offend the constitutional rights of an individual; thus, the student will be restricted from attending the university. *Id.* at 265.

134. *Goldberg v. Kelly*, 397 U.S. 253, 268 (1970). Here, the Supreme Court held that a welfare recipient must be given an "evidentiary hearing" before his or her benefits may be terminated. *Id.* Welfare payments were not charity, but a right protected by the Constitution. *Id.*

135. *Bell v. Burson*, 402 U.S. 535, 542-43 (1971). Here, the Supreme Court held that a licensed driver had an entitlement to his or her state driver's license, and that the license could not be revoked following an accident without a hearing to determine fault. *Id.*

136. *Snidach v. Family Fin. Corp.*, 395 U.S. 337, 341-42 (1969). In that case, the Supreme Court held that debtors were entitled to a hearing before private creditors could use state judicial machinery to take possession of their property. *Id.* See also *Fuentes v. Shevin*, 407 U.S. 67, 96-97 (1972) (requiring a prior hearing in pre-judgment attachments of property).

137. NOWAK & ROTUNDA, *supra* note 127, at 490.

138. *Bd. of Regents v. Roth*, 408 U.S. 564, 578-79 (1972). Here, the Supreme Court stated that a person does not have a "legitimate claim of entitlement" to being rehired as a non-tenured professor. *Id.* An interest did not exist merely because the individual had a "need for a benefit," or even a "unilateral expectation" of the benefit. *Id.* See also *Leis v. Flynt*, 439 U.S. 438, 443 (1979) (holding that a lawyer does not have a liberty or property interest in being admitted to the practice of law in a state that he or she is not licensed, nor is it necessary to afford the lawyer a hearing as to whether a state trial judge was arbitrary in refusing to admit the attorney to practice).

139. *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972). In this case, the Supreme Court held that a professor was entitled to a hearing on his *de facto* tenure claim, and if proven, the professor had a property interest inherited from custom that a hearing is part of the profession's practice. *Id.*

140. NOWAK & ROTUNDA, *supra* note 127, at 490.

141. NOWAK & ROTUNDA, *supra* note 127, at 513.

tional forms of real and personal property are clearly subject to Fifth Amendment procedural due process protections, but complex issues arise when the definition of property does not fit into the classical construct of real or personal property.¹⁴² Accordingly, this section uses personal property and induced contract reliance analogies to argue that Internet domain names are "property" within the meaning of the Fifth Amendment.

a. Domain Names as Personal "Property"

An Internet domain name is the personal property of a domain name owner to whom the federal government must afford procedural due process prior to its taking. In *Fuentes v. Shevin*,¹⁴³ for example, the Supreme Court held that a Florida and Pennsylvania replevin statute deprived the petitioner of personal chattels without due process of law because the respective statutes did not allow the petitioner a right to a hearing before a neutral tribunal.¹⁴⁴ Hence, personal property is an inherent constitutional "right" which must be afforded due process of law before it is confiscated by the federal government.¹⁴⁵

NSI must provide a domain name owner, like the petitioner in *Fuentes*, due process of law because a domain name is personal property. First, domain names are personal property because domain names are bought and sold on the open market, and the Internal Revenue Service auctions off domain names as assets in proceedings to cover federal tax obligations.¹⁴⁶ Second, a domain name provides a corporate domain

142. NOWAK & ROTUNDA, *supra* note 127, at 514.

143. 407 U.S. 67 (1972).

144. *Id.* at 96. Here, the court reviewed the decisions of two three-judge federal District Courts that upheld a Florida and Pennsylvania statute that authorized seizure of chattels prior to a hearing. *Id.* at 69. Fuentes challenged the Florida statute when a sheriff seized her personal chattel pursuant to a writ of replevin authorized under the contested statute. *Id.* at 70. Fuentes challenged the statute because she did not receive a proper hearing under Fourteenth Amendment due process rights before her chattels were seized pursuant to a replevin complaint instituted by a private party. *Id.* The Court held that a hearing was necessary under due process of law before personal property is taken. *Id.* at 96.

145. See *supra* text accompanying note 136. See also *North Georgia Finishing, Inc. v. Di-Chem, Inc.* 419 U.S. 601, 608 (1975) (holding that a statute which allowed a creditor to garnish personal property of a debtor with procedural safeguards but without a hearing prior to garnishment was invalid).

