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MOOT COURT COMPETITION

BENCH MEMORANDUM

REVOCATION OF AN INTERNET DOMAIN NAME FOR VIOLATIONS OF "NETIQUETTE": CONTRACTUAL AND CONSTITUTIONAL IMPLICATIONS

by DAVID E. SORKIN[†]

THE FIFTEENTH ANNUAL JOHN MARSHALL LAW SCHOOL
NATIONAL MOOT COURT COMPETITION IN INFORMATION
TECHNOLOGY AND PRIVACY LAW

NO. 96-315

IN THE SUPREME COURT
OF THE
STATE OF MARSHALL

MONA SEIDMAN, d/b/a)	
Magphone Ventures,)	
)	
Petitioner,)	
)	
v.)	No. 96-315
)	
SAIC NETWORK)	
SOLUTIONS, INC.,)	
)	
Respondent.)	

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I. INTRODUCTION

Seidman v. SAIC Network Solutions, Inc., is a dispute over a single record in a database containing over half a million "domain names" that serve as addresses for computers and computer networks connected to the Internet. The respondent, SAIC Network Solutions, Inc. ("NSI"),¹ maintains this database pursuant to an agreement with the United States government. The petitioner, Mona Seidman d/b/a Magphone Ventures, filed suit against NSI when it removed her computer's domain name from its database. Seidman raises issues involving governance structures and rules of conduct applicable to the Internet in the context of this dispute.

When Mona Seidman originally registered her chosen domain name with NSI, she entered into NSI's standard domain name registration agreement. Other Internet users later contacted NSI to complain about "junk e-mail" they were receiving from Seidman, and NSI responded by removing Seidman's domain name from its database.

Seidman claims that she has a contractual right to the continued use of the domain name under the registration agreement, and that NSI breached that agreement when it removed the name from its database. NSI asserts that the agreement permits NSI to revoke a domain name registration for any reason, and that in any event, Seidman had already breached the agreement by violating Internet customs and standards (an implied term of the agreement, according to NSI) when she used the Internet to send unsolicited bulk e-mail messages.

Seidman also alleges that NSI's domain name registration functions constitute governmental action for purposes of the Fifth Amendment to the United States Constitution. She argues that NSI violated her due process rights when NSI removed her domain name from its database.

The trial court granted NSI's motion for summary judgment, and the Marshall Court of Appeals affirmed. Seidman is appealing that decision to the Supreme Court of the State of Marshall.

II. STATEMENT OF THE CASE

On December 11, 1995, Mona Seidman submitted an application to NSI, seeking to register "magphone.com" as an Internet domain name for her business, Magphone Ventures. NSI granted Seidman's application on December 13, 1995.

During the month of January 1996, Seidman began to send numerous unsolicited e-mail messages to various recipients using the Internet.

1. Although SAIC Network Solutions, Inc., is an actual corporation, *Seidman* is a fictitious case. No inference should be drawn that any person or company has actually engaged in any of the activities described herein.

These messages offered to sell magazine subscriptions and long distance telephone service. The messages identified the sender as "info@magphone.com," and contained a toll-free telephone number for responses.

Glenlacher Computer Services Corp. is a regional Internet access provider based in Los Angeles, California. Glenlacher registered the "glenlacher.com" domain name with NSI in 1993. Glenlacher's customers include businesses and individuals who subscribe to Glenlacher's services in order to obtain access to the Internet, including e-mail and the World Wide Web ("Web"). Their e-mail addresses all terminate in "glenlacher.com."

Starting in mid-January of 1996, Glenlacher began to receive complaints from its customers complaining about "junk e-mail messages"—unsolicited commercial messages sent to them on their Glenlacher accounts from "info@magphone.com." Alan Goldman, Glenlacher's system administrator, searched NSI's registration database using the Internet and learned that "magphone.com" was registered to Magphone Ventures. Over the next several weeks, Goldman sent approximately ten e-mail messages to "info@magphone.com," requesting that no further unsolicited messages be sent to addresses in the "glenlacher.com" domain.

By February 12, 1996, over half of the e-mail messages coming into Glenlacher's system were from Magphone Ventures, and the performance of Glenlacher's entire computer system began to suffer. As a result, on February 15, Goldman configured Glenlacher's system to "bounce back" copies of all messages received from the "magphone.com" domain to the sender, and the messages subsequently came to a halt. Goldman also sent an e-mail message to NSI on February 15 asking NSI to consider canceling the registration of "magphone.com" because the domain was being used to send unsolicited bulk e-mail messages, in violation of Internet customs and standards.

On February 19, 1996, NSI forwarded Goldman's complaint to Seidman, notifying her that if she did not respond within 30 days, NSI would place the "magphone.com" domain on "hold" status, making it unavailable for use or registration by any party. Seidman responded with a brief e-mail message to NSI on March 11, 1996, stating that she wished to continue using the "magphone.com" domain, and would supply any information NSI requested. On March 20, 1996, NSI sent Seidman a message stating that it was placing the domain name on "hold" status. On the same day, NSI removed "magphone.com" from its active domain registration database, thereby preventing all Internet users from sending e-mail to addresses in the "magphone.com" domain or accessing information on the Web in the "magphone.com" domain.

As a result of NSI's actions, Seidman filed for declaratory and injunctive relief in the Addison County Circuit Court. In the complaint Seidman asked that her rights to the "magphone.com" domain be recognized, and that NSI be ordered to restore her registration of the "magphone.com" domain and enjoined from revoking it in the future. Seidman alleged that NSI breached the domain name registration agreement and violated her due process rights by removing her domain name from its database.

NSI moved for summary judgment on both counts of breach of contract and denial of due process. The trial court granted NSI's motion, and the court of appeals affirmed. The Supreme Court of the State of Marshall granted Seidman's petition for leave to appeal as to both issues.

III. ISSUES PRESENTED

A. Whether an Internet domain name registry is contractually prohibited from suspending a domain name based upon violations of "netiquette."

B. Whether the registration of domain names in the ".com" domain constitutes governmental action for purposes of the Due Process Clause.

IV. BACKGROUND

A. THE INTERNET

The Internet is a worldwide communications system that links millions of computers and computer networks together.² This worldwide system poses a host of difficult legal and political problems. Some of these problems are a result of the advances in technology and communications that the Internet represents; others stem from the fact that the Internet transcends national and other geographic boundaries. The latter set of problems is compounded by the Internet's awkward transition from a United States government-funded military research system to a worldwide communication and information system for commerce, education, and many other purposes, in addition to the lack of intergovernmental and other international organizations willing and able to exercise control over the present-day Internet.

1. *A Brief History of the Internet*

The Internet traces its origins to the ARPANET, created in 1969 by the Advanced Research Projects Agency of the United States Department of Defense.³ The government designed the ARPANET as a system

2. See *ACLU v. Reno*, 929 F. Supp. 824, 830-31 (E.D. Pa. 1996).

3. See *id.* at 831; DANIEL P. DERN, *THE INTERNET GUIDE FOR NEW USERS* 8 (1994).

for sharing information and computing between the United States military, defense contractors, and universities conducting defense-related research.⁴ The expansion of the ARPANET during the 1970's reached academic institutions in the United States and elsewhere. The National Science Foundation ("NSF"), another federal agency, assumed increasing responsibility for funding and management of the ARPANET as it evolved from a military network to one primarily used for academic research and teaching.⁵

In the 1980's and early 1990's the business world gradually started to recognize the potential benefits of a worldwide network for electronic communication. Private Internet access providers began to offer high-speed network connections. This private access avoided NSF's restrictions on commercial use by forming the Commercial Internet Exchange, which eliminated the need to rely upon NSF's communication backbone.⁶

In response to the increasing commercialization and internationalization of the evolving Internet, NSF gradually retreated from its supervisory role. NSF has now transferred most of its funding and management functions to private firms and other independent entities, some of which continue to receive financial support from the federal government.

In 1992, as part of this privatization effort, NSF developed a plan in which several Internet management functions would be taken over by a collaboration of private firms, to be called the Internet Network Information Center or "InterNIC."⁷ One of the functions delegated to the InterNIC was the registration of domain names and other addressing information. Prior to the establishment of the InterNIC, the Defense Information Systems Agency Network Information Center in conjunction with the Internet Assigned Numbers Authority ("IANA"), an entity operated by the Information Sciences Institute of the University of Southern California provided this service.⁸ A "Cooperative Agreement" between NSF and NSI assigned the registration services portion of the InterNIC to NSI, effective from January 1993 through September 1998.⁹

4. *ACLU*, 929 F. Supp. at 831.

5. Dan L. Burk, *Trademarks Along the Infobahn: A First Look at the Emerging Law of Cybermarks*, 1 RICHMOND J.L. & TECH. 1, ¶ 6 (Apr. 10, 1995) <<http://www.urich.edu/~jolt/v1i1/burk.html>>.

6. DERN, *supra* note 3, at 15.

7. See National Science Foundation Cooperative Agreement No. NCR-9218742 (effective Jan. 1, 1993) <<http://rs.internic.net/nsf/agreement/>> [hereinafter "NSF Cooperative Agreement"].

8. *Id.*; see also Jon Postel, *Domain Name System and Delegation*, Network Working Group Request for Comments no. 1591, Mar. 1994, at 1 <<http://ds.internic.net/rfc/rfc1591.txt>> [hereinafter "RFC 1591"].

9. NSF Cooperative Agreement, *supra* note 7. NSI was purchased in early 1995 by Science Applications International Corporation ("SAIC"), a closely-held defense contractor.

2. *Components of the Internet*

The Internet is a collection of thousands of computer networks all over the world. These networks all use a set of common protocols which permit disparate operating systems and hardware platforms to communicate with one another.¹⁰ The Internet and associated networks now reach into most of the countries on the earth, using fiber optic cables, twisted-pair copper wire, microwave transmissions, and other means.¹¹ A corporation or university can obtain a high-bandwidth direct connection to the Internet for its local computer network, while an individual can connect his or her own personal computer to the Internet using an inexpensive modem and telephone line.¹²

Each node¹³ on Internet has a unique numeric address that enables other computers and networks to communicate with it. This numeric Internet Protocol ("IP") address consists of four numbers separated by periods, such as 128.40.5.1.¹⁴ For a number of reasons—including the fact that numeric IP addresses are difficult to remember—Internet nodes are also assigned alphanumeric labels, referred to as "domain names." When a computer user requests a connection to a particular domain name, a domain name server automatically translates the name into an IP number to enable the computer to make the connection.¹⁵

The domain name system has a hierarchical structure. The rightmost part of a domain name is referred to as a "top-level domain" or TLD, and represents the type or the location of the entity to which the name is registered. Many domain names in common use within the United States fall within one of the seven three-letter TLDs: ".com" (intended for commercial entities), ".edu" (educational), ".gov" (federal government agencies), ".int" (international treaty organizations), ".mil" (United States military organizations), ".net" (network providers), and ".org" (miscellaneous organizations).¹⁶ At least three of these TLDs—".com," ".net," and ".org"—are open for registration to entities in any country, though most of the registered domain names in these TLDs be-

See Glenn R. Simpson, *Internet Users Spooked About Spies' New Role*, WALL ST. J., Oct. 2, 1995, at B1.

10. DERN, *supra* note 3, at 16.

11. Burk, *supra* note 5, at ¶ 2.

12. See *ACLU*, 929 F. Supp. at 832. Individuals generally connect to the Internet either through a commercial online system or, increasingly, though a direct Internet access provider. See *id.* at 833; Peter H. Lewis, *More Users Now Taking Direct Route to the Internet, a Survey Finds*, N.Y. TIMES, Sept. 23, 1996, at D1.

13. "Each link or node in this Web is a computer or computer site connected together by a variety of connections: fiber optic cable, twisted-pair copper wire, microwave transmission, or other communications media." Burk, *supra* note 5, at ¶2.

14. DERN, *supra* note 3, at 70.

15. DERN, *supra* note 3, at 75-76.

16. RFC 1591, *supra* note 8, at 2-3.

long to United States-based companies and individuals.¹⁷ These TLDs are among those for which NSI performs registration services under the Cooperative Agreement with NSF. Businesses in the United States generally have a strong preference for the “.com” domain.

In addition to the three-letter TLDs, there is also a much larger class of two-letter TLDs. Each country is assigned its own two-letter TLD. For example, the United States is “.us,” Canada is “.ca,” and Great Britain is “.uk.” In most instances, an entity may choose whether to register in a two-letter or a three-letter TLD. NSI, however, does not administer any of the two-letter TLDs.

The hierarchical structure within each TLD varies. The “.com” domain is considered flat: the registration authority (NSI) accepts registrations only for second-level domains within “.com,” such as “acme.com,” “ameritech.com,” and “apple.com.” A company that registers a domain name has control over all domains within its second-level domain. If Example Industries had registered “example.com,” then it would also have the rights to “www.example.com” (normally used to denote a Web server), “mail.example.com” (possibly a computer dedicated to sending and receiving e-mail messages), and “sales.example.com” (perhaps a departmental network within the company). Many TLDs, particularly the country-specific two-letter TLDs, have a deeper structure. In some instances, for example, the second-level domain is used to indicate the type of entity (such as “ac.uk” for academic institutions in Great Britain), and third-level domains are registered to individual entities. The “.us” domain is divided geographically (as in “www.ci.chi.il.us,” the Web server for the City of Chicago, Illinois).

Because a domain name is valid throughout the Internet and because two entities cannot both use the same domain name, a number of disputes over the rights to domain names have arisen in recent years.¹⁸ Largely in response to these disputes, several proposals have been put forth to create additional international TLDs. IANA has asserted that it has the exclusive power to approve new TLDs, and recently published a draft outlining procedures for approving new TLDs and registration authorities.¹⁹ IANA’s authority over the “root” space (the level above the

17. See Robert Shaw, *Internet Domain Names: Whose Domain Is This?*, Paper Presented at the Workshop on Coordination and Administration of the Internet, Sept. 9-10, 1996 (visited Feb. 14, 1997) <<http://www.itu.ch/intreg/dns.html>>.

18. See *infra* section IV.B.

19. See Jon Postel, *New Registries and the Delegation of International Top Level Domains*, Aug. 1996 (visited Feb. 14, 1997) <<ftp://ftp.isi.edu/in-notes/iana/administration/new-registries>>. While opening new TLDs addresses the access problem (for example, Apple Records could register “apple.biz” if “apple.com” were already taken), it would likely exacerbate the problems of trademark infringement and dilution. See also David Loundy, *Internet Name Game Gets New Set of Rules*, CHI. DAILY L. BULL., Sept. 12, 1996, at 5.

TLDs) has been widely questioned, however, and competing registries have announced the creation of new TLDs such as ".biz," ".corp," ".law," and ".sex."²⁰

3. *Governance of the Internet*

The technical structure of the Internet may be complex, but for the most part it is fully capable of performing the tasks demanded of it by users. If the bandwidth of the backbone proves insufficient, for example, MCI or another company will step in to provide the additional bandwidth demanded by the market. The governance structure of the Internet, however, is quite another matter.

The United States government, through the NSF and other agencies, still has a role in governing the Internet despite efforts to transfer responsibility to the private sector. The Federal Networking Council ("FNC"), for example, coordinates federal funding of IANA and other organizations that perform technical and administrative functions related to the Internet.²¹ As recently as November 1995, a representative of the FNC claimed that the United States government owns the "root" space as well as the ".com," ".net," and ".org" TLDs.²²

The InterNIC, established at NSF's initiative and presently comprised of NSI and AT&T, performs highly visible services for the Internet, including NSI's domain name registration functions. Apart from NSI's reluctant involvement in domain name disputes, however, the InterNIC's role in governance is primarily administrative. The Cooperative Agreement between NSF and NSI originally provided that NSF would pay NSI for administering the registration services. When the agreement was amended in September 1995 to permit NSI to collect user fees from domain name registrants, most of the payments from NSF were discontinued.²³ The amended agreement authorizes NSI to impose an annual fee of \$50 upon registrants for each second-level domain name. NSI is permitted to retain 70% of those user fees as consideration for providing registration services, and must use the remaining 30% "for the preservation and enhancement of the 'Intellectual Infrastructure' of the Internet," in conformity with plans approved by NSF.²⁴ NSI must obtain NSF approval for any changes in the fee structure, and must sub-

20. Loundy, *supra* note 19.

21. 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 DNS Issue*, Paper Presented at the Harvard University DNS Workshop Nov. 20, 1995 (visited Feb. 14, 1997) <<http://ksgwww.harvard.edu/iip/fnc.html>>.

22. St. Johns, *supra* note 21.

23. NSF Cooperative Agreement, *supra* note 7, amend. 4 (Sept. 13, 1995).

24. NSF Cooperative Agreement, *supra* note 7, amend. 4 (Sept. 13, 1995).

mit monthly, quarterly, and annual reports to NSF.²⁵

A number of private organizations exert influence and authority over the Internet.²⁶ IANA oversees the assignment of domain names and other addressing information and delegates these responsibilities to the InterNIC and similar agencies in other countries.²⁷ The Internet Society ("ISOC") is an international organization comprised of individuals and organizations concerned with the growth and evolution of the Internet.²⁸ The Internet Engineering Task Force ("IETF") is an open international community of computer professionals. Started in 1986 as a forum for ARPANET contractors, the IETF's meetings are now open to anyone who wishes to register and attend.²⁹ The IETF's activities are managed by the Internet Engineering Steering Group ("IESG").³⁰ Members of the IESG are appointed by the Internet Architecture Board (formerly the Internet Activities Board), an advisory group of ISOC.³¹ Among its other activities, the IETF approves documents for publication in the Request for Comments ("RFC") series, which set forth standards, protocols, and recommended practices for use of the Internet.³²

B. DOMAIN NAME DISPUTES

NSI registers domain names on a first-come, first-served basis. The corporation requires registrants to represent that the domain name they seek to register does not infringe upon third parties' trademark rights, but does not otherwise screen or investigate requested domain names.³³

25. NSF Cooperative Agreement, *supra* note 7, amend. 4 (Sept. 13, 1995).

26. See generally Shaw, *supra* note 17; David W. Maher, *Trademarks on the Internet: Who's in Charge?*, Paper Presented at the Internet Society Annual Meeting June 24-26, 1996 (visited Feb. 14, 1997) <http://www.isoc.org/isoc/whatis/conferences/inet/96/proceedings/f4/f4_2.html>.

27. RFC 1591, *supra* note 8, at 3-4.

28. See *What Is the Internet Society?* (last modified Aug. 14, 1995) <<http://www.isoc.org/whatis/what-is-isoc.html>>.

29. See *Welcome to the Internet Engineering Task Force* (last modified Aug. 7, 1996) <<http://www.ietf.org/>>; *IETF Overview* (last modified Sept. 9, 1996) <<ftp://ftp.ietf.org/ietf/ietf-description.txt>>; Gary Malkin, *The Tao of IETF—A Guide for New Attendees of the Internet Engineering Task Force*, Network Working Group Request for Comments no. 1718, Oct. 1994, at 2-3 <<http://ds.internic.net/rfc/rfc1718.txt>> [hereinafter "RFC 1718"].

30. RFC 1718, *supra* note 29, at 4.

31. Jon Postel, *IAB Overview* (last modified Oct. 20, 1995) <<http://www.iab.org/iab/overview.html>>.

32. The RFC series includes standards documents and other publications of the IESG, IAB, and other segments of the Internet community; in practice, most RFCs are approved by the IETF. See Internet Architecture Board & Internet Engineering Steering Group, *The Internet Standards Process—Revision 2*, Network Working Group Request for Comments no. 1602, Mar. 1994, at 15-16 <<http://ds.internic.net/rfc/rfc1602.txt>>.