146. See Matthew McAllester, *What's In a Name? A Lot of Money If It's Your Domain*, NEWSDAY, Aug. 25, 1996, at A51. According to messages posted to InterNIC's Domain Policy mailing list in June 1996, the Internal Revenue Service has auctioned off domain names as assets to cover overdue tax obligations. *Id.* See also BLACK'S LAW DICTIONARY 1216 (6th ed. 1990). Property is defined as follows:

That which is peculiar or proper to any person; that which belongs exclusively to one . . . [t]he word is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make

name owner access to the Internet in order to complete commercial transactions, and provide the public with corporate information.¹⁴⁷ Accordingly, a domain name is an IAP's most valuable asset because an IAP's business is based upon a domain name which provides customers with the ability to establish addresses for Web sites, receive and distribute electronic mail, and use the Internet as a "marketplace."¹⁴⁸ Third, a domain name as "property" is evidenced by the legal controversies that have arisen between trademark owners, NSI, and domain name owners.¹⁴⁹ Therefore, a domain name is personal "property" under Fifth Amendment due process because a domain name is a valuable corporate asset, a primary asset for an IAP, and a major source of legal disputes.

b. Domain Names as "Property" Based on Induced Contract Reliance

Generally, the theory of induced contract reliance is based on the proposition that a domain name owner, as a party to NSI's Registration Agreement, has a property interest in a domain name if the owner substantially relies to its detriment on NSI's implied promise of continued use of a domain name.¹⁵⁰ For example, in *Perry v. Sinderman*,¹⁵¹ the

up wealth or estate. It extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments, and includes every invasion of one's property rights by actionable wrong . . . [p]roperty, within constitutional protection, denotes group of rights inhering in citizen's relation to physical thing, as right to possess, use and dispose of it

Id.

147. Burk, *supra* note 11, ¶ 9.

148. DERN, *supra* note 14, at 15. See also *Cyber Promotions, Inc.*, 948 F. Supp. 436, 1996 WL 633702, at *7 (stating an IAP's Internet e-mail system is property).

149. *Porsche Cars N. Am. v. Chen*, No. 96-CV-1006 (E.D. Va., filed July 26, 1996); *Am. Commercial v. Sports & Leisure*, No. 96-CV-713 (C.D. Cal., filed July 25, 1996); *Regis McKenna, Inc. v. Regis Corp.*, No. 96-CV-20551 (N.D. Cal., filed July 9, 1996); *Network Solutions, Inc. v. Clue Computing, Inc.*, No. 96-1530 (D. Colo. filed June 21, 1996); *Giacalone v. NSI*, 96-CV-20434 (N.D. Cal., filed May 30, 1996); *Data Concepts, Inc. v. Digital Consulting*, No. 96-429 (M.D. Tenn., filed May 8, 1996); *Panavision Int'l v. Troeppen*, No. 96-CV-3284 (C.D. Cal., filed May 7, 1996); *Comp Examiner Agency v. Juris Inc.*, (C.D. Cal. Apr. 26, 1996) (granting an order for a preliminary injunction); *Roadrunner Computer Sys., Inc. v. Network Solutions, Inc.*, No. 96-413-A (E.D. Va. filed Mar. 26, 1996); *Prestone Prod. v. Collision*, No. 96-CV-234 (E.D. Va., filed Feb. 22, 1996); *KnowledgeNet, Inc. v. D.L. Boone*, No. 94-CV-7195 (N.D. Ill. filed Dec. 2, 1994); *In re Arbitration Between Stanley H. Kaplan Educ. Ctr., Ltd. v. Princeton Review Management Corp.*, No. 13-199-00145 94, decision; *MTV Networks v. Curry*, 867 F. Supp. 202 (S.D.N.Y. 1994).

150. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979), which states the following:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Id.

151. 408 U.S. 593 (1972).

Supreme Court held that a college professor, under contract to teach for one year, had a property interest in his employment because he relied on a "de facto" tenure program.¹⁵² Thus, for procedural due process standards, a property interest is established by induced contract reliance on the subject matter of the contract.