33. See NSI Domain Name Dispute Policy Statement, Revision 02 (effective Sept. 9, 1996) <<ftp://rs.internic.net/policy/internic/internic-domain-6.txt>>.

Several disputes over domain names have reached the courts in recent years, and NSI's efforts to keep itself out of such disputes have not always been successful.

The most widely reported domain name dispute to date was *MTV Networks v. Curry*.³⁴ Adam Curry registered "mtv.com" under his own name while employed by MTV. He refused to assign the domain name to MTV after he left the network. MTV sued, alleging trademark infringement, breach of contract, fraud, negligent misrepresentation, and unfair competition. Curry began using the domain name "metaverse.com" pending trial, and ultimately reached a settlement with MTV in which Curry relinquished "mtv.com" to the network.³⁵ Similar claims were behind other early domain name disputes, including a dispute between Stanley H. Kaplan Educational Centers and the Princeton Review over Princeton's registration of "kaplan.com," and reporter Joshua Quittner's registration of "mcdonalds.com," which he surrendered only when McDonald's Corporation agreed to make a \$3,500 contribution to a grade school for the purchase of computer equipment.³⁶

The first case in which NSI itself faced a legal challenge was *KnowledgeNet v. D.L. Boone & Co.*³⁷ Boone registered the domain name "knowledge.net" and KnowledgeNet subsequently sued Boone, NSI, and others, alleging among other claims that the defendants had conspired to misappropriate KnowledgeNet's trademark. NSI was ultimately dismissed as a party when KnowledgeNet and Boone reached a settlement.³⁸

In response to the *KnowledgeNet* action, NSI adopted a domain name dispute policy in July of 1995.³⁹ The policy attempts to remove NSI from domain name disputes, particularly those involving trademark rights, by forcing parties to resolve such disputes between one another without bringing in NSI as a party. In this regard it has not been particularly successful; while the policy has generally prevented NSI from being sued by trademark owners, several domain name holders have sued NSI to prevent the corporation from suspending their domain names.

One such case, *Roadrunner Computer Systems, Inc. v. Network Solu-*

34. 867 F. Supp. 202 (S.D.N.Y. 1994).

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

36. See Burk, *supra* note 5, at ¶¶ 16-22; Maher, *supra* note 26.

37. No. 94-CV-7195 (N.D. Ill. filed Dec. 2, 1994).

38. See Maher, *supra* note 26.

39. See NSI Domain Dispute Resolution Policy Statement (July 28, 1995) <ftp://rs.internic.net/policy/internic/internic-domain-1.txt>. The policy has been revised twice since it was originally announced. See NSI Domain Name Dispute Policy Statement, Revision 01 (effective Nov. 23, 1995) <ftp://rs.internic.net/policy/internic/internic-domain-4.txt>; NSI Domain Name Dispute Policy Statement, Revision 02 (effective Sept. 9, 1996) <ftp://rs.internic.net/policy/internic/internic-domain-6.txt>.

tions, Inc.,⁴⁰ began with a domain name challenge submitted to NSI by Time Warner Entertainment, L.P., based upon Time Warner's trademark registration for "Road Runner" and Roadrunner Computer Systems' registration of the "roadrunner.com" domain. NSI notified Roadrunner Computer Systems that it would suspend "roadrunner.com" unless Roadrunner could produce its own federal trademark registration for the word "roadrunner." The case was ultimately dismissed after Time Warner agreed to permit Roadrunner to continue using its domain name.⁴¹ A similar case, *Clue Computing, Inc. v. Network Solutions, Inc.*,⁴² arose after toy manufacturer Hasbro, Inc., contacted NSI to challenge domain names which were equivalent to registered trademarks for Hasbro's products, including "clue.com."⁴³ The court in *Clue Computing* granted Clue's motion for a preliminary injunction preventing NSI from placing the domain name on hold pending trial.⁴⁴

C. "Netiquette" and Unsolicited E-Mail

The Internet has grown from a relatively small, homogeneous group of technically-oriented academics to an international community that includes people from a vast array of cultural, socioeconomic, and educational backgrounds. This diversity can make effective communication difficult. Accordingly, some more-or-less generally accepted behavioral norms have evolved.⁴⁵ These norms, often referred to as rules of network etiquette or "netiquette," are communicated to new users of the Internet in several ways, including "Frequently Asked Questions" lists (FAQs) distributed in discussion forums; guidelines, acceptable use principles, and terms of service for individual computer systems and online services; "flames" and other messages targeted at individuals perceived to be netiquette violators; and a variety of other generally informal methods.

Netiquette covers a wide range of principles related to the use of the Internet. One netiquette rule, for example, discourages the use of all

40. No. 96-413-A (E.D. Va. filed Mar. 26, 1996).

41. Evan Ramstad, *Electronic Traffic Cop: Small Company Growing Fast, Trying to Stay Ahead of Internet Address Business Demands*, FT. WORTH STAR-TELEGRAM, Aug. 25, 1996, at 13.

42. No. 96-CV-694 (Colo. Boulder County filed June 12, 1996).

43. Another domain name challenged by Hasbro was "candyland.com," which was being used by an outfit called "Club Love" to distribute sexually explicit materials over the Internet. See *Hasbro, Inc. v. Internet Entertainment Group, Ltd.*, No. C96-130WD, 1996 U.S. Dist. LEXIS 11626, 1996 WL 84853 (W.D. Wash. Feb. 9, 1996); David Post, *A Domain by Any Other Name*, CORP. COUNS. MAG., June 1996, at 37.

44. Dinah Zeiger, *Network Solutions Pulls Plug on "Delinquent" Internet Addresses*, DENVER POST, July 1, 1996, at E5.

45. See Sally Hambridge, *Netiquette Guidelines*, Network Working Group Request for Comments No. 1855, Oct. 1995, at 5 <<http://ds.internic.net/rfc/rfc1855.txt>> [hereinafter "RFC 1855"].

upper case letters in e-mail messages and other electronic communications;⁴⁶ another rule discourages the posting of off-topic messages in discussion forums dedicated to a specific subject.⁴⁷

Because netiquette is merely an evolving set of cultural norms for a rapidly changing and largely ungoverned communications medium, there is no authoritative source of netiquette rules. RFC documents published by IETF⁴⁸ represent a widely recognized source of Internet documentation, although less than thirty of the nearly 2,000 RFCs published to date have been formally designated by the IETF as Internet Standards. A relatively recent RFC, *Netiquette Guidelines* (RFC 1855),⁴⁹ attempts to document a baseline set of netiquette rules. RFC 1855 is written as a basis for adaptation rather than as a set of standards to be applied universally, and it has been published as an Informational RFC rather than as an Internet Standard.

One rule of netiquette that is widely accepted but often violated is a prohibition on the use of bulk e-mail to send unsolicited advertisements.⁵⁰ RFC 1855 provides this guideline:

The cost of delivering an e-mail message is, on the average, paid about equally by the sender and the recipient (or their organizations). This is unlike other media such as physical mail, telephone, TV, or radio. Sending someone mail may also cost them in other specific ways like network bandwidth, disk space or CPU usage. This is a fundamental economic reason why unsolicited e-mail advertising is unwelcome (and is forbidden in many contexts).⁵¹

Other netiquette-related documents concur with this view. The Advertising on Usenet FAQ, for example, describes "junk email" as an "often-practiced and often-punished scheme" that will cause most Internet providers to cancel the sender's account.⁵² The Net Abuse FAQ suggests methods of combating unsolicited e-mail by complaining to the administrator of the sender's computer system.⁵³

Internet access providers and online services often have more formal acceptable use policies and rules of conduct. Many providers include general references to netiquette in their terms of service, and many specifically prohibit users from sending unsolicited and bulk e-mail

46. *See id.* at 4.

47. *See id.* at 8.

48. *See supra* section IV.A.3.

49. RFC 1855, *supra* note 45.

50. *See* Al Bredenberg, *Caveat Spammor: Marketers Are Trying to Legitimize Internet Junk Mail, or Spam, Through New Methods*, INTERNET WORLD, July 1996, at 68, 69.

51. *Id.* at 5.

52. Joel K. Furr, *Advertising on Usenet: How To Do It, How Not To Do It* (last modified Nov. 13, 1995) <<http://www.danger.com/advo.html>>.

53. J.D. Falk, *Net Abuse FAQ* § 3.10 (last modified Sept. 12, 1996) <<http://www.cybernothing.org/faqs/net-abuse-faq.html>>.

messages.⁵⁴

The controversy over unsolicited e-mail is at the heart of a case currently pending in federal court, *Cyber Promotions, Inc. v. America Online, Inc.*⁵⁵ Cyber Promotions is a marketing firm that uses bulk e-mail to distribute advertising messages on behalf of its clients.⁵⁶ Hundreds of thousands of America Online subscribers received such messages from the firm, and many complained to AOL. AOL asked Cyber Promotions to stop sending unsolicited messages to AOL subscribers. Cyber Promotions, however, apparently ignored AOL's request. AOL then began accumulating undeliverable messages from Cyber Promotions and returning them en masse, causing problems for Cyber Promotions' Internet provider and eventually forcing Cyber Promotions' to change providers three times. Cyber Promotions responded by suing AOL, alleging computer fraud and abuse, unfair competition, and intentional interference with contractual relations.⁵⁷

America Online announced in early September of 1996 that it would block out all incoming e-mail from Cyber Promotions and other selected sites. Cyber Promotions promptly sought a preliminary injunction to prevent AOL from blocking its e-mail messages. The district court granted the injunction, but the Third Circuit vacated it two weeks later.⁵⁸

V. BREACH OF CONTRACT

Mona Seidman's first claim is that NSI breached its contract with her when it removed her domain name from its active domain registration database. NSI denies that the Domain Name Registration Agreement confers any enforceable rights to the continued use of a domain name, and contends further that Seidman had already breached the agreement, which justified NSI's revocation of the domain name. In relevant part, the agreement reads as follows:

54. See John Schwartz, *It's the Spam You Read That's Making Many Interneters Queasy*, WASH. POST, Nov. 20, 1995, at F17.

55. 948 F. Supp. 436 (E.D. Pa. 1996).

56. See Bredenberg, *supra* note 50, at 70.

57. See Richard Raysman & Peter Brown, *Regulating Internet Advertising*, N.Y. L.J., May 14, 1996, at 3; Jared Sandberg, *America Online Sets Cyberspace Barriers Against Junk E-Mail*, WALL ST. J., Sept. 5, 1996, at B4.

58. See *America Online Wins Appeal on Mail*, N.Y. TIMES, Sept. 21, 1996, at 43; Thomas E. Weber, *America Online Wins Rounds in Suits over Junk E-Mail and Billing Practices*, WALL ST. J., Sept. 23, 1996, at B6. The Third Circuit panel held that the district court erred by not holding a hearing before entering the injunction. AOL has since reinstated the block on incoming e-mail from Cyber Promotions pending trial. Art Kramer & Elizabeth Lee, *Netwatch*, ATLANTA J. & CONST., Sept. 27, 1996, at D2.

Registering a domain name does not confer any the legal rights to that name and any disputes between parties over the rights to use a particular name are to be settled between the contending parties using normal legal methods (see RFC 1591).

By applying 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 'Policy Statement') which is available at <ftp://rs.internic.net/policy/internic.domain.policy>. . .The applicant acknowledges and agrees that NSI may change the terms and conditions of the Policy Statement from time to time as provided in the Policy Statement.

The applicant agrees 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.

This Registration Agreement shall be governed in 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. This Registration Agreement is the complete and exclusive agreement of the applicant and NSI ("parties") regarding domain names. It supersedes, and its terms govern, all prior proposals, agreements, or other communications between the parties. This Registration Agreement may only be amended as provided in the Policy Statement.⁵⁹

The "Policy Statement" referred to in the Agreement is NSI's Domain Name Dispute Policy Statement, which sets forth NSI's procedures for responding to domain name challenges based upon trademark claims.⁶⁰ The other document referred to is RFC 1591, which describes the domain name system.⁶¹

A. EXISTENCE OF ENFORCEABLE RIGHTS

To prevail on her breach of contract claim, Seidman must argue that she has a contractual right to continued use of her domain name despite the contrary language in the Registration Agreement. She can argue that the provision disclaiming legal rights to a domain name should not be enforced because it is unconscionable and contrary to public policy.⁶²

59. NSI Domain Name Registration Agreement, Version 2.0 (effective Sept. 1995) <http://webwrite.com/dn_form.txt>. The domain registration template has been revised slightly since Seidman registered her domain name, although the changes are not relevant to this dispute. See NSI Domain Name Registration Agreement, Version 3.0 (effective Aug. 1996) <<ftp://rs.internic.net/templates/domain-template.txt>>.

60. See *supra* section IV.B.

61. RFC 1591, *supra* note 8; see *supra* section IV.A.2.

62. Another possible argument is that domain name holders are intended third-party beneficiaries of the NSF Cooperative Agreement, *supra* note 7, and that they possess rights under that contract in addition to any rights conferred by the Registration Agreement.

She may also contend that interpreting the provision to bar a registration-related claim against the domain registry itself is contrary to the intent of the parties. Finally, she might argue that the disclaimer should be nullified because NSI induced her to rely on an implied promise that she would be able to make continued use of her domain name.

1. *Unconscionability and Public Policy*

Seidman may argue that the disclaimer should not be enforced because it is unconscionable and contrary to public policy. If a contract term is unconscionable at the time the contract is made, a court may ignore the term or limit its application in order to avoid an unconscionable result.⁶³ A court may also decline to enforce contract terms that are contrary to public policy.⁶⁴

Seidman can argue that the entire Registration Agreement is a contract of adhesion, based upon NSI's exclusive control over the ".com" domain and the fact that NSI presents the agreement to applicants on a take-it-or-leave-it basis. The imbalance in the parties' bargaining positions supports this argument. NSI is a multi-million-dollar corporation for which the \$50 annual registration fee paid to it by Seidman for her domain name is an inconsequential sum. Other provisions of the Registration Agreement (such as the incorporation of NSI's dispute policy, which NSI can modify at will) further illustrate the inequality in bargaining power and the unfairness of the agreement.

NSI is likely to respond to the unconscionability argument by pointing out that the disclaimer of legal rights is written in clear language and appears prominently in the Registration Agreement. The agreement is included in the domain name application form that applicants must complete and submit to NSI electronically in order to register a domain name. Had NSI wished to conceal the disclaimer, it might have buried it deeper in the agreement or placed it in the dispute policy incorporated by reference instead of in the agreement itself. Furthermore, NSI may argue that Seidman was free to register in a top-level domain controlled by a different registration authority (such as the ".us" domain, which is ad-

Similar claims were raised by the plaintiffs in *Roadrunner Computer Systems, Inc. v. Network Solutions, Inc.*, No. 96-413-A (E.D. Va. filed Mar. 26, 1996), and *Clue Computing, Inc. v. Network Solutions, Inc.*, No. 96-CV-694 (Colo. Boulder County filed June 12, 1996). Seidman has not alleged a third-party beneficiary claim in this action, although she may be able to use an analogous argument in urging the court to reject the disclaimer based upon public policy considerations.

63. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979); *American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.*, 75 F.3d 1401, 1412 (9th Cir. 1996).

64. See RESTATEMENT (SECOND) OF CONTRACTS § 178 (1979); *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983).

ministered by IANA) if she did not wish to agree to NSI's registration terms.

With respect to public policy, Seidman may argue that the NSF Cooperative Agreement and other Internet-related documents express a clear public policy that promotes a reliable infrastructure for the Internet, which includes a stable domain name system. RFC 1591, for example, refers to domain registration authorities as "trustees" for the domains delegated to them.⁶⁵ Stable domain names are particularly important in commercial uses of the Internet, as consumers may rely upon a domain name just as they rely upon product trademarks and company names. Vesting a single entity—especially a private entity—with the power to suspend domain names arbitrarily is hardly sound policy.

NSI may respond to this argument by asserting that its obligations under the NSF Cooperative Agreement are to the government and possibly to Internet users and the general public, but not to individual domain name holders. Furthermore, unsolicited bulk e-mail may pose a much greater threat to the Internet than the suspension of a single domain name, and in any event the suspension of Seidman's domain name does little more than temporarily inconvenience her until she obtains an alternate domain name from NSI or another registry.

2. *Scope of the Disclaimer*

Seidman can argue that interpreting the disclaimer of rights to bar a suit against NSI over a domain name registration is contrary to the parties' intent. She may urge a narrower construction of the disclaimer under which it covers only claims involving third parties in which the domain name holder's rights to the use of the name in general, rather than merely as a registered Internet domain name, are at issue. (In other words, the agreement would not confer any rights upon Seidman as against a party claiming trademark rights to the name "MagPhone.") This interpretation is consistent with NSI's obvious reluctance to be drawn into disputes between trademark owners and domain name holders. To the extent that the disclaimer is ambiguous, Seidman may have a viable argument here, as the Registration Agreement was drafted by NSI's lawyers and any ambiguities ought to be resolved in her favor.⁶⁶

NSI should counter this argument by contending that the disclaimer is clear on its face and does not warrant such a contorted construction.

65. RFC 1591, *supra* note 8, at 4

66. See RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979). Seidman might also contend that the covenant of good faith and fair dealing implied in every contract warrants a narrow construction of the disclaimer, though an implied duty of good faith ordinarily will not overcome an express term of a contract. See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979); *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 826 P.2d 710, 727-28 (9th Cir. 1992).

The disclaimer states that registration “does not confer any legal rights”; for a court to append a clause limiting the scope of the disclaimer would be contrary to the clearly expressed intent of the parties.

3. *Induced Reliance*

Another possible argument Seidman could make against the disclaimer is that NSI induced her to rely upon an implied promise that she would be able to make continued use of the domain name.⁶⁷ NSI did require Seidman to prepay the registration fee for a two-year period upon registering the domain. Seidman may also attempt to show that domain names are commonly treated as property—indeed, there is an active secondary market in domain names.⁶⁸ NSI arguably recognizes domain name holders’ property rights when it transfers domain name registrations upon request after being notified of a sale. Finally, Seidman might argue that the ability to register a domain name is meaningless without an accompanying right to use the name. In any event, while Seidman probably believed she could use the domain name for as long as she kept paying NSI’s annual fees, NSI should be able to defeat her reliance claim based upon the language of the agreement itself. The disclaimer states that the agreement does not confer any legal right to a domain name, and the incorporated dispute policy warns of various circumstances in which a domain name may be suspended.

B. PRIOR BREACH

If Seidman prevails on the enforceability issue, NSI will need to show that it was justified in suspending her domain name based upon her netiquette violations. NSI will argue that netiquette rules are an implied term of the agreement, and that sending unsolicited bulk e-mail messages is a serious breach of netiquette.

1. *Netiquette as an Implied Term*

Usage and customs of an industry are often considered by courts interpreting contracts, particularly where a necessary term is missing or the language of the contract is ambiguous.⁶⁹ Netiquette guidelines are set forth in a variety of different documents, including FAQs and

67. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

68. 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 the InterNIC’s Domain-Policy mailing list in June 1996, the Internal Revenue Service has even auctioned off domain names as assets to cover overdue tax obligations.

69. See *Varni Bros. Corp. v. Wine World, Inc.*, 41 Cal. Rptr. 2d 740, 745 (Ct. App. 1995).

RFCs.⁷⁰ Few of these documents represent official standards, but many of them describe customs and practices that are widely accepted within the Internet community, including netiquette guidelines. NSI thus can make a plausible argument that these guidelines should be an implied term of every contract that relates to use of the Internet.

Seidman will argue that the Registration Agreement neither explicitly nor implicitly incorporates any of these customs, and that the agreement certainly should not be interpreted to incorporate mere etiquette pointers. NSI's role under the Registration Agreement and the NSF Cooperative Agreement is simply to register domain names on a first-come, first-served basis; it has no legitimate interest in the ways in which the registrant of a domain name may subsequently choose to make use of the name.⁷¹ Furthermore, cancellation of a domain name is likely to have little effect on netiquette violations. Internet novices are unlikely to have their own domain names, and domain name holders who intentionally breach netiquette rules are usually capable of concealing their own identity.

2. *Unsolicited Bulk E-mail as a Breach of Netiquette*

NSI should be able to demonstrate that Seidman's actions were a serious breach of netiquette. Though the rule against unsolicited bulk e-mail is frequently violated by both new and experienced Internet users, it is recognized and accepted by most members of the Internet community. Some users have even lobbied for federal legislation prohibiting unsolicited e-mail advertisements (possibly as an amendment to the Telephone Consumer Protection Act of 1991,⁷² which prohibits unsolicited fax advertisements), though many people are wary of legislative efforts to control the Internet in the wake of the Communications Decency Act,⁷³ and some argue that e-mail advertising is less wasteful than direct mail and less intrusive than telemarketing.

Seidman's actions were a blatant violation of the netiquette rule against unsolicited bulk e-mail. She apparently sent multiple messages

70. See *supra* section IV.C.

71. The Marshall Court of Appeals did take note of an RFC that appears to obligate domain administrators to monitor such uses. See M. Stahl, *Domain Administrators Guide*, Network Working Group Request for Comments no. 1032, Nov. 1987, at 3 <<http://ds.internic.net/rfc/rfc1032.txt>> ("[T]he administrator of a domain is responsible for the actions of hosts within his domain."). While such a responsibility might make sense at the lowest levels of the Internet hierarchy—for example, an employer might be held responsible for defamatory messages sent out by its employees—it breaks down rapidly at higher levels. Since IANA purports to control the "root" space (over the TLDs), it could be held responsible for everything that happens anywhere on the entire Internet.

72. 47 U.S.C. § 227 (1994).

73. See *ACLU*, 929 F. Supp. at 824.

to each recipient, ignored requests from recipients to remove their names from her list, and accelerated the rate of unsolicited messages upon receiving complaints.

VI. DENIAL OF DUE PROCESS

Seidman's second claim is that NSI violated her constitutional rights when it removed her domain name from its database. The Due Process Clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." It applies only to acts of the federal government, and offers no shield against private conduct.⁷⁴ A domain name presumably represents a sufficient property interest to qualify for due process protection: as noted above, domain names often have a market value and are commonly treated as property.⁷⁵ The problem for Seidman is demonstrating that NSI's conduct qualifies as governmental action.

The conduct of a private party may be deemed governmental action if the government's involvement in the conduct is substantial. Three tests have been developed by the United States Supreme Court to determine the existence of governmental action: the "nexus" test, the "public function" test, and the "symbiotic relationship" test. Seidman could argue that NSI's actions should be deemed governmental action under any or all of these tests, but her case is probably strongest with respect to the symbiotic relationship test.

A. NEXUS

The nexus test finds governmental action when a private entity is highly regulated by the government to the extent that the private entity's conduct may be fairly attributed to the government.⁷⁶ Seidman might argue that this test is met by the performance and reporting requirements imposed on NSI by the NSF Cooperative Agreement

While NSF has general oversight authority over NSI, NSI establishes its own domain registration procedures, and NSI alone enters into agreements with domain name applicants. The Supreme Court declined to find governmental action in *Jackson v. Metropolitan Edison Co.*,⁷⁷ which involved a regulated utility company with monopoly power in most of its service area; Seidman is unlikely to be able to present a stronger case for finding government action here under the nexus test. Furthermore, Seidman probably cannot demonstrate a connection between any act of the federal government and NSI's suspension of her domain

74. *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 461 (1952).

75. *See supra* section V.A.3.

76. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

77. *Id.*

name.⁷⁸

B. PUBLIC FUNCTION

Under the public function test, private conduct will be deemed governmental action if it represents what is traditionally an exclusive function of government. The utility in *Jackson* was not held to be a governmental actor because furnishing of electrical services was not considered a state function. To qualify under the public function test, the function must be "traditionally the exclusive prerogative of the state."⁷⁹

Seidman may argue that registration of Internet domain names generally, or (more plausibly) of those in the ".com" domain, is an exclusive function of the United States government. Her case would be stronger if the domain name at issue were in one of the two-letter country-specific TLDs (and specifically the ".us" domain), or if she can at least convince the court that the ".com" domain is owned by the United States government.⁸⁰ If ".com" is considered an international TLD (as it probably is by most of the Internet community),⁸¹ then registering domains in ".com" could not be considered the exclusive prerogative of the United States government.

NSI will claim that ".com" is or will become an international TLD, and that the pending establishment of new TLDs (some potentially to be administered by multiple competing registries) is evidence that domain registration is not an exclusive governmental function.⁸² NSI may also draw an analogy between telephone numbers and domain names: a telephone company can freely change customers' telephone numbers (subject to state regulations and public relations considerations), despite the fact that the public interest in functional telephone service is at least as great as its interest in the Internet.

C. SYMBIOTIC RELATIONSHIP

Seidman's strongest argument for governmental action relies on the symbiotic relationship test. Under this test, a person claiming that a private entity is a governmental actor must show a mutually beneficial relationship between the government and the private entity beyond

78. See *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (government must have influenced the particular decision being challenged).

79. *Jackson*, 419 U.S. at 353.

80. See *supra* section IV.A.3.

81. See, e.g., RFC 1591, *supra* note 8, at 2 (referring to ".com" and other TLDs as "World Wide Generic Domains" and "international in nature"); Shaw, *supra* note 16 (describing ".com" as "a non-country-specific international top level domain").

82. See *supra* section IV.A.2.

mere government funding or contracts.⁸³ The government must have "so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity."⁸⁴

In *Burton v. Wilmington Parking Authority*,⁸⁵ a restaurant located in a public parking garage engaged in discriminatory practices. Because the restaurant paid rent to support the garage, the state profited from its discriminatory practices. The Supreme Court therefore held that there was a symbiotic relationship between the state and the restaurant. In *Rendell-Baker v. Kohn*,⁸⁶ on the other hand, a city government referred students to a private school and paid for their education. Nearly all of the school's budget was derived from public funding, but the Supreme Court declined to find a symbiotic relationship, finding the school's position no different from that of any other contractor receiving public funds.

The NSF Cooperative Agreement seems to establish the symbiotic relationship contemplated by *Burton*. The agreement permits NSI to invest 30% of the fees it collects from domain name registrants "for the preservation and enhancement of the 'Intellectual Infrastructure' of the Internet," in conformity with plans approved by NSF. The fact that it was executed as a cooperative agreement rather than a traditional procurement contract or grant agreement lends further support to Seidman's argument. The federal statute authorizing cooperative agreements states that they are appropriate when "substantial involvement is expected between the executive agency and the . . . recipient when carrying out the activity contemplated in the agreement,"⁸⁷ language which is highly suggestive of the symbiotic relationship requirement.

NSI may point out that the 30% "infrastructure" fee is not paid to NSF, and thus the government does not profit from the domain registration system. Furthermore, the domain registration function is in a transition period now, as the Internet shifts from a United States-centered network funded and managed by the United States government to an international system of independently funded and managed networks; finding governmental action in NSI's conduct could frustrate this transition process without setting a useful precedent.

83. The status of NSI's parent corporation, SAIC, as a major defense contractor is therefore largely irrelevant.

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

85. 365 U.S. 715, 723 (1961).

86. 457 U.S. 830 (1982).

87. 31 U.S.C. § 6305 (1994).

BRIEF FOR THE PETITIONER

No. 96-315

IN THE SUPREME COURT
STATE OF MARSHALL

MONA SEIDMAN, D/B/A
MAGPHONE VENTURES,

Petitioner,

v.

SAIC NETWORK SOLUTIONS, INC.,

Respondent.

ON APPEAL FROM THE APPELLATE COURT
OF THE STATE OF MARSHALL

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

- I. WHETHER UPHOLDING SUMMARY JUDGMENT ON THE BREACH OF CONTRACT CLAIM WAS INAPPROPRIATE BECAUSE PETITIONER HAS ENFORCEABLE RIGHTS UNDER THE CONTRACT AND PETITIONER DID NOT BREACH THE CONTRACT?
- II. WHETHER SUMMARY JUDGMENT ON PETITIONER'S DUE PROCESS CLAIM WAS INAPPROPRIATE SINCE GOVERNMENTAL ACTION WAS INVOLVED IN THE SEIZURE OF PETITIONER'S DOMAIN NAME WITHOUT DUE PROCESS?

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OPINIONS BELOW

The opinion of the Addison County Circuit Court is unreported. The opinion of the Court of Appeals of the State of Marshall, First District, is unreported and appears in the record at pages 1-14.

STATEMENT OF JURISDICTION

The formal statement of jurisdiction has been omitted pursuant to § 1020 (2) of the Official Rules of the Fifteenth Annual John Marshall National Moot Court Competition in Information Technology and Privacy Law.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are relevant: Marshall R. Civ. P. 56 (c); the Fifth Amendment to the United States Constitution, U.S. Const. amend V; 31 U.S.C. § 6305 (1994); and Cal. Civ. Code 1670.5 (West. 1985). U.S. Const. amend V is set out in Appendix A. 31 U.S.C. § 6305 (1994) is set out in Appendix B. Cal. Civ. Code 1670.5 (West. 1985) is set out in Appendix C.

STATEMENT OF THE CASE

A. SUMMARY OF THE FACTS

Petitioner, Mona Seidman, is a resident of Marshall and does business as "Magphone Ventures," a multi-level marketing system, whereby she sells magazine subscriptions and long distance telephone service. (R. at 3.) Respondent, SAIC Network Solutions, Inc. ("NSI"), administers the registration of Internet domain names under a Cooperative Agreement with the National Science Foundation ("NSF"), an agency of the United States government. (R. at 1-3.) Until 1993, when NSI began providing registration services for Internet domain names, the federal government, through the Defense Information Systems Agency Network Information Center and NSF, controlled the registration and administration of domain names. (R. at 11.) NSI's parent company is Science Applications International Corp. ("SAIC"). (R. at 13-14 n.17.)

On December 11, 1995, Petitioner applied to NSI to register "magphone.com" as a domain name for Magphone Ventures. (R. at 4.) Domain names allow users to "locate and communicate with other computers and networks," and have "substantial economic value" since they allow their user to utilize the Internet. (R. at 2.) Petitioner's application was granted on December 13, 1995, thereby establishing a contract between Petitioner and NSI. (R. at 4.)

On February 16, 1996, NSI received an e-mail message from a regional Internet access provider in California, complaining that its customers were receiving commercial e-mail messages from the "magphone.com" domain, and asking NSI to consider canceling Petitioner's domain name registration. (R. at 4.) A copy of the complaint was forwarded to Petitioner by NSI on February 19, 1996. (R. at 4-5.) Petitioner was told by NSI that "magphone.com" would be placed on "hold" status if Petitioner did not respond within 30 days. (R. at 5.) Petitioner responded on March 11, 1996, by sending an e-mail message to NSI stating her desire to continue using the "magphone.com" domain and volunteering to supply "any information NSI requested." (R. at 5.) On March 20, 1996, without any further comment or communication with Petitioner, NSI sent a message informing Petitioner that her domain name was being placed on "hold" status. (R. at 5.) NSI removed "magphone.com" from its active domain registration on the same day, which prevented all Internet users from sending e-mail to or from addresses in the "magphone.com" domain. (R. at 5.)

B. SUMMARY OF THE PROCEEDINGS

This case is an appeal from an order granting NSI's motion from summary judgment. Petitioner filed suit against NSI in the Addison County Circuit Court seeking reinstatement of her Internet domain

name, "magphone.com." (R. at 2, 3.) The suit alleged that NSI breached its contract with Petitioner when it revoked her domain name and that "NSI's conduct denied [her] due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution." (R. at 3.) "NSI moved for summary judgment on both issues." (R. at 4.) The circuit court granted NSI's motion for summary judgment, finding no genuine issue of material fact on either issue. (R. at 4.)

Petitioner filed a timely appeal to the Court of Appeals of the State of Marshall, First District. (R. at 1.) The court of appeals affirmed the order of the circuit court. (R. at 14.) On Petitioner's contract claim, the court of appeals found that "NSI was not bound . . . to maintain [Petitioner's] domain name in its registration database." (R. at 10.) Alternatively, the court found that even if NSI was bound, Petitioner had breached an implied term of the registration contract and was justified in terminating the contract. (R. at 8.) Regarding Petitioner's due process claim, the court found that the Due Process Clause of the Fifth Amendment did not apply to NSI's performance of the contract because governmental action was not involved. (R. at 13.) The court of appeals did not consider Petitioner's Fourteenth Amendment claims because only federal action was involved. (R. at 3 n.3.)

SUMMARY OF ARGUMENT

NSI is not entitled to summary judgment on Petitioner's contract or due process claims because it has failed to remove all genuine issues of material fact and has failed to show that it is entitled to judgment as a matter of law. The court of appeals' decision affirming summary judgment should be reversed.

I. CONTRACT CLAIM

The court of appeals pins its decision to affirm summary judgment on the notion that the "no legal rights" clause in the Domain Name Registration Agreement should be construed literally to deny Petitioner all legal rights. Contrary to the court of appeals' interpretation, the clause merely applies to trademark disputes and does not deprive Petitioner of all legal rights.

The court of appeals failed to adhere to the most basic of contract interpretation principles: that a contract should be interpreted as a whole to determine its meaning. The court of appeals simply examined one 13-word clause in one paragraph of a contract comprised of two documents with 28 total paragraphs. When interpreted as a whole, the clause relied upon by the court of appeals fails to eliminate Petitioner's contractual right to use the domain name. Instead, the clause states that registration of the name does not provide any trademark rights.

Since the dispute in this case does not involve a dispute over the name "magphone," the court of appeals' interpretation of the contract was in error.

In addition to failing to review the contract as a whole, the court of appeals inappropriately interpreted the contract in a manner that nullified and made unnecessary many provisions of the contract. The court's conclusion creates an indefensibly cruel, harsh, and unreasonable result. Such an interpretation cannot stand. Therefore, the contract should be interpreted as it was intended, by providing Petitioner with enforceable rights.

If the court of appeals properly interpreted the contract, the "no legal rights" clause must be stricken because the contract is unconscionable and is one of adhesion. The contract is a standardized form contract in which Petitioner has no power because she cannot bargain on any terms and must simply accept the terms because of NSI's monopoly status. The clause relied upon by the court of appeals should be stricken and the contract interpreted against the drafter.

The court of appeals also erred in concluding that Petitioner breached the contract. Contrary to the court's assertions, Petitioner complied with the terms governing disputes, which are set forth in the NSI Domain Name Dispute Policy Statement, while NSI ignored them. Petitioner responded to NSI's e-mail regarding the potential breach, but NSI improperly informed Petitioner of the nature of her breach and failed to evaluate Petitioner's timely response in a reasonable fashion. Lastly, the implicit contract terms that NSI says Petitioner breached are not binding standards. Instead, these terms, known as Requests for Comments, are nothing more than opinion-based "etiquette" requests, and cannot rise to the level of industry custom and usage. Therefore, these terms were not implied into the contract and Petitioner did not breach the contract. Thus, Petitioner is entitled to proceed against NSI.

II. GOVERNMENTAL ACTION

NSI's actions are fairly attributable to the federal government under the "symbiotic relationship" and "public function" tests. The "symbiotic relationship" test is a viable test and is satisfied in the present case because the federal government has insinuated itself into a position of interdependence with NSI. This interdependence is apparent from the government's characterization of its relationship with NSI, the government's funding and assistance of the Internet and NSI, the government's supervision of domain name registration service, the public's perception, and SAIC's strong relationship with the federal government. Likewise, government action is apparent under the "public function" test because NSI is performing a function that has traditionally been the exclusive

prerogative of the federal government. Therefore, Petitioner is entitled to the Fifth Amendment's guarantee of due process.

Finally, Petitioner has a significant property interest in being able to access the Internet with "magphone.com." Domain names possess many characteristics of other types of protected property, such as having economic value and being bought and sold. In addition, the "magphone.com" domain has significant value to Petitioner because it allows her to successfully operate her business. Petitioner has purchased the right to use "magphone.com;" therefore, she is entitled to the domain name and is protected by the Fifth Amendment.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN UPHOLDING THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT BECAUSE RESPONDENT FAILED TO SHOW THAT THERE ARE GENUINE ISSUES OF MATERIAL FACT AND THAT IT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

When reviewing a trial court's grant of summary judgment courts employ a de novo standard. *See Kelley v. Price-Macemon, Inc.*, 992 F.2d 1408, 1413 (5th Cir. 1993). Although *Kelley* applies Fed. R. Civ. P. 56(c) instead of Marshall R. Civ. P. 56(c), the two rules are similar. Therefore, federal precedent is instructive on reviewing summary judgments.

Summary judgment is proper only if the record discloses a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Marshall R. Civ. P. 56(c). Facts and reasonable inferences must be construed in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

NSI, as the moving party, bears the initial burden of demonstrating that it is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If NSI establishes that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law, the burden is shifted to the non-moving party. *See Id.* at 322-23. Petitioner, as the non-moving party, must establish a genuine issue of material fact or that Respondent is not entitled to judgment as a matter of law. *Id.* To preclude summary judgment, "there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson*, 477 U.S. at 248.

NSI fails to satisfy its burden as to Petitioner's contract and due process claims. NSI fails to establish that Petitioner is not entitled to rights under her contract with NSI or that Petitioner breached the contract. *See infra* Part II. NSI also fails to establish as a matter of law, that its actions are not fairly attributable to the federal government or

that it provided Petitioner due process as a matter of law. *See infra* Part III.

Therefore, this Court should reverse the court of appeals' decision to uphold the circuit court's grant of summary judgment in favor of NSI.

**II. THE COURT OF APPEALS' DECISION WAS ERRONEOUS
BECAUSE PETITIONER HAS ENFORCEABLE RIGHTS UNDER
THE CONTRACT AND PETITIONER DID NOT BREACH
THE CONTRACT.**

Summary judgment was improper in this case because the court of appeals' interpretation of the contract was erroneous as a matter of law. Because no extrinsic evidence as to the erroneous interpretation was admitted below, this Court must make an independent interpretation of the contract's meaning. *Western Medical Enter., Inc. v. Albers*, 212 Cal. Rptr. 434, 437 (Ct. App. 1985).¹ This court is not bound by the court of appeals' decision that the contract contains no ambiguity, and may re-examine the issue *de novo*. *Brunt v. Occidental Life Ins. of Cal.*, 35 Cal. Rptr. 492 (Dist. Ct. App. 1963).