Like the professor in *Perry*, NSI must provide a domain name owner procedural due process because the domain name is the subject of NSI's Registration Agreement. Because NSI is the only top-level domain name registry for worldwide generic domain names, the domain name owner is necessarily induced to rely on NSI's Registration Agreement in order to register its name. As the subject of the agreement, the domain name owner is granted continuous use of the domain name in exchange for a registration fee.¹⁵³ Thus, under the induced reliance theory, a domain name is a property interest because a domain name owner substantially relies on NSI's Registration Agreement.

3. *Recommendation and Proposal for Fifth Amendment Procedural Due Process Guidelines That NSI Owes to a Domain Name Owner*

a. *NSI's Current Policy Statement Under Revision 02*

NSI must grant a domain name owner some form of procedural due process before it can confiscate a domain name.¹⁵⁴ According to the Supreme Court, the most effective safeguard against arbitrary action by the federal government is the adversary process.¹⁵⁵ NSI's current *Policy Statement* (Revision 02) provides the domain name owner no such protection from arbitrary action if NSI decides to confiscate a domain name.¹⁵⁶ For example, the *Policy Statement* merely states that an individual will be given "notice" that a domain name dispute has arisen based on trademark infringement, and the individual will have thirty days to provide documentation that the domain name owner is also a trademark owner.¹⁵⁷ Upon receiving such documentation, NSI allows "simultaneous" use of the domain name, and after ninety days places the disputed name on "Hold" status.¹⁵⁸

152. *Id.* at 602-03.

153. *NSI Registration Agreement*, *supra* note 40. The Registration Agreement states that a domain name owner must pay a \$100 registration fee with a \$50 maintenance fee, and with the fee a domain name owner relies on "use or continued use" of a domain name. *Id.*

154. U.S. CONST. amend. V.

155. NOWAK & ROTUNDA, *supra* note 127, at 524.

156. See generally *infra* APPENDIX.

157. See *infra* Clause II-6(d) of APPENDIX.

158. See *infra* Clause II-6(d) of APPENDIX.

Accordingly, if the domain name owner fails to provide documentation of trademark ownership, fails to accept assignment of a new domain name, or fails to take any action within thirty days of receipt of NSI's dispute notification letter, NSI will arbitrarily place the domain name on "Hold" status.¹⁵⁹ In effect, NSI's *Policy Statement* simply overrides the innate principles of Fifth Amendment procedural due process by not providing a hearing before the domain name is confiscated. Therefore, in order to comport with procedural due process, this Comment proposes that NSI afford a domain name owner an oral hearing before a neutral decisionmaker prior to placing a domain name on "Hold" status.

b. Proposal of the Form of the Adversary Process under Fifth Amendment Procedural Due Process

In order to establish a hearing with an oral presentation before a neutral decisionmaker, a court institutes a balancing test which weighs the domain name owner's right to a hearing against the federal government's cost in providing a hearing.¹⁶⁰ In *Mathews v. Eldridge*,¹⁶¹ the Supreme Court delineated three factors a court must evaluate to determine the appropriate form of adversarial process granted to a property owner.¹⁶² The first factor considers the property owner's interest that will be affected by the official action.¹⁶³ The second factor analyzes the risk of erroneous deprivation to the property owner absent a hearing.¹⁶⁴ Last, the court considers the federal government's interest, including the burdens that additional procedural requisites would entail.¹⁶⁵ Thus, these interests must be balanced by a court in order to determine the form of the procedures required by Fifth Amendment procedural due process.¹⁶⁶

Under the first factor,¹⁶⁷ a domain name owner's interest in a domain name is that a domain name allows a person access to the In-

159. *See infra* Clause II-6(e) of APPENDIX.

160. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Mathews*, 424 U.S. at 335. *See also* NOWAK & ROTUNDA, *supra* note 127, at 531 (discussing balancing test). On the side of the individual, a court must access two factors. *Id.* First, it must view the importance of the individual liberty or property interest at stake, and the extent that the requested procedure will reduce the possibility of erroneous decision-making. *Id.* Also, on the side of the federal government, the court must balance the governmental interest in avoiding the increased administrative and fiscal burdens which result from the increased procedural requirements. *Id.*

166. NOWAK & ROTUNDA, *supra* note 127, at 531.

167. *Mathews*, 424 U.S. at 335.

ternet.¹⁶⁸ The business community uses the Internet as a strategic marketing tool by disseminating consumer information to the public and providing the public with a direct link to an organization.¹⁶⁹ Accordingly, for the consumer a domain name provides a mode of completing simple transactions, and communicating with various individuals via electronic mail.¹⁷⁰ Thus, because of the Internet's metamorphosis, the private interest in a domain name is paramount because a domain name is a necessary vehicle on which to access the new technology.

Under the second factor of risk of erroneous deprivation to the private interest,¹⁷¹ if NSI places an IAP name on "Hold" status, this action could terminate an IAP's business.¹⁷² An IAP's domain name is the company's primary asset because customers pay the IAP for use of the domain name in order to access the Internet.¹⁷³ If a domain name is placed on "Hold" status, the disturbance in service would realistically produce a significant loss in a provider's customer base.¹⁷⁴ Thus, a domain name owner, especially an IAP, would have a severe risk of erroneous deprivation if its domain name is placed on hold prior to a proper hearing before a neutral decisionmaker.

The last factor relates to the governmental interest involved,¹⁷⁵ NSI will not endure any additional administrative or fiscal burdens merely because it is deemed a federal actor. First, under the present *Policy Statement*, NSI has the burden of providing a domain name owner with a domain name complainant notice.¹⁷⁶ This burden will not be increased if a domain name owner is afforded an oral hearing before a neutral decisionmaker. This is because NSI would only have to change its *Policy Statement* from the provision providing for a domain name complaint notice, to a provision providing for a complaint and oral hearing notice. Additionally, an oral hearing provision in the *Policy Statement* would not burden NSI because the parties would stipulate to an arbitration by an

168. Burk, *supra* note 11, ¶ 9.

169. Burk, *supra* note 11, ¶ 9.

170. Burk, *supra* note 11, ¶ 9.

171. *Mathews*, 424 U.S. at 335.

172. See *supra* note 1 and accompanying text (discussing Roadrunner Computer Systems, an IAP, which sought a preliminary injunction against NSI so it would not lose its domain name "roadrunner.com" and its customers).

173. See *supra* note 1 and accompanying text.

174. See *supra* note 1 and accompanying text. See also Pete Barlas, *PR's Regis Files to Keep Name on Net*, BUS. J. SAN JOSE, Aug. 9, 1996, available in 1996 WL 10047445 (stating that Roadrunner president Jane Hill said her company could have lost 25 percent of its business if it had to change its domain name address, and the cost of keeping the domain name was \$50,000).

175. *Mathews*, 424 U.S. at 335.

176. See *infra* Clause II-6(e) of APPENDIX.

association such as the American Arbitration Association¹⁷⁷ or the Virtual Magistrate.¹⁷⁸ NSI's fiscal and administrative burdens would be

177. See Louise A. LaMothe, *Thinking About Mediation*, 19 NO. 4 A.B.A. SEC. LITIG. REP. 1, *1-2 (1993). The American Arbitration Association ("AAA") program was developed to divert disputes in multiple industries, such as corporations, attorneys, insurers, individuals, trade associations, unions, consumers, and government entities from the trial court to a neutral medium. *Id.* The AAA has facilitated and promoted arbitration by both contractual and court annexed arbitration. *Id.* Contractual arbitration can be negotiated before a dispute via a contract agreement between the parties, or it can be negotiated after a dispute has arisen and is handled by organizations such as AAA. *Id.* When a claim is filed, one or more arbitrators are selected, and a response is filed by the other party. *Id.* Normally, formal discovery is not available, therefore, the exchange of information is on a voluntary basis. *Id.* Depositions replace personal appearances by witnesses, and evidentiary rules are relaxed. *Id.* The arbitrator's award is either written or oral, and he or she is mandated to give an explanation of his or her supporting rationale. *Id.* Awards in a binding arbitration are considered valid judgments that are enforceable in all 50 states. *Id.* Additionally, court-annexed arbitration normally takes place after discovery, otherwise, it is similar to contractual arbitration, except that the award does not bind the parties. *Id.* Generally, arbitration does not bind the parties involved, and trial de novo is an option for parties that are not satisfied with the arbitrator's result. *Id.* See also AAA's *New Website Provides 24-Hour Access to Information on ADR*, 6 WORLD ARB. & MEDIATION REP., Oct. 1995, at 218. The AAA's home page at <http://www.adr.org/> gives general information on dispute resolution, the text of rules or forms, and a list of arbitrators. *Id.* This medium brings new industries and companies into contact with innovative dispute resolution techniques, and is a resource that an Internet user, such as a domain name owner, may access information to begin the process of an oral hearing before a neutral decisionmaker. *Id.*