**A. THE COURT OF APPEALS ERRED IN ITS INTERPRETATION OF THE "NO
LEGAL RIGHTS" PROVISION CONTAINED IN PARAGRAPH 3 OF THE
REGISTRATION AGREEMENT.**

The contract between NSI and Petitioner contains a clause which states, "[r]egistering a domain name does not confer any legal rights to that name." (R. at 15.) The purpose of this clause is to insulate NSI from trademark claims. The court of appeals, however, construed those 13 words to mean that Petitioner paid NSI a 2-year registration fee and signed a seven-page contract that gave her no legal right to the registration of her domain name. In so doing, the court violated one of the principal canons of contract interpretation, which is to construe a contract in its entirety. When read in the context of the entire contract, this clause has no application to the case at hand and the court of appeals erred in relying on this language to completely negate Petitioner's contractual rights.

1. *The court of appeals erred in failing to construe the "no legal rights" provision in the context of the contract as a whole.*

The intent of the parties in making a contract cannot be determined from one isolated paragraph. Contracts are to be read as a whole in order to determine the intent of the parties at the time the contract was

1. By agreement of the parties, contained in provision 8 of the NSI Domain Name Dispute Policy Statement, the issues in this case are governed by California law. (R. at 20.)

made. *La Jolla Beach & Tennis Club, Inc. v. Industrial Indem. Co.*, 884 P.2d 1048, 1056 (Cal. 1995). Reading the "no legal rights" clause in the context of the paragraph in which it appears, it becomes apparent that the purpose of the language is to govern trademark disputes over the particular name a registrant chooses, and not to govern disputes over the right to access the Internet via that name. The court erred in construing the clause to mean that the contract did not afford Petitioner the right she bargained for—the right to register her name.

Rather than focus on the "no legal rights" clause alone, the court should have looked at the clause in the context of the whole paragraph, and then at the whole paragraph in the context of the entire contract. At the end of the one-sentence paragraph in which the "no legal rights" provision is located, a parenthetical marker indicates one should "see RFC 1591." (R. at 15.) RFC 1591 deals with "disputes between domain name registrants as to the rights to a particular name." Jon Postel, Domain Name System and Delegation, Network Working Group, Request for Comments No. 1591, Mar. 1994. RFC 1591 states that, "[t]he registration of a domain name does not have any trademark status." *Id.* Since the only reference to legal rights in RFC 1591 pertains to trademarks, it is reasonable to interpret the "no legal rights" provision as dealing only with trademark disputes. Since this was not a trademark dispute, the provision does not apply. Had the court of appeals taken even the first step toward looking at the contract as a whole (i.e., reading the whole paragraph in which the clause is found), it could not have reached the conclusion it did.

The court of appeals also failed to examine the remainder of the contract, which includes both the NSI Domain Name Registration Agreement ("Agreement") and the NSI Domain Name Dispute Policy Statement ("Policy Statement"). (R. at 21.) Both parts can reasonably be construed to apply only to trademark disputes: the Agreement because of its reference to RFC 1591, and the Policy Statement because 12 of its 22 paragraphs apply specifically to trademark disputes, and all but two of the remaining paragraphs have some application to trademark dispute issues. Had the court reviewed the entire contract, it could not have reached the conclusion that there are no legal rights attached to it, because the contract merely provided that Petitioner had no trademark rights to the "magphone" name, a fact which Petitioner does not dispute. The court, in the final analysis, misapplied the language of the contract to the dispute at hand, and its ruling should be overturned.

2. *The court of appeals erred in choosing an interpretation of the "no legal rights" provision which renders many provisions of the contract unnecessary or useless.*

If the court of appeals' "no legal rights" clause interpretation stands, then several provisions of the entire NSI contract will be rendered useless and meaningless. Such an interpretation would be contrary to the well established principle that parties to an agreement do not include unnecessary language in their contracts. *In re Marriage of Whitney*, 139 Cal. Rptr. 324, 326 (Ct. App. 1977).

Numerous provisions of the Agreement as well as the Policy Statement confer substantial legal rights upon registrants. The Agreement states at least two rights granted to registrants: 1) to have the Policy Statement provided to them, and 2) to have any disputes regarding the domain name settled by federal law. (R. at 15.)

The Policy Statement establishes several legal rights pertaining to domain names. Paragraph 1a gives registrants the right to use the domain name under which they register, denying NSI the right to change such names. (R. at 16.) Paragraph 2 states that registrants must be given at least 30 days' notice of any changes that are made to the Policy. (R. at 16.) Paragraph 3 gives registrants the right to continue to use the name as long as users sign onto the Internet at least every 90 days. (R. at 16.) Paragraph 4 guarantees registrants written notice of any claim pertaining to a potential trademark infringement or tortious interference with business. (R. at 17.) Paragraph 5 guarantees registrants 30 days' notice of an intent to terminate a domain name. More importantly, it provides that the name can only be withdrawn when a court or a mutually agreed upon arbitration panel so orders. (R. at 17.)

In Paragraph 6a, registrants are given the right to be told in writing that they have committed a breach, to have the breach explained in full, and to have 30 days to respond to the allegation. In evaluating the registrant's response to the allegations, NSI must adhere to a reasonableness standard. (R. at 18.) Paragraph 6b provides that in disputes with third parties, other than those dealing with trademarks, NSI cannot terminate a registrant's domain name without a court order, or by a full arbitration panel's decision. (R. at 18.) Paragraph 6c outlines extensive legal rights governing trademark disputes. It establishes rights to written evidence, binding arbitration, and limitations on NSI's ability to interfere with a domain name while it is in dispute. (R. at 18.) Paragraph 8 sets forth the absolute right to binding arbitration in any dispute regarding the right to register and use a domain name. (R. at 20.) Finally, paragraph 9 requires notices and other agreements to be set forth in writing, guaranteeing to registrants a degree of notice before any action can be taken. (R. at 21.)

By concluding that there are "no legal rights" in the NSI contract, the court of appeals ignored well-established legal doctrine aimed at giving force and effect to all parts of a contract. If possible, a writing is to be construed with reference to, and harmonizing of, all its parts. *Simons v. Young*, 155 Cal. Rptr. 460, 466 (Ct. App. 1979). In other words, each part of the contract should be taken into account and harmonized with all the other parts of the contract. In construing the "no legal rights" provisions, the court should have interpreted the clause to give a reasonable meaning to all provisions of the contract, and not rendered a judgment which left whole provisions useless and inexplicable. *Heidlebaugh v. Miller*, 271 P.2d 557, 559 (Cal. Dist. Ct. App. 1954).

If the court of appeals' decision is allowed to stand, then the standard NSI contract is construed as conferring no legal rights to any individual who has signed it, including the more than 12 million current domain name registrants. Such an interpretation renders most of a seven-page contract meaningless, containing nothing but wasted words. Given the principles of contract construction, which seek to preserve rather than to destroy contracts, that judgment cannot stand and must be overturned.

3. *The court of appeals' interpretation of the "no legal rights" provision renders the entire contract unconscionable.*

Courts, if possible, should avoid an interpretation of a contract provision that will make a contract extraordinary, harsh, unjust, or inequitable. *County of Marin v. Assessment Appeals Bd., County of Marin*, 134 Cal. Rptr. 582 (Ct. App. 1976). The court of appeals therefore erred in concluding that the "no legal rights" provision deprived Petitioner of any legal rights to access the Internet. An interpretation which gives one party to a contract no legal rights in that instrument is necessarily extraordinary, harsh and unjust, rendering the contract unconscionable and unenforceable as a matter of law. Section 1670.5 of the California Civil Code states:

(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause as to avoid any unconscionable result. Cal. Civ. Code § 1670.5 (West 1985).

The preferred analytical framework for determining whether such a contractual provision is unconscionable is set out in *Graham v. Scissor-Tail Inc.*, 171 Cal. Rptr. 604 (1981), a case which factually parallels the current dispute.²

2. *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114 (Ct. App. 1982), offers an alternative analytical framework. Although both cases should lead to the same conclusion,

In *Graham*, the California Supreme Court tackled the issue of how to determine whether a standard form contract is a contract of adhesion and, if so, whether it is so unconscionable as to be unenforceable. *Id.* at 610. The term "adhesion contract" is used to describe standardized contract forms offered to consumers on a "take it or leave it" basis; the consumer has no realistic opportunity to bargain and cannot obtain the desired product or services except by signing the unnegotiated contract. The distinctive feature of a contract of adhesion is that the weaker party has no realistic choice as to its terms. *Graham*, a concert promoter, signed several standard form contracts drafted by the American Federation of Musicians ("A.F. of M."). The A.F. of M. contracts differed only in the particularities of time, place, warm-up act and the like, just as the registrant and domain name are the only things which make one NSI contract distinguishable from another. In neither case could the terms be altered.

In addition, a contract of adhesion gives "the subscribing party the opportunity to either adhere to the contract or reject it." *Neal v. State Farm Ins. Cos.*, 10 Cal. Rptr. 781, 784 (Dist. Ct. App. 1961). Neither *Graham* nor Petitioner had any realistic choice since *Graham* could not promote concerts without signing an A.F. of M. contract and, for Petitioner, NSI is the only source for domain name registration on the Internet in the United States. NSI constitutes a private government-sanctioned monopoly over the registration of all domain names on the Internet. If Petitioner does not utilize NSI's registration services, it cannot obtain a domain name on the Internet. Consequently, Petitioner was in an exceedingly weak bargaining position with NSI when she entered into the contract.

A contract of adhesion is not automatically unenforceable. It may be unenforceable only if certain legislative and judicially determined factors are present. First, the adhesive contract will not be enforced if the contract or a provision of the contract falls outside the reasonable expectations of the weaker party. *Graham*, 171 Cal. Rptr. at 612. It is readily apparent that the court's interpretation of the "no legal rights" provision is outside of Petitioner's reasonable expectations when making the contract. Petitioner would never reasonably expect to enter into a contract that she was legally prevented from enforcing.

Even if the interpretation of this provision was within Petitioner's reasonable expectations, it is unenforceable if the court deems it unduly oppressive or unconscionable. *Id.* The "no legal rights" clause, as applied by the lower court, is unenforceable because it is unduly oppressive. This provision allows NSI to eliminate an entity's identity on the

Graham comports more closely to California precedent. *Perdue v. Crocker Natl. Bank*, 216 Cal. Rptr. 345 (1985), *appeal dismissed*, 475 U.S. 1001 (1986).

Internet without just cause or reasonable notice. This gives all the power to the drafter of the contract, and thus enforcement of that contract is biased in his favor. NSI, and NSI alone, decides whether a subscriber's response is "reasonable" when notified of a potential breach. Further, there is no other avenue of appeal, at least for those disputes not involving trademark issues. NSI is granted unlimited power. Under the *Graham* test, such unlimited power amounts to a level of unconscionability that renders the "no legal rights" portion of the contract unenforceable. The court erred in rendering such a harsh and unjust ruling.

4. *Alternatively, if the contract is ambiguous, the court of appeals erred in failing to construe the ambiguities of the contract against the drafter.*

The foregoing rules of contract interpretation prove that the court erred in utilizing NSI's interpretation of the "no legal rights" provision. However, even if the utilization of the rules does not provide sufficient proof of the correct interpretation of the provision, any uncertainty or ambiguity in a contract will be construed against the drafter of the contract. *Rainier Credit Co. v. Western Alliance Corp.*, 217 Cal. Rptr. 291, 295 (Ct. App. 1983). This rule applies with particular force in the case of a contract of adhesion. *Neal*, 10 Cal. Rptr. at 784.

NSI not only drafted the entire contract, but Petitioner lacked the economic power to change any of the language. The contract was on a "take it or leave it" basis. Because of this economic power imbalance, any ambiguities in this contract of adhesion should be construed against NSI. It is apparent that the "no legal rights" provision pertains only to trademark disputes, but any ambiguity created by NSI should be construed in favor of Petitioner's reasonable interpretation. Therefore, the no rights provision should be construed as applying solely to trademark disputes and not the right to access the Internet through a registered domain name.

CONCLUSION: Because the court of appeals' expansive interpretation of the "no legal rights" provision in the Agreement violates several rules of contract interpretation, summary judgment was improper as a matter of law. The court of appeals failed to read the "no legal rights" provision in the context of the contract as a whole, and thus failed to limit the "no legal rights" clause to trademark disputes alone. In addition, the court's construction of the provision rendered the contract unconscionable and unenforceable. Finally, the court did not utilize the fundamental rule of contract interpretation that ambiguities are construed against the drafter of a contract of adhesion. Petitioner has substantial legal rights under the NSI contract.

B. THE COURT OF APPEALS ERRED IN CONCLUDING THAT PETITIONER BREACHED HER CONTRACT WITH NSI.

NSI relies on an implied rather than an express term of the contract to support its assertion that Petitioner breached the contract by sending unsolicited e-mail. The court of appeals erred in concluding several Internet Requests for Comments ("RFCs") became implied terms of its contract with NSI. These provisions do not rise to the level of industry custom or standard. Therefore, Petitioner did not breach her contract with NSI. However even if these terms were implied into the contract, it was NSI and not Petitioner who failed to follow dispute procedures.

1. *The Requests for Comments and other "Netiquette" guidelines did not become terms of the contract by implication.*

NSI claims Petitioner breached the contract by sending bulk e-mail messages to an Internet server. Nowhere within the words of the contract does a prohibition against the forwarding of bulk e-mail appear. The court of appeals' conclusion that this custom is implied into the contract is unsubstantiated by evidentiary proof. Whether such a custom exists is a question of fact which the one asserting the custom must prove. *Cox v. Pithoud*, 34 Cal. Rptr. 582, 583 (Dist. Ct. App. 1963).

In an attempt to substantiate the existence of an Internet standard prohibiting the sending of bulk e-mail, the Respondent cites to Requests for Comment #1855 and #1032. (R. at 8.) By the court's own admission, these guidelines have not been promoted to the level of "Internet standard." (R. at 8 n.8.)

RFC #1855 deals with "Netiquette Guidelines." The guidelines in this RFC are akin to the standards of good etiquette listed in books by authors such as "Miss Manners" or "Emily Post."

In the pre-computer days of fountain pens and monogrammed stationery, Amy Vanderbilt and Emily Post offered advice about which fork to use and how to RSVP. Now their successors are offering advice on when to throw in an emotion, why "spamming" is a no-no and when to use abbreviations like IMHO and BTW.

James Barron, *Netiquette Gurus Can Help You Avoid On-Line Gaffes*, Montreal Gazette, Jan. 14, 1995, at H6. However, these proposed rules of good manners on the Internet do not rise to the level of Internet standards which are implied into a contract. Though these proposed guidelines might be appreciated by users, utilizing these guidelines as contract terms is similar to implying good telephone etiquette into a long distance telephone service agreement.

Nor is Petitioner likely to be aware of the existence of these supposedly implied terms. There are approximately 2000 RFCs posted on the Internet. (R. at 8 n.8.) These suggestions deal with such topics as not

typing in all capital letters and the appropriate use of "smilies" (typed symbols that signal emotion constructed with a colon, a dash and parenthesis :-) or :-() in Internet conversations. See Sally Hambridge, *Netiquette Guidelines*, Network Working Group Request for Comments No. 1855, Oct. 1995, at 5. Which of these RFCs become implied terms of all domain name registration contracts? If taken to extremes, NSI will be allowed to cancel a registrant's domain name simply because other Internet users complain that they are getting e-mail typed in all capital letters.

The Internet is a relatively new entity and no central authority, to date, has control over industry standards. Because the Internet is new and evolving, the Internet "standards" are constantly changing. The fact that these "standards" are called "Requests for Comments" further underscores the lack of authority attached to them. It would be unconscionable for such illusive guidelines to be implied into domain registration contracts.

The court of appeals decided, as a matter of law, that RFC #1032 is an implied term of all of NSI's domain name registration contracts. (R. at 8.) No court has ever found a domain name administrator liable for the actions of hosts within his or her domain who violate these terms. RFC #1032 is not a designated industry standard, (R. at 8 n.8), and no other court in the country recognizes it as such. Most likely, this is because RFC #1032, like most other RFCs, is simply a collection of users' "wish lists" about how they would like to see the Internet operate. If these RFCs are to be raised to the level of trade usage or custom, such usage must be established as a matter of fact and not of opinion. *Wise v. Reeve Elecs., Inc.*, 6 Cal. Rptr. 587, 589 (Dist. Ct. App. 1960).

"Wish lists" of desired behavior do not provide the proof necessary to establish the existence of trade usage or custom. The court of appeals could not reasonably conclude that RFCs rise to the level of trade custom and usage. As a result, RFCs #1855 and #1032, along with any other pertinent RFCs, did not become implied terms of the contract.

2. *Even assuming the RFCs became implied terms in the contract, NSI was not justified in unilaterally terminating its contract with Petitioner.*

The Policy Statement sets forth the procedures to be followed when there is an alleged breach by a registrant, but NSI did not follow those procedures. Provision 6a provides that:

In the event that the Applicant breaches any of its obligations under this Policy Statement, NSI may, request that Applicant relinquish the Domain Name in a written notice describing the alleged breach. If Applicant fails to provide evidence that it has not breached its obligations which is reasonably satisfactory to NSI within thirty (30)

days of the date of receipt of such notice, then NSI may terminate Applicant's use and registration of the Domain Name.

(R. at 18.)

In harmony with the policy statement, Petitioner responded to the complaint within the 30-day limitation period. In her response, Petitioner attempted to cooperate with NSI. Since NSI did not state what information it needed when forwarding the complaint, Petitioner offered to supply any information that might be helpful in resolving the conflict. Therefore, Petitioner did all she could to respond to Alan Goldman's complaint and NSI's wishes and did not breach the contract.

NSI violated its own procedure in a number of ways. First, NSI did not provide written notice describing the alleged breach. NSI simply forwarded to Petitioner a copy of Alan Goldman's complaint. The forwarding of a complaint is not equivalent to a written notice describing an alleged breach. Since the claimed breach is of an implied contract term, NSI should have taken special care to explain that it considered Petitioner's actions to be a breach of contract. Petitioner understood only that NSI had received a complaint, not that an alleged breach had occurred. Second, NSI did not request that Petitioner relinquish her domain name. NSI simply said it would place the domain name on hold if Petitioner did not respond to the complaint.

Finally, NSI breached its own contract by failing to use good faith and fair dealing. As stated above, Petitioner complied with the contractual provisions by offering to supply any information that might be helpful in resolving the conflict. Unfortunately, NSI never requested any information. On the 30th day after NSI forwarded the complaint, NSI canceled Petitioner's domain name without comment. Petitioner did her part to cooperate with NSI, but NSI breached its covenant of good faith and fair dealing by terminating her existence on the Internet. *Gianelli Distrib. Co. v. Beck & Co.*, 219 Cal. Rptr. 203, 208-09 (Ct. App. 1985) (covenant of good faith and fair dealing is implied in all contracts, to effect that neither party will do anything which will injure right of other to receive benefits of agreement); *Comunale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 201 (Cal. 1958). NSI did not let Petitioner respond, thereby depriving her of any opportunity to justify or to explain her actions.

NSI also did not exercise its discretionary powers fairly. The NSI policy statement allows NSI to determine what is "reasonably satisfactory" evidence that no breach has been committed. Thus, it was up to NSI's discretion to decide what information provided by Petitioner would satisfy its inquiry. However, when a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed on the party to exercise that discretion in good faith and in accordance with fair dealing. *Automatic Vending Co. v. Wisdom*, 6 Cal. Rptr. 31, 33 (Dist.