178. *The Virtual Magistrate Project* (visited May 15, 1996) <<http://vmag.law.vill.edu:8080/>>. The Virtual Magistrate Project is an experimental project that offers arbitration for disputes involving users of on-line systems, persons or entities who claim to be harmed by wrongful Internet messages, postings, or files, and system operators. *Id.* The goals of the project are:

- 1) Establish the feasibility of using on-line dispute resolution for disputes that originate on-line.
- 2) Provide system operators with informed and neutral judgments on appropriate responses to complaints about allegedly wrongful postings.
- 3) Provide users and others with a rapid, low-cost, and readily accessible remedy for complaints about on-line messages, postings, and files.
- 4) Lay the groundwork for a self-sustaining, on-line dispute resolution system as a feature of contracts between system operators and users and content suppliers (and others concerned about wrongful postings).
- 5) Help to define the reasonable duties of a system operator confronted with a compliant.
- 6) Explore the possibility of using the Virtual Magistrate Project to resolve other dispute related to computer networks.
- 7) Develop a formal governing structure for an ongoing Virtual Magistrate operation.

Id.

The Virtual Magistrate Program's objective is to receive and resolve complaints regarding copyright, trademark infringement, misappropriation of trade secrets, defamation, fraud, deceptive trade practices, inappropriate materials via the Internet, and invasion of privacy via e-mail. *Id.* The complaint should be submitted by the complainant via e-mail to vmag@mail.law.vill.edu, and should describe the nature of the disputed activity or conduct, and should identify the parties in dispute. *Id.* The Virtual Magistrate, similar to

minimal compared to the private interest and risk of erroneous deprivation suffered by domain name owners. Therefore, this Comment proposes that NSI must institute a clause in its present *Policy Statement* that provides for an oral hearing before a neutral decisionmaker, prior to NSI placing a domain name on "Hold" status, in order to comport with Fifth Amendment procedural due process requirements.

IV. CONCLUSION

This comment argued that NSI's current Domain Name Dispute Policy (Revision 02) does not afford an individual Fifth Amendment procedural due process of law. Evolving from the United States Department of Defense Advanced Research Projects Agency ("ARPAnet"), NSF, a federal agency that provides support and monetary grants, established the InterNIC to act as a central Internet resource. As a division of InterNIC, NSI was established to act as a top-level domain name registry.

Pursuant to this Comment, NSI is a "federal actor" that must afford a domain name owner procedural due process of law established by the Fifth Amendment. NSI is a governmental corporation and federal actor because NSI receives substantial financial assistance and monitoring from the government, and NSI serves a large geographical area.

Furthermore, modern constitutional principles of "property" comport with the analysis of a domain name as property under the analyses of personal chattels and induced contract reliance. Accordingly, NSI's *Policy Statement* usurps a domain name owner's property by confiscating a domain name prior to a hearing before a neutral decisionmaker. Because a domain name owner has a severe risk of erroneous deprivation from a domain name taking, this Comment proposes that NSI's present *Policy Statement* must include a clause that affords a domain name owner an oral hearing before a neutral decisionmaker. Therefore, an oral hearing before a neutral decisionmaker will comport with a domain name owner's Fifth Amendment procedural due process rights.

Steven A. McAuley

AAA is given jurisdiction by way of a contract, and all decisions are binding. *Virtual Magistrate Project, supra*. Decisions are sent to the parties via e-mail within 72 hours of acceptance, and are also posted on the Internet unless otherwise ordered by the Magistrate. *Id.*

APPENDIX : DOMAIN NAME DISPUTE

NETWORK SOLUTIONS' DOMAIN NAME DISPUTE POLICY

(Revision 02, Effective September 9, 1996)

I. INTRODUCTION

1. Network Solutions, Inc. ("Network Solutions") is responsible for the registration of second-level Internet domain names in the top level COM, ORG, GOV, EDU, and NET domains. Network Solutions registers these second-level domain names on a "first come, first served" basis. By registering a domain name, Network Solutions does not determine the legality of the domain name registration, or otherwise evaluate whether that registration or use may infringe upon the rights of a third party.