Ct. App. 1960); *Universal Sales Corp. v. California Press Mfg. Co.*, 128 P.2d 665, 677 (Cal. 1942); *Brogdex Co. v. Walcott*, 267 P.2d 28, 32 (Cal. Dist. Ct. App. 1954); *Brawley v. Crosby Research Found., Inc.*, 166 P.2d 392, 397 (Cal. Dist. Ct. App. 1946). NSI's power to decide what constitutes a satisfactory response to a complaint imposes upon it a duty to use good faith and fair dealing. When NSI refused to accept Petitioner's offer of unlimited information, it was not exercising good faith and fair dealing. NSI could have easily requested any information it wished from Petitioner, but it chose not to do so and instead extinguished the viability of that domain name. Petitioner complied with the procedures set out in Provision 6a of the policy statement, but NSI breached its duty. Thereby, Petitioner is relieved of responsibility for any possible breach of implied contract terms.

CONCLUSION: Because RFCs #1855 and #1032 do not rise to the level of customs and standards of the Internet industry, they did not become implied terms of the contract between Petitioner and NSI. Therefore, Petitioner did not breach the terms of its contract. However, if such terms were implied into the contract, Petitioner complied with the dispute procedure set out in the Policy Statement. Therefore, NSI was not justified in unilaterally terminating the contract.

III. THE COURT OF APPEALS' DECISION WAS ERRONEOUS BECAUSE NSI'S ACTIONS ARE FAIRLY ATTRIBUTABLE TO THE FEDERAL GOVERNMENT UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Although the Constitution's protection of individual liberty and due process applies, in general, only to actions of government, "governmental authority may dominate an activity to such an extent that its [non-governmental] participants must be deemed to act with the authority of the government and, as a result be subject to constitutional constraints." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). The standard for finding federal government action under the Fifth Amendment is the same as that for finding state action under the Fourteenth Amendment. *Warren v. Government Nat'l Mortgage Ass'n.*, 611 F.2d 1229, 1232 (8th Cir.), cert. denied, 449 U.S. 847 (1980).

The determination as to whether conduct constitutes governmental action "frequently admits of no easy answer." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). The ultimate issue is whether the alleged infringement of constitutional rights is "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 933, 937 (1982). In *Lugar*, the Court enunciated a two prong test to determine whether an action is

attributable to the government. *Id.* First, the alleged deprivation of constitutional rights must be “caused by the exercise of some right or privilege created by the [government] or by a rule of conduct imposed by the [government] or by a person for whom the [government] is responsible.” *Id.* Second, “the party charged with the deprivation must be a person who may fairly be said to be a [government] actor.” *Id.* Both prongs are satisfied in the present case. Therefore, NSI’s seizure of “magphone.com” is attributable to the federal government.

A. THE FIRST PRONG OF THE GOVERNMENTAL ACTION ANALYSIS IS MET BECAUSE NSI ACTED IN ACCORDANCE WITH ITS AGREEMENT WITH THE FEDERAL GOVERNMENT WHEN IT DEPRIVED PETITIONER OF HER DOMAIN NAME WITHOUT DUE PROCESS.

The first prong of the *Lugar* test only seeks to determine whether the private entity’s action conforms with the jurisdiction’s law. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1144 (3d Cir.), *cert. denied*,—U.S. —, 116 S. Ct. 165 (1995). In other words, “under what authority did the private person engage in the allegedly unlawful acts.” *Id.*

In the present case, NSI was acting in accordance with the Cooperative Agreement reached with NSF. (R. at 1-3.) Since the authority of NSI to act stems from an agreement with the government, the “central inquiry focuses on the second factor of whether a party can be described ‘in all fairness’ as a state actor.” *Hampton Int’l Communications, Inc. v. Las Vegas Convention and Visitors Auth.*, 913 F. Supp. 1402, 1408 & n.4 (D. Nev. 1996); *see Mark*, 51 F.3d at 1144 (finding first prong satisfied because the unconstitutional deprivation related to the Borough’s agreement with the private entity). Therefore, Petitioner satisfies the first prong of the *Lugar* test.

B. THE SECOND PRONG OF THE GOVERNMENTAL ACTION ANALYSIS IS MET BECAUSE NSI MAY “FAIRLY BE SAID TO BE” A GOVERNMENT ACTOR UNDER THE “SYMBIOTIC RELATIONSHIP” AND “PUBLIC FUNCTION” TESTS.

“Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.” *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722. Although the U.S. Supreme Court has not developed a uniform test for ascertaining when a private entity is a government actor, the Court has developed a number of “formulae” or “tests.” *See Gallagher v. “Neil Young Freedom Concert”*, 49 F.3d 1442, 1447 (10th Cir. 1995). The three most frequently utilized tests are the “symbiotic relationship,” “public function,” and “nexus” tests. The federal courts apply these tests in ana-

lyzing the second prong of *Lugar*. See *Gallagher*, 49 F.3d at 1447.³ In the present case, governmental action is present under both the "symbiotic relationship" and "public function" tests.

1. *NSI's actions are attributable to the federal government under the "symbiotic relationship" test.*
- a. *The "symbiotic relationship" test remains a viable test for establishing governmental action, and should be utilized in the present case.*

Although the continuing viability of the "symbiotic relationship" test has been questioned, see *Lebron v. National R.R. Passenger Corp.*,—U.S. —, 115 S. Ct. 961, 979-80 (1995) (O'Connor, J., dissenting), the federal courts continue to rely on the "symbiotic relationship" principles established in *Burton*. The critics of the "symbiotic relationship" test incorrectly believe that the "nexus" test⁴, enunciated in *Jackson*, replaced the "symbiotic relationship" test. See *Lebron*,—U.S. —, 115 S. Ct. at 979-80. Contrary to the critics' assertions, the "symbiotic relationship" test remains a viable test. In fact, the U.S. Supreme Court continued to utilize the "symbiotic relationship" test after *Jackson*. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (privately operated school); *Blum v. Yaretsky*, 457 U.S. 991, 1010-11 (1982) (private nursing home). As recently as 1991, the Court endorsed the principles enunciated in *Burton* as a means of demonstrating the presence of governmental action. See *Edmonson*, 500 U.S. at 621. Even more informative of the continuing viability of *Burton* is *Jackson* itself. After establishing the "nexus" test, the *Jackson* court found that there was no "symbiotic relationship" between the private entity and the State. See *Jackson*, 419 U.S. at 357. Therefore, the *Jackson* court acknowledged and utilized the "symbiotic relationship" test instead of eliminating it.

The federal courts of appeals also continue to utilize the "symbiotic relationship" test. The Fifth Circuit has stated that the "nexus" test should be looked to "only after [the court] is unable to find state action

3. NSI may argue that the U.S. Supreme Court, in *Edmonson*, enunciated a new test that combines the principles of the three existing tests. Although the Court in *Edmonson* listed three factors that are relevant in a governmental action inquiry, the Court did not enunciate a new all encompassing test. See *Edmonson*, 500 U.S. at 621-22. The Court did not overrule or discourage the use of the "symbiotic relationship" or "public function" tests, see *id.*, and lower federal courts have continued to utilize these tests, see *Gallagher*, 49 F.3d at 1447, 1451; *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1486 (9th Cir. 1995).

4. The "nexus" test asks whether there is a sufficiently close nexus between the federal government and the challenged action of the private entity "so that the action of the latter may be fairly treated as that of the [federal government] itself." *Jackson*, 419 U.S. at 350.

under other theories.” *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219, 1223 (5th Cir. 1982). Similarly, the Third Circuit has stated that the “symbiotic relationship” test remains viable and has not been superseded by the “nexus” test. *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589, 595 (3d Cir. 1979), *cert. denied*, 446 U.S. 956 (1980). In addition to the Fifth and Third Circuits, other courts of appeals have recognized the continuing viability of the “symbiotic relationship” test, *see, e.g., Holodnak v. Avco Corp., Avco-Lycoming Div., Stratford, Conn.*, 514 F.2d 285, 288 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975); *Morast v. Lance*, 807 F.2d 926, 931 (11th Cir. 1987), including recent decisions, *see, e.g., Gallagher v. “Neil Young Freedom Concert”*, 49 F.3d 1442, 1447, 1451 (10th Cir. 1995); *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1486 (9th Cir. 1995). These cases show that the “symbiotic relationship” test retains its viability, and that it should be utilized when the government has an extensive relationship with a private entity. Therefore, this Court should utilize the “symbiotic relationship” test to determine whether NSI is a government actor.

- b. *NSI’s actions are fairly attributable to the government because the federal government has insinuated itself into a position of interdependence with NSI.*

Under the “symbiotic relationship” test, governmental action is present if the government “has so far insinuated itself into a position of interdependence” with a private entity that “it must be recognized as a joint participant in the challenged activity.” *Burton*, 365 U.S. at 725. The inquiry is fact based and analyzes numerous factors. *De Malherbe v. International Union of Elevator Constructors*, 438 F. Supp. 1121, 1131-32 (N.D. Cal. 1977). In the present case, a “symbiotic relationship” exists between the federal government and NSI; therefore, NSI’s action falls within the ambit of the constitutional prohibition against seizure of property without due process.

- i. *The government’s characterization of its relationship with NSI supports finding a “symbiotic relationship.”*

The government’s characterization of its relationship with NSI is a relevant factor that must be considered. In the present case, the government’s intent to form an interdependent relationship with NSI is apparent in 31 U.S.C. § 6305 (1994), which is the statutory provision allowing NSF to contract its domain name registration duties out to NSI, (R. at 11 n.12). Therefore, an analysis of the government’s relationship with NSI should begin with § 6305.

Under § 6305, an “assistance relationship” is formed between the federal government and NSI. *See* S. Rep. No. 449, 95th Cong., 1st Sess. 6

(1977), reprinted in 1978 U.S.C.C.A.N. 11, 16. The relationship is formed in order to carry out a "public purpose . . . " by acquiring "services for the direct benefit or use of the United States Government." 31 U.S.C. § 6305 (1994). Section 6305 provides that "substantial involvement is expected between the agency and the . . . recipient" 31 U.S.C. § 6305(2) (1994). By hiring NSI to perform the registration services the federal government previously performed, the federal government formed a strong relationship with NSI for the government's direct benefit. This fact displays a "symbiotic relationship" between NSI and the federal government. The fact that NSI acts in accordance with an agreement with the federal government distinguishes the present case from many cases where governmental action was not found, because in those cases, governmental involvement was often limited to the mere regulation or funding of private entities. See, e.g., *Blum*, 457 U.S. 991 (private nursing home); *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) (private warehouseman); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (private lodge refused service to African-American guest).

The language of § 6305 shows that Congress intended "assistance relationships," such as the one between NSI and NSF, to be strong and extensive. Therefore, the language and purpose behind § 6305 supports a finding of governmental action.

ii. *The federal government's funding and assistance of the Internet and NSI indicates the existence of a "symbiotic relationship."*

The extent of federal funding or assistance is also relevant in an analysis of governmental action. See *Edmonson*, 500 U.S. at 621. In the present case, the federal government has substantially funded and assisted the development of the Internet and the registration and maintenance of Internet domain names.

In *Burton*, the U.S. Supreme Court found the fact that a governmental agency paid the initial costs of a project with public funds to be relevant in a finding of governmental action. *Burton*, 365 U.S. at 723. The Court held that the exclusion of an African-American from a privately owned restaurant in a building financed by public funds and owned by a governmental agency violated the Equal Protection Clause. *Id.* at 717. Similarly, the federal government in the present case paid for the initial costs of the creation and development of the Internet. (R. at 10.) As in *Burton*, the federal government had a direct interest in the success of the project because the Internet was established by the government for U.S. national defense purposes, G. Andrew Barger, *Cybermarks: A Proposed Hierarchical Modeling System of Registration and Internet Architecture for Domain Names*, 29 J. Marshall L. Rev. 623, 629 (1996), and "originated as a network connecting U.S. Government agencies, govern-

ment contractors, and research institutions,” (R. at 10). NSI and the federal government mutually benefit from the Cooperative Agreement. NSI receives payment for its services, (R. at 11), and the federal government is able to avoid the burdensome and costly task of registering domain names. This mutual benefit, as in *Burton*, evinces a “symbiotic relationship.” Another fact considered relevant in *Burton* was that the state agency was responsible for the upkeep and maintenance of the building and that such repairs were payable out of public funds. *Burton*, 365 U.S. at 723. In the present case, the government is similarly involved in the administration and maintenance of the Internet. NSF and other federal agencies provide financial support for “technical and administrative functions related to the Internet.” (R. at 12.) These facts, as in *Burton*, support a finding of governmental action.

In addition to the government’s general support for the Internet, the government has controlled the funding for the registration of Internet domain names. From the creation of the Internet until 1993, the federal government was responsible for the registration of Internet domain names. (R. at 11.) On January 1, 1993, the government began paying NSI to perform its domain name registration services. (R. at 11.) In general, NSI agreed to perform the services for five years for \$5.9 million. Barger, 29 J. Marshall L. Rev. at 631. Although the Agreement was amended on September 13, 1995, to allow NSI to collect fees in lieu of direct funding, the government retained control over the fee structure. (R. at 11-12.)

In summary, the federal government has established an interdependent relationship with NSI by funding the Internet extensively, paying NSI for its registration services, and assisting in the development of the Internet and Internet domain name policies. Therefore, the extent of federal funding and assistance supports finding a “symbiotic relationship” and governmental action.

iii. *The federal government’s close supervision of NSI and the registration of domain names indicates a “symbiotic relationship.”*

The extent of governmental supervision of the private entity’s activities is also relevant in the “symbiotic relationship” test. See *Mark*, 51 F.3d at 1148. In *Mark*, the government provided funds for the operation and expenditures of a volunteer fire department. *Id.* The government supervised the department by requiring the private entity to prepare and submit an annual budget to the Borough Council. *Id.* In addition, the Fire Chief was required to provide monthly written reports to the Council. *Id.* These facts, in addition to others, led the Third Circuit to find governmental action. See *id.*

In the present case, NSI, like the private entity in *Mark*, is obligated to consult with the government. For example, NSI must obtain the approval of NSF for any changes in the fee structure of the agreement or in its annual program plans. (R. at 12.) NSI must also submit monthly, quarterly, and annual reports to NSF. (R. at 12.) In addition, the Federal Networking Council ("FNC"), an interagency unit of the U.S. government, maintains its claim to policy control over the ".com," ".net," and ".org" top-level domains, whereas NSI simply performs registrar functions. (R. at 12.) These facts distinguish the present case from cases where no "symbiotic relationship" was found. For example, in *Moose Lodge*, the government agency had no role in establishing the membership or guest policies of the lodge, *Moose Lodge*, 407 U.S. at 176, whereas the federal government continues to have a role in the domain name registration policies, (R. at 12).

The record shows that the federal government continues to supervise and direct the registration and administration of Internet domain names. This factor supports finding governmental action under the "symbiotic relationship" test.

iv. *The possible public perception of governmental involvement in the seizure of "magphone.com" indicates the existence of a "symbiotic relationship."*

The public's perception of governmental involvement is an additional factor that should be considered. See *De Malherbe*, 438 F. Supp. at 1132. Since the federal government's historical and continuing involvement with the Internet and the registration of domain names could create the appearance to outsiders that the federal government was implicated in NSI's seizure of Petitioner's domain name, governmental action should be found. See *id.*

As noted earlier, the federal government has a long history of involvement in administering the Internet, including the registration and maintenance of domain names. From the creation of the Internet until 1991, the Defense Information Systems Agency Network Information Center provided domain name registration services. (R. at 11.) After that date, the NSF assumed responsibility for the "non-military registration services." (R. at 11.) Even after obtaining the services of NSI, the federal government continued to pay for the registration of domain names and to supervise the program plans and policies of NSI. (R. at 11.) Such pervasive involvement on the part of the government would lead an "outsider" to perceive that the federal government was responsible for NSI's seizure of the "magphone.com" domain. This factor supports the conclusion that a "symbiotic relationship" is present.

- v. *The close relationship between SAIC and the federal government supports finding a “symbiotic relationship” between NSI and the federal government.*

The relationship between Science Applications International Corp. (“SAIC”), NSI’s parent company, and the federal government further supports a finding of governmental action. SAIC, a defense contractor, derives 85% of its business from contracts with the U.S. government. (R. at 13 n.17.) In addition, SAIC’s board consists primarily of former U.S. intelligence and defense officials. (R. at 13-14 n.17.)

The Second Circuit considered similar facts to be relevant in evaluating the relationship between a private entity and the State. *See Holodnak*, 514 F.2d at 289. The Second Circuit found a “symbiotic relationship” partly because of the large proportion of defense department work done at the private entity’s plant. *Id.* Although some factors present in *Holodnak* are not present in this case, the immense financial interdependence and relationship between SAIC and the federal government provides considerable weight to the existence of a “symbiotic relationship”. Not only does this fact support the argument that the public could perceive that the government was involved in the seizure of “magphone.com,” it also evinces an interdependent relationship between the government and NSI’s parent company that carries over to NSI. This relationship supports a finding of governmental action. Therefore, the court of appeals erred in failing to consider this factor.

CONCLUSION: The facts of the present case, when added together, show that a “symbiotic relationship” exists between NSI and the federal government. Therefore, governmental action has been established and Petitioner is entitled to pursue her due process claim against NSI. The court of appeals’ decision was erroneous, and should be reversed.

2. *NSI’s actions are attributable to the federal government under the “public function” test because NSI exercised powers traditionally the exclusive prerogative of the federal government.*

Under the “public function” test, activity of a private entity is attributable to the government if the private entity exercises, “powers traditionally exclusively reserved to the [government].” *Jackson*, 419 U.S. at 352. Federal courts have recognized governmental action in several different contexts, including: holding elections, *Terry v. Adams*, 345 U.S. 461, 468-70 (1953); impaneling juries, *Edmonson*, 500 U.S. at 624-28; and operating a company owned town, *Marsh v. Alabama*, 326 U.S. 501, 504-08 (1946). However, governmental action has not been found in other factual situations. *See, e.g., Blum*, 457 U.S. at 1011 (nursing home care); *Rendell-Baker*, 457 U.S. at 842 (school for maladjusted children). As in the “symbiotic relationship” test, the “public function” test requires

an inquiry into the facts of each case. *See Lugar*, 457 U.S. at 939. In the present case, NSI's seizure of Petitioner's domain name is attributable to the federal government because NSI was exercising powers traditionally the exclusive prerogative of the U.S. government.

Whereas the challenged activities in *Blum* and *Rendell-Baker* had not historically been the exclusive prerogative of government, *see Blum*, 457 U.S. at 1011; *Rendell-Baker*, 457 U.S. at 842 (finding that the State had not, "until recently," attempted to provide education for students who could not be served by traditional schools), the federal government has traditionally been the exclusive provider of domain name registration services. From the time of the Internet's creation until 1991, the Defense Information Systems Agency Network Information Center performed all domain name registration services. (R. at 11.) After 1991, the NSF "assumed responsibility for non-military registration services." *Id.* Therefore, the facts show that the federal government exclusively performed registration services for Internet domain names from the Internet's creation until 1993.

Beginning on January 1, 1993, NSF agreed to allow NSI to perform its registration duties, but as the Court noted in *Edmonson*, the "fact that the government delegates some portion of [its] power to private [entities] does not change the governmental character of the power exercised." *Edmonson*, 500 U.S. at 626. In the present case, the federal government did not release its control over the registration policies or administration of Internet domain names, it merely hired NSI to perform the technical function of registering domain names. NSF remained substantially involved in the registration and maintenance process. *See* 31 U.S.C. § 6305 (1994). These facts, which show the government's traditional exclusive power to register domain names and its continuing involvement and control of the process, distinguish the present case from cases where the "public function" test was not satisfied, and show that governmental action is attributable to NSI's actions.