2. The applicant ("Registrant") is responsible for the selection of its own domain name ("Domain Name"). The Registrant, by completing and submitting its application, represents that the statements in its application are true and that the registration of the selected Domain Name, to the best of the Registrant's knowledge, does not interfere with or infringe upon the rights of any third party. The Registrant also represents that the Domain Name is not being registered for any unlawful purpose.

3. Network Solutions does not act as arbiter of disputes between Registrants and third party complainants arising out of the registration or use of a domain name. This Domain Name Dispute Policy ("Policy") does not confer any rights, procedural or substantive, upon third party complainants. Likewise, complainants are not obligated to use this Policy.

The following prescribes the procedural guidelines Network Solutions may employ when faced with conflicting claims regarding the rights to register an Internet domain name. This Policy does not limit the administrative or legal procedures Network Solutions may use when conflicts arise.

II. GUIDELINES

1. *Modifications.*

Registrant acknowledges and agrees that these guidelines may change from time to time and that, upon thirty (30) days posting on the Internet at <ftp://rs.internic.net/policy/internic.domain.policy>, Network Solutions may modify or amend this Policy, and that such changes are binding upon Registrant.

2. *Connectivity.*

At the time of the initial submission to Network Solutions of the Domain Name request, the Registrant is required to have operational name ser-

vice from at least two operational domain name servers for that Domain Name. Each domain name server must be fully connected to the Internet and capable of receiving queries under that Domain Name and responding thereto. Failure to maintain two active domain name servers may result in the revocation of the Domain Name registration.

3. *Indemnity.*

(a) Registrant hereby agrees to defend, indemnify and hold harmless (i) Network Solutions, its officers, directors, employees and agents, (ii) the National Science Foundation ("NSF"), its officers, directors, employees and agents, (iii) the Internet Assigned Numbers Authority ("IANA"), its officers, directors, employees and agents, (iv) the Internet Activities Board ("IAB"), its officers, directors, employees and agents, and (v) the Internet Society ("ISOC"), its officers, directors, employees, and agents (collectively, the "Indemnified Parties"), for any loss or damages awarded by a court of competent jurisdiction resulting from any claim, action, or demand arising out of or related to the registration or use of the Domain Name.

(b) Such claims shall include, without limitation, those based upon intellectual property trademark or service mark infringement, tradename infringement, dilution, tortious interference with contract or prospective business advantage, unfair competition, defamation or injury to business reputation.

(c) Each Indemnified Party shall send written notice to the Registrant of any such claim, action, or demand against that party within a reasonable time. The failure of any Indemnified Party to give the appropriate notice shall not effect the rights of the other Indemnified Parties.

(d) Network Solutions recognizes that certain educational and government entities may not be able to provide indemnification. If the Registrant is (i) a governmental or non-profit educational entity, (ii) requesting a Domain Name with a root of EDU or GOV and (iii) not permitted by law or under its organizational documents to provide indemnification, the Registrant must notify Network Solutions in writing and, upon receiving appropriate proof of such registration, Network Solutions will provide an alternative indemnification provision for such a Registrant.

4. *Revocation.*

Registrant agrees that Network Solutions shall have the right in its sole discretion to revoke a Domain Name from registration upon thirty (30) days prior written notice, or at such time as ordered by a court, should Network Solutions receive a properly authenticated order by a federal or

state court in the United States appearing to have jurisdiction, and requiring the Registrant to transfer or suspend registration of the Domain Name.

5. *Third Party Dispute Initiation.*

Registrant acknowledges and agrees that Network Solutions cannot act as an arbiter of disputes arising out of the registration of a Domain Name. At the same time, Registrant acknowledges that Network Solutions may be presented with information that a Domain Name registered by Registrant violates the legal rights of a third party. Such information includes, but is not limited to, evidence that the second-level Domain Name (i.e., not including .COM, .ORG, .NET, .EDU, or .GOV) is identical to a valid and subsisting foreign or United States federal Registration of a trademark or service mark on the Principal Register that is in full force and effect and owned by another person or entity ("Complainant"):

(a) Proof of such a trademark must be by submission of a certified copy, not more than six (6) months old, of a United States Principal or foreign registration (copies certified in accordance with 37 CFR 2.33(a)(1)(viii) or its successor will meet this standard for registrations in jurisdictions other than the United States ("Certified Registration")). Trademark or service mark registrations from the Supplemental Register of the United States, or from individual states (such as California) of the United States are not sufficient.

(b) In addition to the proof required by Clause II-5(a), the owner of a trademark or service mark registration must give prior notice to the Domain Name Registrant, specifying unequivocally and with particularity that the registration and use of the Registrant's Domain Name violates the legal rights of the trademark owner, and provide Network Solutions with a copy of such notice. Network Solutions will not undertake any separate investigation of the statements in such notice.

(c) In those instances (i) where the basis of the claim is other than a Certified Registration described above, or (ii) where the Complainant fails to provide the proof of notice required by Clause II-5(b), the third party procedures in Clause II-6 will not be applied.

6. *Third Party Procedures.*

In those instances where a third party claim is based upon and complies with Clause II-5(a) and (b), Network Solutions may apply the following procedures, which recognize that trademark ownership does not automatically extend to a Domain Name and which reflect no opinion on the part of Network Solutions concerning the ultimate determination of the claim:

(a) Network Solutions shall determine the activation date of the Registrant's Domain Name.

(b) If the Registrant's Domain Name activation date is before the earlier of (i) the date of first use of the trademark or service mark in the Certified Registration or (ii) the effective date of the valid and subsisting Certified Registration owned by the Complainant, or, if Registrant provides evidence of ownership of a trademark or service mark as provided in Clause II-5, the Registrant shall be allowed to continue the registration and use of the contested Domain Name, as against that Complainant and subject to the remaining terms of this Policy.

(c) If the activation date of the Domain Name is after the earlier of (i) the date of first use of a Complainant's trademark or service mark in the Certified Registration, or (ii) the effective date of the valid and subsisting Certified Registration owned by the Complainant, then Network Solutions shall request from the Registrant proof of ownership of Registrant's own registered mark by submission of a certified copy, of the type and nature specified in Clause II-5(a) above, owned by the Registrant and which was registered prior to the earlier of the date of Network Solutions' request for proof of ownership above or any third party notifying the Registrant of a dispute. The mark provided must be identical to the second-level Domain Name registered to the Registrant.

(d) If the Registrant activation date is after the dates specified in Clause II-6(b), or the Registrant fails to provide evidence of a trademark or service mark registration to Network Solutions within thirty (30) days of receipt of Network Solutions' request, Network Solutions will assist Registrant with assignment of a new domain name, and will allow Registrant to maintain both names simultaneously for up to ninety (90) days to allow an orderly transition to the new domain name. Network Solutions will provide such assistance to a Registrant if and only if Registrant (1) submits a domain name template requesting the registration of a new domain name; and (2) submits an explicit written request for assistance, including an identification of the Registrant's desired new domain name and the tracking number assigned by Network Solutions in response to the new domain name template, both within thirty (30) days of receipt of Network Solutions' original notice of the complaint. At the end of the ninety (90) day period of simultaneous use, Network Solutions will Place the disputed Domain Name on "Hold " status, pending resolution of the dispute. As long as a Domain Name is on "Hold" status, that Domain Name registered to Registrant shall not be available for use by any party.

(e) In the event the Registrant (1) fails to provide the documentation required by Clause II-6(c) of a trademark or service mark registration within thirty (30) days of receipt of Network Solutions' dispute notifica-

tion letter, (2) provides Network Solutions written notification that Registrant will neither accept the assignment of a new domain name nor relinquish its use of the Domain Name, or (3) fails to take any action or provide any written notice within the times specified in this Clause II-6, whichever event occurs first, Network Solutions will place the Domain Name on "Hold" status, that Domain Name registered to Registrant shall not be available for use by any party.

(f) Network Solutions will reinstate the Domain Name place in a "Hold" status (i) upon receiving a properly authenticated temporary or final order by a federal or state court in the United States having competent jurisdiction and stating which party to the dispute is entitled to the Domain Name, or (ii) if Network Solutions receives other satisfactory evidence from the parties of the resolution of the dispute.