CONCLUSION: NSI was exercising "powers traditionally exclusively reserved to the [government]." The "public function" test has been met; therefore, Petitioner is entitled to the Fifth Amendment's guarantee of due process. The court of appeals' decision was in error, and should be reversed.

C. PETITIONER HAS A SIGNIFICANT PROPERTY INTEREST IN THE
"MAGPHONE.COM" DOMAIN AND IS ENTITLED TO THE DUE
PROCESS PROTECTIONS OF THE FIFTH AMENDMENT.

Since NSI's action is fairly attributable to the federal government, *see supra* Parts III.A. & III.B., this Court should consider whether Petitioner has a property interest in her domain name that is protected by

the Fifth Amendment. Although the court of appeals did not reach this issue, since it erroneously found that there was no governmental action, it is clear that owners of domain names have a sufficient property interest to force NSI to provide them with due process. Therefore, this Court should find that Petitioner has a property interest in the "magphone.com" domain.

Property interests are not created by the Constitution; instead, they are created by independent sources, such as statutes, regulations, rules, contracts, or mutual understandings. See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Although ownership of a domain name is a new type of property interest, the Constitution protects such interest, because the term "property" is broad and gathers "meaning from experience." See *id.* at 571. The types of protected property relate "to the whole domain of social and economic fact." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982). Therefore, a court must look to the "nature of the interest at stake," and determine whether the claimant is entitled to the property. *Roth*, 408 U.S. at 571, 577.

Domain names possess characteristics common to other types of property. First, they can be, and have been, bought and sold. (R. at 13 n.16.) In fact, the "Internal Revenue Service has auctioned off domain names, and NSI has transferred domain registration in accordance with the results of such auctions." (R. at 13 n.16.) Second, speculation in domain names has occurred, causing NSI to begin charging annual fees to deter such speculation. (R. at 13 n.16.) Third, domain names possess "substantial economic value." (R. at 2.)

Petitioner is entitled to use and control this new type of property because she contractually purchased the right to use "magphone.com." Although the registration agreement states that registration confers no rights to a particular domain name, "how can one purchase the right to use a domain name from another" if granting the domain name confers no legal rights, Paul H. Arne, *New Wine in Old Bottles: The Developing Law of the Internet*, 416 PLI/Pat 9, 52-53 (1995)? Although Petitioner may not have absolute control or right to the domain name, the Constitution's protection of property applies to "any significant property interest," not simply rights of undisputed ownership, *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). In the present case, Petitioner was entitled to control and use the domain name as long as she complied with the contractual agreement, which she did, see *supra* Part II. This right is a significant property interest, given the importance of domain names to a business.

A domain name is more than a simple mailbox or name that can be replaced. "Magphone.com" is a device that allows Petitioner to communicate with the public and operate her business. The name is a "valuable corporate asset" which mirrors the company's name and facilitates communication with a customer base. See *MTV Networks v. Curry*, 867 F.

Supp. 202, 204 n.2 (S.D.N.Y. 1994). Domain names "enable Internet users to locate and communicate with other computers and networks." (R. at 2.) Owning or controlling a specific domain name that is similar to the company's name is extremely important because an Internet user must be able to guess the company's domain name in order to be able to communicate with the company. See *MTV Networks*, 867 F. Supp. at 204 n.2. These facts show that Petitioner has a significant property interest in the "magphone.com" domain.

NSI's seizure of Petitioner's domain name had the significant impact of hindering her ability to operate her marketing business. The seizure prevented "all Internet users from sending e-mail to addresses in the 'magphone.com' domain or accessing information on the World Wide Web in the 'magphone.com' domain." (R. at 5.) For these reasons, Petitioner has a significant property interest in the continued use and control of "magphone.com." Therefore, Petitioner's property interest in "magphone.com" is protected by the Fifth Amendment.

NSI was required to provide Petitioner with notice and a hearing. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). NSI failed to provide the necessary protections; therefore, NSI's actions were unconstitutional.

CONCLUSION: Petitioner paid money to gain the right to control and use the "magphone.com" domain. Petitioner is entitled to the continued use of the domain name and possesses a property interest in "magphone.com." Therefore, Petitioner was entitled to due process before her domain name was seized. For these reasons, the court of appeals' decision granting NSI's motion for summary judgment should be reversed, and this case should be remanded for trial on the merits.

CONCLUSION

For the reasons stated above, the circuit court's and court of appeals' decisions should be reversed, and the case should be remanded for a trial on the merits.

Respectfully submitted,

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UNIVERSITY OF TEXAS SCHOOL OF LAW

APPENDIX A
CONSTITUTIONAL PROVISION

U. S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B
STATUTORY AND REGULATORY PROVISIONS

UNITED STATES CODE

Title 31. Money and Finance

Subtitle V—General Assistance Administration

Chapter 63—Using Procurement Contracts and
Grant Cooperative

§ 6305. 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 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.

APPENDIX C
WEST'S ANNOTATED CALIFORNIA CODES

CIVIL CODE

Division 3. Obligations

Part 2. Contract

Title 4. Unlawful Contracts

§ 1670.5 Unconscionable contract or clause of contract; finding

AS A MATTER OF LAW; REMEDIES

(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

BRIEF FOR THE RESPONDENT

No. 96-315

IN THE SUPREME COURT
OF THE
STATE OF MARSHALL

MONA SEIDMAN, D/B/A
MAGPHONE VENTURES,

Petitioner,

v.

SAIC NETWORK SOLUTIONS, INC.,

Respondent.

ON APPEAL FROM THE APPELLATE COURT
OF THE STATE OF MARSHALL

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

- I. WHETHER SUMMARY JUDGMENT ON PETITIONER'S BREACH OF CONTRACT CLAIM WAS APPROPRIATE, EITHER BECAUSE THE CONTRACT ITSELF DID NOT GIVE PETITIONER ANY ENFORCEABLE RIGHTS, OR BECAUSE RESPONDENT'S CONDUCT WAS JUSTIFIED BASED UPON PETITIONER'S PRIOR BREACH OF INTERNET CUSTOMS AND STANDARDS.
- II. WHETHER SUMMARY JUDGMENT ON PETITIONER'S DUE PROCESS CLAIM WAS APPROPRIATE BECAUSE RESPONDENT'S DECISION TO SUSPEND PETITIONER'S DOMAIN NAME WAS NOT GOVERNMENTAL ACTION.

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OPINIONS AND JUDGMENTS BELOW

The order of the Addison County Circuit Court granting Respondent's motion for summary judgment is unreported.

The opinion of the Court of Appeals of the State of Marshall affirming the Circuit Court's decision is contained in the Record on Appeal. (R. 1-23).

STATEMENT OF JURISDICTION

A formal statement of jurisdiction is omitted pursuant to § 1020(2) of the Rules for the Fifteenth Annual John Marshall National Moot Court Competition in Information Technology and Privacy Law.

CONSTITUTIONAL PROVISION

The text of the Fifth Amendment to the United States Constitution, which is relevant to the determination of this case, is set forth in Appendix A.

STATEMENT OF THE CASE

A. SUMMARY OF THE FACTS

Respondent SAIC Network Solutions, Inc. ("NSI") is a private, for-profit organization that administers the registration system for Internet domain names. (R. 1). Petitioner is an experienced businesswoman whose various enterprises, operating under the name "Magphone Ven-

tures," include the sale of magazine subscriptions and long distance telephone service. (R. 3).

On December 11, 1995, Petitioner applied to NSI seeking to register "magphone.com" as a domain name. (R. 4). NSI granted Petitioner's application after accepting a \$50 registration fee and providing her with rules and regulations governing the use of the domain name. (R. 4). These rules and regulations plainly stated that NSI was merely a registration service and any disputes relating to property rights or trademark infringement were the responsibility of the registrant. (R. 15-21).

Shortly after Petitioner obtained the "magphone.com" domain name, she began sending large amounts of unsolicited commercial e-mail messages to customers of Glenlacher Computer Services Corporation ("Glenlacher"). (R. 22). Customers of Glenlacher complained to Alan Goldman, System Administrator, who sent approximately ten e-mail messages to Petitioner specifically requesting that she stop sending the unsolicited e-mail. (R. 22). Rather than heed this request, Petitioner increased the pace of messages to "glenlacher.com", causing the overall performance of the system to deteriorate. (R. 22-23). On February 15, 1996, Goldman sent an e-mail message to NSI, notifying the company of the problems associated with Petitioner's continued transmission of unsolicited commercial e-mail and asking NSI to cancel Petitioner's domain name registration. (R. 23).

On February 19, 1996, NSI sent Petitioner a copy of Goldman's complaint and informed her that it would place the "magphone.com" domain name on "hold" status if she did not respond within 30 days. (R. 4-5). Petitioner replied with a brief unresponsive e-mail message informing NSI that she would like to keep using the "magphone.com" domain and offering to provide further information. (R. 5). In March 1996, NSI, not satisfied with Petitioner's response, removed "magphone.com" from its active domain database. (R. 5).

B. SUMMARY OF THE PROCEEDINGS

In response to the removal of the "magphone.com" domain name, Petitioner filed an action for declaratory judgment and injunctive relief in the Addison County Circuit Court. (R. 5). She requested that her rights to the "magphone.com" domain name be reinstated and that NSI be enjoined from revoking it in the future. Petitioner alleged that NSI breached the NSI Domain Name Registration Agreement ("Agreement") when it revoked her domain name registration. (R. 5). She further claimed that NSI's administration of the domain name registration was governmental action; therefore, NSI violated her right to due process by revoking the domain name without adequate notice or hearing. (R. 10). NSI moved for summary judgment on both claims.

Circuit Court Judge Clark H. Allstead granted NSI's motion for summary judgment on both counts. (R. 1). Judge Allstead found that the Agreement between Petitioner and NSI permitted NSI to revoke a domain name registration for any reason. (R. 4). The court agreed with NSI that it at least had the power to revoke because Petitioner had violated Internet customs and standards. (R. 4). The court also determined that NSI's conduct in maintaining the domain name registry did not constitute governmental action, thus removing NSI from the realm of constitutional due process scrutiny. (R. 4).

The Court of Appeals for the State of Marshall affirmed the Circuit Court's granting of summary judgment in favor of NSI on both claims. (R. 14). The Court of Appeals concurred with the lower court that NSI was not legally required to maintain Petitioner's domain name in the registration database. (R. 10). The court added that, even if NSI was so bound, Petitioner violated an implied term of the Agreement by blatantly violating Internet protocol. (R. 10). Furthermore, the appellate court found that the Petitioner could not allege a due process violation because the registration of Internet domain names is not a traditional government function and that NSI's ties to the government were insufficient to elevate the revocation of Petitioner's domain name to state action. (R. 13).

On July 15, 1996, this Court granted Petitioner's leave to appeal the decision of the Court of Appeals affirming the circuit court's award of summary judgment in favor of Respondent on the issues of breach of contract and denial of due process. (R. 24).

SUMMARY OF ARGUMENT

I. THE REGISTRATION AGREEMENT DID NOT GIVE PETITIONER ANY ENFORCEABLE RIGHTS TO THE "MAGPHONE.COM" DOMAIN NAME. PETITIONER HAS NO PROPERTY OR OTHER INTEREST ON WHICH TO BASE A BREACH OF THE AGREEMENT BECAUSE NSI CANNOT LEGALLY CONFER SUCH RIGHTS TO A DOMAIN NAME. THE AGREEMENT, EVEN IF A CONTRACT OF ADHESION, IS A FULLY ENFORCEABLE AGREEMENT WHICH EXPRESSLY ESTABLISHES THAT NO LEGAL RIGHTS ATTACH TO A NAME AS A RESULT OF REGISTRATION WITH NSI.

The Agreement, even if a contract of adhesion, is a fully enforceable instrument. The Agreement contains a provision expressly stating that no legal rights to a domain name are conferred through registration of the name with NSI. The entire Agreement, if a contract of adhesion, can be found unenforceable only if the "rights restriction" provision is deemed unconscionable. This provision is not unconscionable because it

is merely an accurate expression of NSI's lack of legal authority to confer any property interest in the domain names it registers. The Agreement, therefore, is enforceable in its entirety because the provision in question is not unconscionable. Pursuant to this provision, Petitioner has no legal right to the "magphone.com" domain name. Absent a legal right, Petitioner's cause of action against NSI for breach of contract must fail as a matter of law.

Moreover, Petitioner has no property interest in the "magphone.com" domain name. A property right to a name is conveyed solely by obtaining a trademark. The Federal Patent and Trademark Office ("PTO") and the California Secretary of State are the only entities with the legal authority to issue a trademark.¹ NSI, as a private corporation, does not possess such legal authority. Therefore, Petitioner did not receive a legal right to the "magphone.com" name when she registered with NSI. Absent a legal right to the name, NSI's revocation of the domain name does not constitute a breach of the Agreement.

Furthermore, NSI was justified in terminating the Registration Agreement because Petitioner breached Internet customs and standards that prohibit the use of the system for sending bulk commercial e-mail. Well-known industry customs and standards are implicit in every contract, including the Agreement between Petitioner and NSI. Those engaged in a particular industry are presumably aware of prominent customs that apply to the industry. Petitioner chose to participate on the Internet; therefore, she is bound by its prevalent customs and standards.

The Internet is a unique industry and is not subject to governmental regulation. The lawmakers of the Internet are the users, making the strict enforcement of customs and standards essential to maintaining the integrity and true purpose of the system. Petitioner blatantly violated e-mail custom when she sent unsolicited bulk e-mail to users of the "glenlacher.com" domain. Because this custom is part of the Agreement between Petitioner and NSI, her actions constituted a breach of the Agreement. In response to this breach, NSI was justified in revoking Petitioner's use of the "magphone.com" domain name.

1. California law is referenced with specificity because the Agreement contains an unchallenged choice of law clause directing the parties to submit to "the non-exclusive jurisdiction of the Superior Court of the State of California, San Diego County, and the United States District Court" in the event of a legal dispute. (R. 20-21).

II. NSI'S REVOCATION OF PETITIONER'S DOMAIN NAME WAS A PRIVATE DECISION AND NOT GOVERNMENTAL ACTION SUBJECT TO THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT. PETITIONER WAS NOT ENTITLED TO DUE PROCESS PROTECTION SINCE NSI IS A PRIVATE ENTITY THAT DOES NOT MEET THE SUPREME COURT'S CRITERIA FOR TRANSFORMING PRIVATE ACTS INTO GOVERNMENTAL ACTION. SINCE NSI DID NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS, THE MARSHALL COURT OF APPEALS WAS CORRECT IN AFFIRMING THE TRIAL COURT'S GRANTING OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE STATE ACTION CLAIM.

The registration of Internet domain names is not a function traditionally or exclusively reserved to the government. Although NSI serves a public interest, it does not perform a traditional government function. Moreover, the fact that the National Science Foundation, a government entity, played a part in giving NSI the exclusive right to register domain names does not make its actions those of the government.

Furthermore, NSI does not have a symbiotic relationship with the government that could justify calling its decisions state actions. NSI is not financially dependent on the government nor does the record indicate that it operates out of government-owned property. Its role as a government contractor does not create state action, but merely puts NSI in the same category as the thousands of private businesses that perform public tasks.

Finally, the federal government did not encourage or coerce NSI into revoking Petitioner's domain name. Petitioner, in fact, offers no evidence that the government was even aware of the revocation decision. The suspension was simply part of the day-to-day operations of a government contractor. Although some government organizations were part of the coalition which established the Internet policy violated by Petitioner, this does not constitute the encouragement or coercion necessary to make the revocation decision state action. The Court of Appeals correctly ruled that the decision to revoke Petitioner's domain name is not subject to Due Process scrutiny. Appropriately, its decision to uphold the trial court's ruling granting Respondent's motion for summary judgment should be affirmed.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE REGISTRATION AGREEMENT DOES NOT GRANT PETITIONER ANY ENFORCEABLE RIGHTS AND BECAUSE PETITIONER BREACHED THE AGREEMENT WHEN SHE VIOLATED INTERNET CUSTOMS AND STANDARDS.

The Marshall Court of Appeals correctly held that summary judgment in favor of Respondent on the Petitioner's contract claim was proper. Summary judgment must be granted when there is no genuine issue of material fact and reasonable minds can reach but one conclusion, that the moving party is entitled to judgment. Marshall R. Civ. P. 56(c). In the case at bar, summary judgment was appropriately granted as reasonable minds would conclude that NSI could not confer any enforceable right to the "magphone.com" domain name. Furthermore, as a matter of law, the Internet custom prohibiting unsolicited commercial e-mail is an implied term of the Agreement between Petitioner and NSI. Petitioners' breach of that term enabled NSI to legally revoke the use of the "magphone.com" domain name without violating the Agreement. Accordingly, summary judgment in favor of NSI on Petitioner's breach of contract claim must be affirmed.

A. THE NSI DOMAIN NAME REGISTRATION AGREEMENT DID NOT CONFER ONTO THE PETITIONER ANY ENFORCEABLE RIGHTS TO THE "MAGPHONE.COM" DOMAIN NAME.

The Court of Appeals correctly affirmed the trial court's granting of summary judgment in favor of Respondent because the Domain Name Registration Agreement did not confer onto Petitioner any legal right to the "magphone.com" domain name. Absent a legal right to that name, NSI's revocation or suspension of the "magphone.com" domain name does not constitute a breach of the Agreement. Petitioner does not possess any enforceable right to the "magphone.com" name for two reasons. First, the Agreement, even if a contract of adhesion, is a fully enforceable agreement which expressly establishes that no legal rights to a name are conferred through the registration of a domain name with NSI. Second, Petitioner has no property interest on which to allege a breach of the Agreement because NSI cannot legally confer such rights to a domain name to any applicant, including Petitioner.

1. *The Agreement, even if a contract of adhesion, was fully enforceable.*

Petitioner erroneously asserts that the Agreement's "rights restriction" provision creates an unenforceable contract of adhesion. That provision states that "[r]egistering a domain name does not confer any legal rights to that name." (R. 15). Nowhere does Petitioner challenge the claim that, if the clause is valid, she has no right upon which to base her action. The only basis for asserting that a contract is unenforceable is if the contract, or a provision within it, is unconscionable. This is true even if the contract is one of adhesion. *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114 (Ct. App. 1982). The contract in the case at bar, even if a contract of adhesion, does not render the rights restriction clause unconscionable.

A contract of adhesion is defined by the California Supreme Court as "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 171 (Cal. 1981)(quoting *Neal v. State Farm Ins. Co.*, 10 Cal. Rptr. 781, 784 (Ct. App. 1961)). "A contract of adhesion is fully enforceable according to its terms" unless it violates the reasonable expectations of the weaker party or if the contract is unduly oppressive or unconscionable. 623 P.2d at 172-73. In the case at bar, the Agreement, although arguably a contract of adhesion, is fully enforceable unless it is ruled unconscionable.

An unconscionable contract is one which "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Hume v. United States*, 132 U.S. 406, 411 (1889). An unconscionable contract or provision is defined as one that "shocks the conscience." *California Grocers Assn., Inc. v. Bank of America*, 27 Cal. Rptr. 2d 396, 402 (Ct. App. 1994). In the case at bar, the Agreement is a fully enforceable instrument because its terms are not unconscionable or unfair. The Agreement between NSI and Petitioner in no way "shocks the conscience," especially given the fact that Petitioner is a businessperson using the Internet to conduct a commercial enterprise.