7. *Litigation.*

In the event that, prior to the Domain Name being placed on "Hold":

(a) The Registrant files suit related to the registration and use of the Domain Name against the Complainant in any court of competent jurisdiction in the United States, Network Solutions will not place the Domain Name on "Hold," subject to the remaining terms of this Policy and pending a temporary or final decision of the court, provided that the Registrant provides a copy of the file-stamped Complaint to Network Solutions. In such cases, Network Solutions will deposit control of the Domain Name into the registry of the court. Registrant also shall promptly provide copies of any and all pleadings filed in the action to Network Solutions upon Network Solutions' request.

(b) The Complainant files suit related to the registration and use of the Domain Name against the Registrant in any court of competent jurisdiction in the United States and provides Network Solutions with a copy of the file-stamped Complaint, Network Solutions will not place the Domain Name on "Hold," subject to the remaining terms of this Policy, and will deposit control of the Domain Name into the registry of the court pending a temporary or final decision of the court.

(c) In both instances, under Clause II-7(a) and (b), Network Solutions will immediately abide by all temporary or final court orders directed at either Registrant or Complainant, without being named as a party to the suit. If named as a party to a law suit, Network Solutions shall not be limited to the above actions, but reserves the right to raise any and all defenses deemed appropriate.

8. *Disclaimer.*

REGISTRANT AGREES THAT NETWORK SOLUTIONS WILL NOT BE LIABLE FOR ANY LOSS OF REGISTRATION AND USE OF REGISTRANT'S DOMAIN NAME, OR FOR INTERRUPTION OF BUSINESS, OR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND (INCLUDING LOST PROFITS) REGARDLESS OF THE FORM OF ACTION WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, EVEN IF NETWORK SOLUTIONS HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT SHALL NETWORK SOLUTIONS' MAXIMUM LIABILITY UNDER THESE POLICY GUIDELINES EXCEED FIVE HUNDRED (\$500.00) DOLLARS.

9. *Notices.*

All notices or reports permitted or required under this Policy shall be in writing and shall be delivered by personal delivery, facsimile transmission, and/or by first class mail, and shall be deemed given upon personal delivery, or seven (7) days after deposit in the mail, whichever occurs first. Initial notices to the Registrant shall be sent to the Domain Name Administrative Contact at the address associated with the Domain Name Registrant listed in the InterNIC Registration Services' database (i.e., the address contained in Clause II-3 of the Domain Name Registration Agreement (template)).

10. *Non-Agency.*

Nothing contained in this Policy shall be construed as creating any agency, partnership, or other form of joint enterprise between the parties.

11. *Non-Waiver.*

The failure of either party to require performance by the other party of any provision hereof shall not affect the full right to require such performance at any time thereafter; nor shall the waiver by either party of a breach of any provision hereof be taken or held to be a waiver of the provision itself.

12. *Breach.*

Registrant's failure to abide by any provision under this Policy may be considered by Network Solutions to be a material breach and Network Solutions may provide a written notice, describing the breach, to the Registrant. If, within thirty (30) days of the date of mailing such notice, the Registrant fails to provide evidence, which is reasonably satisfactory to Network Solutions, that it has not breached its obligations, then Net-

work Solutions may revoke Registrant's registration of the Domain Name. Any such breach by a Registrant shall not be deemed to have been excused simply because Network Solutions did not act earlier in response to that, or any other, breach by the Registrant.

13. *Invalidity.*

In the event that any provision of this Policy shall be unenforceable or invalid under any applicable law or be held by applicable court decision, such unenforceability or invalidity shall not render this Policy unenforceable or invalid as a whole. Network Solutions will amend or replace such provision with one that is valid and enforceable and which achieves, to the extent possible, the original objectives and intent of Network Solutions as reflected in the original provision.

14. *Entirety.*

THESE GUIDELINES, AS AMENDED, AND THE REGISTRATION AGREEMENT (TEMPLATE) TOGETHER CONSTITUTE THE COMPLETE AND EXCLUSIVE AGREEMENT OF THE PARTIES REGARDING DOMAIN NAMES. THESE GUIDELINES SUPERSEDE AND GOVERN ALL PRIOR PROPOSALS, AGREEMENTS, OR OTHER COMMUNICATIONS BETWEEN THE PARTIES. REGISTRANT AGREES THAT REGISTRATION OF A DOMAIN NAME CONSTITUTES AN AGREEMENT TO BE BOUND BY THIS POLICY, AS AMENDED FROM TIME TO TIME.