The unconscionability of a provision is determined by examining the totality of the circumstances surrounding the negotiation and execution of the contract. *Geldermann & Co. v. Lane Processing, Inc.*, 527 F.2d 571 (8th Cir. 1975). Two factors courts use to determine if a contract provision is unconscionable are whether there is a gross inequality of bargaining power between the parties of the contract, and whether the aggrieved party was made aware of and comprehended the provision in question. *Id.* at 575. An equally important factor is whether the provision is com-

mercially reasonable "according to the mores and business practices of the time and place." *Id.* (quoting 1 ARTHUR L. CORBIN, CONTRACTS § 128, at 551 (1963)).

In *Geldermann*, a provision similar to the one at issue in the present case was claimed to be unconscionable. The provision read "in the absence of unusual circumstances, one hour shall be deemed a reasonable time" for a customer to meet margin calls in the commodities market. 527 F.2d at 575. Finding that the provision was not unconscionable, the court reasoned that customs and standards of the industry dictate that investors or speculators should be aware that they must maintain a sufficient margin to cover adverse price fluctuations. *Id.* at 578. Likewise, Petitioner should have known that she was merely registering the "magphone.com" name with NSI, not purchasing it. The Agreement between the parties signed by Petitioner is explicitly titled "The NSI Domain Name Registration Agreement." (R. 15) (emphasis added).

In *E.H. Ashley & Co. v. Wells Fargo Alarm Servs.*, 907 F.2d 1274 (1st Cir. 1990), a limitation of liability clause in a service contract was challenged as an unconscionable contract of adhesion. The court commented, "[i]n order to establish unconscionability, a party must prove that (1) there is an absence of 'meaningful choice' on the part of one of the parties; and (2) the challenged contract terms are 'unreasonably favorable' to the other party." *Id.* at 1278 (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)). In holding the contract fully enforceable, the court reasoned that similar companies in the industry had comparable limitation of liability clauses in their contracts, which demonstrated the commercially reasonable nature of the provision. 907 F.2d at 1280. Furthermore, the court considered that the limitation provision was written in plain English and on the first page of the contract. *Id.* Given that the parties were of equal sophistication and bargaining power, the court concluded that the contract was a "commercially sensible arrangement" and did not constitute "unfair surprise or oppression." *Id.* at 1279. Similarly, in the NSI matter, the rights restriction provision does not render the contract an unenforceable contract of adhesion. A provision conferring no legal rights is common in the contracts of service providers like NSI. See *Slenderella Sys. of Berkeley, Inc. v. Pacific Tel. & Tel. Co.*, 286 F.2d 488 (2d Cir. 1961); *M.R. Glass, Inc. v. New York Tel. Co.*, 264 N.Y.S.2d 160 (App. Div. 1965). Also, as in *Ashley*, the provision is conspicuous, clear, and near the top of the Registration Agreement. (R. 15). It is divided as its own paragraph and is clearly set off from the other paragraphs in the Agreement. (R. 15).

Furthermore, as with the parties in *Ashley*, the bargaining power between NSI and Petitioner is far from unequal. Petitioner is engaged in a business and possessed the sophistication to use an Internet web site

in a commercial manner. (R. 3). Such an individual should be unable to declare that a "commercially sensible arrangement" is unconscionable.

Considering the totality of the circumstances, the rights restriction provision is not unconscionable and is fully enforceable. As a result, the Agreement is "commercially reasonable" and does not "shock the conscience." Even construing the facts in a light most favorable to Petitioner, a reasonable factfinder can come to but one conclusion, that no genuine issue of material fact exists as to the existence of any legal right possessed by Petitioner to the "magphone.com" domain name. Absent a legal right, Petitioner cannot maintain a breach of contract claim against NSI. The decision of the Court of Appeals affirming the trial court's granting of summary judgment to NSI should be affirmed.

2. *Petitioner has no property interest in "magphone.com" upon which to base a breach of contract claim.*

The Agreement between Petitioner and NSI, by its express terms, does not confer upon Petitioner any legal rights to the "magphone.com" domain name. (R. 15). In fact, the only basis upon which Petitioner could assert a breach of contract would be if the contract conferred upon the Petitioner a property interest in the domain name. *See generally Clayton Home Equip. Co. v. Florida Tel. Corp.*, 152 So. 2d 203 (Fla. Dist. Ct. App. 1963). Petitioner has no property interest in the "magphone.com" domain name because NSI does not have the legal authority to confer such a right.

In order to have an enforceable property right in the domain name, Petitioner must acquire a trademark, which is a form of business property. *International Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912 (9th Cir.), *cert. denied.*, 452 U.S. 941 (1981). The Federal Patent and Trademark Office (PTO) is the only federal entity possessing the legal authority to confer a legal right to any name through registration of a trademark. In California, a trademark may also be acquired through registration with the Secretary of State. Cal. Bus. & Prof. Code § 14230 (West 1996). Registration with the appropriate entity is necessary to establish a legally enforceable right to use a particular name or number. *Cytanovich Reading Ctr. v. Reading Game*, 208 Cal. Rptr. 412 (Ct. App. 1984). Since none of these avenues were pursued, Petitioner's claim must fail as a matter of law.

Only the owner of a validly registered trademark may bring an action if that mark is infringed upon. *Mechanical Plastics Corp. v. Titan Techs., Inc.*, 823 F. Supp. 1137, 1143 (S.D.N.Y. 1993). Internet domain names are no different and can only acquire property status when they are registered as trademarks and used in a trademark sense. Gary W. Hamilton, *The Emerging Law on Computer Networks: Trademarks on*

the Internet: Confusion, Collusion or Dilution?, 4 TEX. INTELL. PROP. L.J. 1, 1 n.10 (1995). See also *Malarkey-Taylor Assocs., Inc. v. Cellular Telecomms. Indus. Assoc.*, 929 F. Supp. 473 (D.D.C. 1996). Petitioner's failure to validly register the "magphone.com" name with the appropriate entity deprives her of any cause of action alleging unlawful suspension of the name.

Like the Petitioner in the case at bar, the defendant Anheuser-Busch in *G. Heileman Brewing Co. v. Anheuser-Busch, Inc.*, 873 F.2d 985 (7th Cir. 1989), failed to obtain a valid registration of the "LA" mark with the United States Patent and Trademark Office. Rival brewing companies sought declaratory judgment that their use of the initials "LA" on their products to communicate "low alcohol" was not trademark infringement. *Id.* at 989. The court held that, without a registered mark, Anheuser-Busch had no legally recognizable rights to the "LA" name. *Id.* at 997.

Similarly, Petitioner has no cause of action for a violation of her rights to the "magphone.com" domain name. Her breach of contract suit is predicated on the assumption that NSI has the authority to confer an interest in the "magphone.com" domain name. Given that such legal authority did not exist, there was no provision in the Agreement that NSI could have breached.

NSI's registration service can be likened to a public utility registering telephone numbers. A public utility assigns the number and merely authorizes its use as long as the subscriber complies with the registration agreement. A telephone company maintains the right to change a subscriber's telephone number and to terminate service upon breach of the registration agreement. See *Burriss v. South Cent. Bell Tel. Co.*, 540 F. Supp. 905 (S.D. Miss. 1982); *Freedom Fin. Co. v. New York Tel. Co.*, 285 N.Y.S.2d 163 (App. Div. 1967). Additionally, telephone subscribers have no proprietary right in a particular phone number. This is true even in situations in which the telephone number has become commercially associated with a business. *First Cent. Serv. Corp. v. Mountain Bell Tel.*, 623 P.2d 1023 (N.M. Ct. App. 1981).

In *M.R. Glass*, the subscriber obtained a telephone number that corresponded on the telephone dial to the letters M-R-G-L-A-S-S. 264 N.Y.S.2d at 161. Comparable to the Agreement between Petitioner and NSI, the general rules and regulations of the telephone company expressly stated that "the subscriber has no proprietary right in any number." *Id.* at 162. Enforcing this provision, the court held that the subscriber had no legal right to retain its phone number and that the telephone company, pursuant to its rules and regulations, maintained the right to change the number at its discretion. *Id.* See also *Slenderella*, 286 F.2d at 490.

While a subscriber may have a legal right to use a particular telephone number, that right is subject to the rights of the telephone company. *Darman v. Metropolitan Alarm Corp.*, 528 F.2d 908 (1st Cir. 1976). In *Darman*, the court held that the rights of the telephone company were paramount to the interests of the subscriber. *Id.* at 910. Accordingly, the service agreement may be terminated solely at the discretion of the telephone company's determination that the agreement has been breached.

NSI is similar to telephone companies in that it has also taken specific measures to avoid conferring enforceable legal rights upon registrants. (R. 15). Every part of the Agreement demonstrates NSI's reluctance to be a participant in property disputes, which is in fact, the general Internet custom. See Joshua Quittner, Making a Name on the Internet, *Newsday*, October 7, 1994, at A4. The Agreement specifically states that "any disputes between parties over the rights to use a particular name are to be settled between the contending parties using normal legal methods." (R. 15).

Under the Agreement, Petitioner has no enforceable rights conferred through registration of the domain name. NSI does not have the power to confer such rights and as a consequence, could not breach any contractual obligation. Absent an enforceable right, Petitioner cannot maintain a breach of contract claim against NSI. Accordingly, the decision of the Court of Appeals is correct and should be affirmed.

B. RESPONDENT WAS JUSTIFIED IN REMOVING "MAGPHONE.COM" FROM ITS ACTIVE DOMAIN REGISTRATION DATABASE BECAUSE PETITIONER BREACHED INTERNET CUSTOMS AND STANDARDS.

The decision of the Court of Appeals to affirm the trial court's granting of summary judgment in favor of NSI should be upheld because Petitioner breached the Agreement with NSI when she violated Internet customs and standards. Perhaps the most prevalent Internet custom is refraining from unsolicited e-mail advertising. Petitioner knew of this custom, or at least should have known of it, because she is a sophisticated businessperson who sought to register a domain name to further her enterprise. There is no dispute that Petitioner sent unsolicited bulk e-mail to users of the "glenlacher.com" domain. Her actions constituted a breach of Internet custom, as well as a breach of the Agreement. NSI was justified in responding to this breach by revoking Petitioner's use of the "magphone.com" domain name. The Court of Appeals recognized this as a breach and, therefore, its decision upholding the grant of summary judgment should be affirmed.

1. *Industry customs and standards of usage are implied in the Registration Agreement between Petitioner and Respondent.*

NSI was justified in terminating the Agreement because Petitioner breached Internet customs and standards which are implicit in the Agreement. Customs and standards are part of a contract unless a contrary intent appears. *Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc.*, 252 Cal. Rptr. 573, 579 (Ct. App. 1988)(citing *California Lettuce Growers v. Union Sugar Co.*, 289 P.2d 785 (Cal. Ct. App. 1955)). Applying California law, the chosen law under the contract (R. 15), prevailing industry custom binds those engaged in the business even though there is no specific proof that the particular party to the litigation knew of the custom. 252 Cal. Rptr. at 579 (citing *Peskin v. Squires*, 319 P.2d 405 (Cal. Ct. App. 1957))(emphasis added).

It is a well-known custom of the Internet that unsolicited e-mail advertising is unwelcome. *See generally Brian G. Gilpin, Attorney Advertising and Solicitation on the Internet: Complying with Ethics Regulations and Netiquette*, 13 J. MARSHALL J. COMPUTER & INFO. L. 697 (1995). Aside from the shared cost to sender and receiver, Internet users have traditionally resisted any commercial advertising on the network and have long viewed unsolicited e-mail as offensive. Law Firm Advertising Ties Up Internet Access, Online Newsletter (Info. Access Co.), May 1994; Steve Creedy, *Internet Spawning Spammers; Unsolicited E-mail a Byproduct of On-Line Commercialization*, PITTSBURGH POST-GAZETTE, July 28, 1996, at C3. Mention of e-mail etiquette and guidelines to regular users of e-mail brings nods in agreement over the shared experiences of receiving too much irrelevant e-mail. Joanne Goode & Maggie Johnson, Putting out the Flames: The Etiquette and Law of E-mail, Online, November 1991, at 61. A highly publicized example of e-mail abuse occurred when the Phoenix law firm of Cantor and Siegel sent unsolicited commercial e-mail to approximately 7,000 people advertising their legal services. Gilpin, *supra*, at 697-98. In response, the firm was bombarded with more than 30,000 replies by irate Internet users, and the firm's Internet supplier threatened to revoke its service. *Id.*; Jared Sandberg, Company Providing Access Threatens to Restrict Firm in "Cease and Desist" Order, Wall St. J., June 22, 1994, at B5. This retribution demonstrates that advertising through mass e-mail messages is recognized as a significant Internet problem. Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L.J. 1639 (1995).

Unsolicited bulk commercial e-mail was also the focus of a recent Third Circuit Court of Appeals decision. *See Cyber Promotions, Inc. v. America Online, Inc.*, Nos. 96-1811, 96-1812 (3d Cir. Sept. 20, 1996). Cyber Promotions, Inc. had been flooding America Online ("AOL") sub-

scribers with junk e-mail. See *Thomas E. Weber, America Online Wins Rounds in Suits Over Junk E-Mail and Billing Practices*, Wall St. J., Sept. 23, 1996. When subscribers began complaining, AOL moved to block the messages. *Id.* Cyber Promotions, Inc. sought and obtained an order that AOL cease blocking the Cyber Promotions messages. *Id.* On September 20, 1996, the Third Circuit Court of Appeals lifted the injunction, thus allowing AOL to block the unsolicited e-mail messages. *Id.* This lawsuit emphasizes that both e-mail users and Internet Access Providers will not tolerate disrespect of the deeply rooted tradition of prohibiting unsolicited commercial e-mail.

In the present case, Petitioner is not an unsophisticated layperson who unknowingly logged onto the Internet and inadvertently advertised her product. She is a businessperson who is aware of the potential commercial power of the Internet, as evidenced by her desire to retain a specific domain name. (R. 5). Petitioner cannot demonstrate that she was unaware that her advertising scheme violated Internet protocol. Persons in a particular trade should be aware of prominent trade customs that apply to their industry. *Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc.*, 131 Cal. Rptr. 183 (Ct. App. 1976). The knowledge may be actual or constructive. It is constructive if the custom is of such general and universal application that the party must be presumed to know of it. *Id.*

Those engaged in a particular trade or business, such as Petitioner, are held to a higher standard of knowledge and responsibility. In fact, state codes and statutes distinguish between merchants and laypersons, and codify standards of care for professionals and business entities. See, e.g., Cal. Com. Code § 2104(1) (West 1996). Implicit in these legislative actions is the acknowledgment that those engaged in a commercial enterprise are responsible for knowing rules and regulations governing their industry.

Petitioner should have been familiar with prevalent Internet customs. In fact, Judge Wellington pointed out the numerous mechanisms by which Internet standards are readily available. (R. 8). Additionally, "The Rules of Netiquette" are available at most Internet access sites. *Opinions; Letters*, Network World, October 3, 1994, at 51. Recently, several Internet access providers have even included language in their contracts specifically prohibiting unsolicited e-mail advertising. *Briefs*, NETWORK WORLD, Jan. 29, 1996, at 43.

The NSI Agreement does not expressly restrict e-mail. The Agreement, however, is not integrated and certain provisions are implied. NSI does not dispute that the Agreement contained an integration clause. (See R. 15). This clause, however, is not conclusive evidence of the parties' intent, since inclusion of an integration clause is merely one factor that is considered when determining the intent of parties with respect to

a contract. *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848 (9th Cir.), cert. denied, 116 S. Ct. 170 (1995). The plain language of the Agreement between Petitioner and NSI indicates that the writing does not express the parties' complete contract. For example, although the Agreement repeatedly disclaims involvement in name disputes, it is completely void of any rules governing Petitioner's use of the domain name. (See R. 15).

Furthermore, the circumstances surrounding this Agreement demonstrate that the parties did not intend the writing to be the entirety of their contract. This was a standard form contract, not negotiated by the Petitioner and NSI. (See R. 15). Even in the absence of negotiations, it is reasonable that an industrywide custom or usage could be considered part of the Agreement. See, e.g., *Gianelli Distrib. Co. v. Beck & Co.*, 219 Cal. Rptr. 203 (Ct. App. 1985). Guidelines issued by the Internet Engineering Task Force ("IETF") state that an administrator of a domain is responsible for the actions of hosts within his domain. (See R. 8 n.9). This implies that some rules, other than those in the writing, exist to govern a registrant's use of the domain name. Petitioner should have expected that industrywide customs and standards governed the contract since she has offered no evidence to suggest a contrary intent.

Jurisdictions other than California hold that those who deal in a particular industry must be aware of uniform customs and standards when contracting within the industry. For instance, in *Clark v. General Foods Corp.*, 400 N.E.2d 1027 (Ill. Ct. App. 1980), the Illinois appellate court held that when a person deals with a particular market it is presumed he or she acted in accordance with customs and standards. Similarly, in *Hellenic Investment, Inc. v. Kroger Co.*, 766 S.W.2d 861 (Tex. Ct. App. 1989), the Texas appellate court determined that parties presumably contract according to custom that prevails in the particular trade or business to which the contract relates. The Seventh Circuit Court of Appeals found that customs of the baking industry are part of a baker's contract with a packing company. See *La Nasa v. Russell Packing Co.*, 198 F.2d 992 (7th Cir. 1952). Petitioner likewise contracted in accordance with Internet customs and standards which included an obligation not to send unsolicited bulk e-mail. She was made aware of this prevailing custom on two occasions. Petitioner was initially informed between January 15, 1996 and February 15, 1996 when Alan Goldman sent approximately ten e-mail messages to the "magphone.com" domain, requesting that no further unsolicited e-mail be sent to "glenlacher.com" accounts. (See R. 22, Declaration of Alan Goldman ("Declaration"), at par. 8). Despite this information, Petitioner continued her junk e-mail advertising campaign and increased the pace of messages to "glenlacher.com", causing the entire system to deteriorate. (See R. 22-23, Declaration, at par. 10).

On February 15, 1996, Alan Goldman sent NSI an e-mail message stating what Petitioner had done, and requesting that NSI consider canceling the registration of the "magphone.com" domain name because it was being used to send unsolicited bulk e-mail in violation of Internet customs and standards. (See R. 23, Declaration, at par. 12). On February 19, 1996, Petitioner was sent a copy of the complaint Goldman had mailed to NSI, sufficiently notifying her a second time that she was violating Internet customs and standards. (R. 4). NSI received Petitioner's sole response to this complaint on March 11, 1996 wherein Petitioner expressed her desire to continue using the "magphone.com" domain. (R. 5). Petitioner neither denied the allegations of misconduct nor did she offer an explanation for her behavior. *Id.*

As early as January 15, 1996, Petitioner should have known that sending unsolicited bulk e-mail is a violation of Internet customs and standards. (See R. 22-23, Declaration, at par. 10). On February 19, 1996, Petitioner was expressly told that she had breached this custom. (See R. 4-5; R. 23). After receiving this message, Petitioner expressed a desire to continue using her domain name, but gave no indication that she would refrain from sending the junk e-mail. (See R. 5; R. 22-23). NSI was not reasonably satisfied with Petitioner's response and was left with no other option but to revoke the "magphone.com" domain name.

2. *Considering the unique nature of the Internet, it is especially important for customs and standards to be a part of every domain name registration agreement.*

The Internet is a unique entity, not subject to governmental regulation, that must enforce its own customs and standards to maintain its integrity. Internet users have expressed:

We must police ourselves and act in accordance with the same ethical principles and procedures that are operative in our lives generally. If we do not root out the bad seeds and the abusers, then Big Brother will step in, and we will discover to our dismay that the Internet police, the Internet lawyers, and the Internet judges are in control of our cyberdestinies.

Robert Hauptman & Susan Motin, *The Internet, Cyberethics, and Virtual Morality*, ONLINE, Mar. 1994, at 8.

This comment illustrates just how strongly the Internet community views the observance of customs and standards. The IETF has issued a guideline supporting this concept of self-regulation which states, "the administrator of a domain is responsible for the actions of hosts within his domain." (R. 8 n.9). Judge Wellington noted this guideline and concluded that NSI, as administrator of the ".com" top-level domain, has a

legitimate interest in policing the conduct of hosts registered therein. (R. 8 n.9).

Judge Wellington further opined that the same justifications which led to the prohibition of unsolicited facsimile transmissions apply to e-mail. (R. 9-10). Recipients of e-mail bear a significant portion of the cost of transmission, like recipients of facsimile transmissions. See Judy Heim, Online Q&A; Question and Answer, PC World, August 1996, at 266. In addition, junk e-mail has the potential to tie up transmission paths, eat up memory on computer networks, and discourage users from checking their messages. Steven Guengerick & David Menendez, *Talking LAN to LAN*, NETWORK WORLD, April 2, 1990, at 35. The government did not hesitate to regulate facsimile transmissions when it became obvious that the industry was not regulating itself. E-mail would certainly be headed for the same fate if the Internet community did not strictly adhere to its well-established customs and standards. Such governmental regulation would be directly contrary to the philosophy that has guided the Internet since its inception. See generally Hauptman & Motin, *supra*, at 8.

Adherence to customs and standards in an unregulated medium, where the users are the lawmakers, is essential. To maintain the integrity of the system, well-established customs and standards must be implied in every domain name registration agreement. Absent a custom and policy against unsolicited e-mail advertising, there would be chaos on the Internet and all electronic mail boxes would be filled with unmanageable amounts of junk e-mail. The Internet would become strictly a cheap advertising medium, and its true purpose, as a worldwide information and communications medium, would be destroyed.

When Petitioner sent unsolicited commercial e-mail messages in large quantities across the Internet, she breached network etiquette as well as the Agreement with NSI. As a result of this breach, NSI was justified in suspending Petitioner's use of the "magphone.com" domain name. For these reasons, this Court should affirm the trial court's granting of summary judgment in favor of NSI on Petitioner's breach of contract claim.

II. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE TRIAL COURT'S DECISION GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE NSI IS A PRIVATE ENTITY AND ITS REVOCATION OF PETITIONER'S DOMAIN NAME IS NOT GOVERNMENTAL ACTION THAT REQUIRES SCRUTINY UNDER THE DUE PROCESS CLAUSE.

The appellate court was correct in ruling that Respondent's suspension of Petitioner's domain name, as the act of a private entity, is not

subject to constitutional scrutiny. The Fifth Amendment to the U.S. Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Fifth Amendment applies to acts of the federal government and does not apply to private conduct. *Public Utils. Comm. v. Pollak*, 343 U.S. 451 (1952).

The Court of Appeals correctly notes (R. 13) that the Fifth Amendment is relevant to the instant matter since Petitioner claims the action in question is that of the federal government. The Due Process Clause is applicable to actions of state and local governments through the Fourteenth Amendment. Due Process analysis for both Fifth and Fourteenth Amendment claims is identical. See *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). Acts of private entities may be regarded as governmental action for constitutional purposes, but only when certain criteria, not present in this case, are met. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). Petitioner admits that NSI is a private entity, but claims that it performs a governmental function in registering Internet domain names. (R. 12-13). NSI's actions, however, fall short of meeting the various well-tested criteria set forth by the United States Supreme Court for determining whether the action of a private entity constitutes governmental action.

The actions of a private entity are considered "state action" only when the private entity performs a function traditionally reserved to the government, when a symbiotic relationship exists between the private entity and the government, or when the government encourages or coerces the private entity into taking the disputed action. See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); see also Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302 (1995). Under each of these tests, the challenged action must "fairly be attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

NSI fails all three of these tests and its actions cannot be fairly attributable to the federal government. As a private entity, NSI's suspension of Petitioner's domain name is not state action subject to scrutiny under the Due Process Clause of the Fifth Amendment. Appropriately, the decision of the Court of Appeals is correct and should be affirmed.

A. NSI DOES NOT SERVE A TRADITIONAL GOVERNMENT FUNCTION IN REGISTERING INTERNET DOMAIN NAMES.

The lower court correctly concluded that the task of registering Internet domain names is not a job traditionally or exclusively reserved for the government. When a private party performs a function traditionally associated with the government or on behalf of the government, that en-

tity will be deemed a state actor. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). The function performed, however, must be "traditionally the exclusive prerogative of the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). That a private entity, such as NSI performs a function that serves the public, "does not make its acts state action." *Rendell-Baker*, 457 U.S. at 842.

The registration of Internet domain names can hardly be considered an act traditionally reserved for the government. Functions previously found by the Supreme Courts to be the exclusive province of the government include holding elections, *Terry v. Adams*, 345 U.S. 461 (1953), and empaneling juries, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). The Flagg Court mentioned functions such as education, fire and police protection and tax collection as exclusive to government. *Flagg*, 436 U.S. at 163. In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Court found that a privately-owned company town is subject to constitutional scrutiny because it "had all the characteristics of any other American town." *Id.* at 502. Petitioner erroneously argues that the Fifth Amendment is applicable to NSI because it performs a "government function." (R. 12). Unlike the company town in *Marsh*, NSI is not indistinguishable from any other government entity. Nor does the task of registering domain names compare to those tasks mentioned in *Flagg* or others found by the courts to be traditional government functions.

Commentators consider the Internet, because of its potential impact on communication and commerce, "the town square, or the shopping mall of the future." See A. Michael Froomkin, *Flood Control on the Information Ocean: Living With Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & Com. 395, 413 (1996). This cannot be compared, however, to the company town at issue in *Marsh*. Even if the Froomkin analogy is correct, NSI's distinct role in the Internet is private, perhaps comparable to a private store owner in the "shopping mall of the future."

Furthermore, any resemblance NSI has to a government entity is quickly fading. NSI no longer receives funding from the National Science Foundation, but instead charges registrants a \$50 annual fee (R. 11), prompting one observer to notice that the company is "increasingly acting as a commercial player rather than a government operative." Network Solutions Says Name Policy is "Not Subject To Review By Courts", Info. L. Alert: Voorhees Report (May 17, 1996). In addition, NSI's monopoly on domain name registration may only be temporary since the Cooperative Agreement with NSF expires in 1998. (R. 11). This leaves open the possibility that NSI will have to compete with other private companies for the task of domain name registration and strengthens the argument that NSI is more like a commercial player than a government entity.

Petitioner is mistakenly confusing a public interest with a government function. Although NSI serves a public interest in registering domain names, it does not perform a government function. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987), the Supreme Court held that the United States Olympic Committee (USOC) was not a government actor for Fifth Amendment purposes. USOC was established under federal law and, like NSI, received federal funds. Nonetheless, the Court concluded that, while the activities performed by the USOC serve "a national interest," the Committee merely coordinates "activities that always have been performed by private entities." *San Francisco Arts & Athletics*, 483 U.S. at 544-45. Likewise, NSI's role in Internet administration is merely as a coordinator and, as such, does not bring it into the sphere of state action. Similarly, the respondent in *Rendell-Baker* was a privately operated school for troubled high school students. A teacher filed suit against the school upon her termination arguing, inter alia, that her Fifth Amendment rights were violated. In determining that the firing was not state action, the *Rendell-Baker* Court reasoned that "[t]here can be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry." 457 U.S. at 842. As with the plaintiff in *Rendell-Baker*, further inquiry into state action requirements only deflates Petitioner's argument that she is entitled to constitutional due process.

The fact that NSI currently has the exclusive right to register domain names does not elevate NSI's function to one traditionally reserved for the government. In *San Francisco Arts & Athletics*, the Supreme Court ruled that the actions of the United States Olympic Committee were not governmental even though the government gave the Committee the exclusive right to use the word "Olympic." 483 U.S. at 547 n.29. The Court compared this grant of an exclusive right to the issuance of rights under a trademark which "are created by some government act" and determined that "[t]he actions of the trademark owners nevertheless remain private." *Id.* at 544. Similarly, although the federal government was involved in giving NSI the exclusive right to register Internet domain names (R. 11), NSI's actions, including the suspension and revocation of such names, remains private and is not subject to the requirements of the Due Process Clause.

Earlier this year, the Court of Appeals for the Ninth Circuit upheld a federal district court's dismissal of a Due Process claim resulting from the Federal Home Loan Mortgage Corporation's ("Freddie Mac") termination of a mortgage banking corporation's status as a seller/servicer. *American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.*, 75 F.3d 1401 (9th Cir. 1996). The defendant mortgage banker claimed that, because Freddie Mac is a unique, federally chartered cor-

poration subject to numerous governmental regulations, the bank's Fifth Amendment Due Process rights were violated when Freddie Mac terminated its status for alleged failure to comply with the Corporation's standards.

The court, citing *Rendell-Baker*, determined that, "[w]hile Freddie Mac's objective of increasing the affordability of housing is clearly governmental, performance of activities that serve a national interest does not in itself constitute federal action." *Id.* at 1410. The court further held that the powers exercised by Freddie Mac "hardly qualify as powers 'traditionally associated with sovereignty, such as eminent domain.'" *Id.*, (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)). NSI's task of overseeing the registration of Internet domain names, also "hardly qualifies" as a power associated with sovereignty. Accordingly, the Marshall Court of Appeals was correct in ruling that NSI did not violate the Fifth Amendment when it suspended Petitioner's domain name.

The suspension of the Petitioner's domain name can be compared to the action of a telephone company in denying use of its equipment to transmit sexually explicit messages. See *Carlin Communications, Inc. v. Southern Bell Tel. Co.*, 802 F.2d 1352 (11th Cir. 1986). The plaintiff in *Carlin* argued that his First Amendment rights were violated because the Public Service Commission, a government agency, delegated the "public function of censorship" to the telephone company. *Id.* at 1361. The court disagreed, finding that "it is clear that restriction of message content by a private company based on a determination that it does not wish to do business with another company is not a traditional state function, much less one exclusively reserved to the state." *Id.* The *Carlin* court further held that "[a] private business is free to choose the content of messages with which its name and reputation will be associated and such a choice is not the exercise of a public function." *Id.*

Comparably, NSI, while performing a public service, was not performing a traditional state function in its revocation of Petitioner's domain name. As indicated by the *Carlin* court, a private company, such as NSI, is free to make such a business decision regarding its associates, without being subject to constitutional requirements. NSI did not violate the Constitution by choosing not to associate with Petitioner's junk e-mail.

B. NSI DOES NOT HAVE A SYMBIOTIC RELATIONSHIP WITH THE
GOVERNMENT THAT ELEVATES ITS REGISTRATION OF DOMAIN
NAMES TO STATE ACTION.

The federal government did not serve as a joint actor with NSI in the revocation of Petitioner's domain name. The actions of a private party

become state action only when a state actor has "so far insinuated itself into a position of interdependence" with the private entity that "it must be recognized as a joint participant in the challenged activity." *Burton*, 365 U.S. at 725. Such interdependence constitutes a "symbiotic relationship" between the private and state entities that transforms private acts into state action. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

This "symbiotic relationship" test also requires the court to determine the "extent to which the actor relies on the governmental assistance and benefits." *Edmonson*, 500 U.S. at 621. In *Burton*, the government leased space in a government-owned building to a diner that refused to serve African-Americans. The *Burton* Court ruled that the diner was a state actor because of its interdependence with the government in the lease of the property. No similar relationship exists in the case at bar. In fact, NSI's dependence on the federal government is minimal. Although NSF once paid NSI to register domain names, NSI now generates income by charging registration fees. (R. 11). While the government continues to provide financial support to agencies that perform technical and administrative functions for the Internet, private companies such as MCI and Sprint now provide its financial backbone. (R. 12).

NSI performs domain registration functions through a Cooperative Agreement with the National Science Foundation. (R. 11). Consequently, commentators describe NSI's status as that of a government contractor. See James West Marcovitz, *ronald@mcdonalds.com - "Owning A Bitchin'" Corporate Trademark As An Internet Address - Infringement?*, 17 CARDOZO L. REV. 85, 85 n.1 (1995). NSI's status as a government contractor does not provide the symbiotic relationship necessary to elevate it to the role of government actor.

The existence of a contract between the federal government and a private entity does not create state action. *Rendell-Baker*, 457 U.S. at 843. Important to the instant matter, "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Id.* at 841. Nearly all of the students at the school at issue in *Rendell-Baker* were referred through city school committees established by state law or by state agencies. *Id.* at 830. The school also received an overwhelming majority of its funds from numerous government agencies. *Id.* The Court rejected the argument that the school was a state actor and concluded that "the school's fiscal relationship with the State is not different from that of many contractors performing services for the government." *Id.* at 843. Notably, NSI's dependence on the government is much weaker than that of the private school at issue in *Rendell-Baker*. NSI, like the plethora of other government contractors that perform a variety of public tasks, is simply performing a "service" for the federal government by reg-

istering Internet domain names. Such a relationship does not transform NSI's decisions into state action.

A Second Circuit Court of Appeals case demonstrates the strong ties to government necessary to make the actions of a government contractor state action and, thus, emphasizes the weakness of NSI's government bonds. In *Holodnak v. Avco Corp.*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975), the Second Circuit determined that, because of significant government involvement, the termination of an employee of a private company that made parts for army helicopters was state action subject to constitutional requirements. *Id.* at 289. The property on which the company's plant and other buildings was built was owned by the federal government. Additionally, a government "task force" was maintained at the plant to "assure contract compliance, to guarantee control of product quality, and to audit the accounting activities" at the facility. *Id.* The court concluded that the government "must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been 'purely private.'" *Id.*

The Record offers no evidence of similar ties between NSI and the federal government. The government exerts no such authority over NSI and therefore, the company's relationship with the federal government cannot be described as "symbiotic."

In fact, NSI's ties to the government are tenuous. While the Federal Networking Council claims to have "policy control" (R. 12) over the top-level domain names, this authority is shared with numerous private organizations, including the Internet Society and the IETF. *Id.* Petitioner offers no indication that government agencies exert more influence over Internet policy than do the private organizations, lending support to the characterization of this relationship as the "mysterious, decentralized, inscrutable world of Internet governance." Network Solutions, *supra*.

That NSI has to submit reports to the National Science Foundation (R. 12) is also insufficient to transform its connection with the federal government into a symbiotic relationship. The United States Olympic Committee in San Francisco Arts & Athletics had to submit reports regarding operations and expenditures to Congress. 483 U.S. at 522 n.24. The Court, nonetheless, found that the decisions of the Committee were not state action. The reports that NSI must submit to the NSF also fail to convert its registration of domain names into state action. Accordingly, this Court should find that NSI lacks the symbiotic relationship with the government necessary to elevate its functions to state action. The decision of the Marshall Court of Appeals holding that the suspension of the Respondent's domain name does not violate the Fifth Amendment is correct and should be affirmed.

C. THE GOVERNMENT DID NOT ENCOURAGE OR COERCE THE RESPONDENT
TO REVOKE PETITIONER'S DOMAIN NAME.

NSI's conduct in revoking Petitioner's domain name is the result of private choice and not state influence or coercion. A private party is considered a state actor only if that party's actions are encouraged or facilitated by the government. *Reitman v. Mulkey*, 387 U.S. 369 (1967). A private party's actions may be subject to constitutional scrutiny if a state policy "significantly encourage[s] and involve[s] the State in private discriminations." *Id.* at 381. The government is responsible for a private decision "only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the [government.]" *Blum v. Yaretsky*, 457 U.S. 991, 1004

(1982). Significantly, the Blum Court determined that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to hold the State responsible for those initiatives." *Id.* at 1004-05.

By arguing that NSI's revocation of her Internet domain name is state action, Petitioner is inferring that the federal government was involved in the revocation decision. While NSI is loosely associated with government agencies that play a role in Internet governance (R. 12), none of these agencies is mentioned in NSI's Registration Agreement or Dispute Policy Statement as being involved in the decisions to either confer or suspend domain names. (R. 15).

Earlier this year, the Ninth Circuit Court of Appeals, relying on Blum, found no state influence in a decision to terminate a prison employee. *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227 (9th Cir. 1996). The defendant in George, a private entity, contracted with the county to operate a correctional facility. *Id.* at 1229. The court determined that the government did not regulate the prison's termination process and that, in fact, the county and state had "shown no interest in George's type of dispute." *Id.* at 1231. Furthermore, the court concluded that the termination was part of the prison's "day-to-day management" and that "day-to-day management of private contractors performing government functions does not generally constitute state action." *Id.*

NSI's decision to terminate Petitioner's domain name, like the decision at issue in George, was merely a "day-to-day" task of a government contractor. Petitioner cannot prove that the suspension of her domain name was a result of coercion or influence on the part of the federal government. No indication exists that the government was even aware of the suspension of Petitioner's domain name. Logic dictates that such a decision cannot be state action.

At best, the government merely acquiesced to NSI's decision which, under Blum, does not trigger state action. The plaintiffs in Blum argued

that the decision by a private nursing home to discharge or transfer patients without notice or a hearing violated the patients' due process rights. The plaintiffs claimed that discharges and transfers constituted state action because the nursing home was governed by various state and federal regulations and received funds through the Medicaid program. 457 U.S. at 991. The Court, however, was unimpressed with this argument and concluded that decisions regarding patient discharge or transfer "ultimately turn on medical judgment made by private parties according to professional standards that are not established by the State." *Id.* at 1008 (emphasis added).

Likewise, the decision to suspend Petitioner's Internet domain name was based on private judgment and privately-adopted standards. In *Alliance For Community Media v. F.C.C.*, 56 F.3d 105 (D.C. Cir. 1995)(en banc), *aff'd in part, rev'd in part on other grounds sub nom. Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 116 S. Ct. 2377 (1996), the petitioners failed in their argument that because the government allowed cable television operators to prohibit indecent programming on cable access channels, "state action" is established. At issue is a portion of the Cable Television Protection and Competition Act which gives cable operators the option to reject indecent programming on their cable systems. 47 U.S.C.A. § 532(h) (West 1996). The court determined that although the legislation instructs the Federal Communications Commission to promulgate regulations enabling cable operators to prohibit indecent programming, this does not constitute coercion or encouragement. 56 F.3d at 118.

The fact that NSI has adopted policies established in part by government agencies does not elevate its decisions influenced by that policy to state action. The protocol which governs Internet uses and which the Petitioner blatantly breached, is imposed by a consortium of Internet organizations which includes some government agencies. (R. 12). NSI's use of this policy, however, is voluntary and not the result of government order. That certain government organizations are involved in maintaining this policy does not constitute the encouragement or coercion necessary to make NSI's suspension of the Petitioner's domain name state action. Accordingly, Petitioner's Fifth Amendment Due Process rights were not violated. As such, the decision of the Court of Appeals is correct and should be affirmed.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the decision of the Marshall Court of Appeals.

Respectfully submitted,

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APPENDIX
CONSTITUTIONAL PROVISION

U. S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

