2003

Seizing Domain Names to Enforce Judgments: Looking Back to Look to the Future

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"Out of the old fields must spring and grow the new corn."[1]

I. INTRODUCTION

The Internet has changed the way people communicate and do business. As business migrates to the Internet, new words, new rights and new wrongs are created. One of the challenges faced by lawyers, judges and legislators is determining whether the rights created by the movement of business to the Internet are truly new rights that need new governing laws or variations of existing rights to which existing legal concepts are easily adapted. Today we watch the law struggle to adapt traditional contract law to electronic transactions,[2] to mold the action of trespass to chattels to cover unauthorized use of a web site,[3] and to find an electronic equivalent to negotiable instruments.[4]

One of the new rights with which the law struggles today is the Internet domain name. A domain name is the identifier used by individuals to find specific web sites. Domain names are of great value: the easier it is for potential customers to find a company's web site, the more business the web site owner will likely receive. People fight over these names all the time. Trademark owners and famous people pursue cybersquatters for wrongfully appropriating their marks or names.[5] Sometimes, more than one individual or organization has the right to use a

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[1] Sir Edward Coke, Preface to THE FIRST PART OF THE REPORTS OF SIR EDWARD COKE, KT (1727).

[2] *See generally* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002).

[3] eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

[4] *See generally* RONALD J. MANN & JANE K. WINN, ELECTRONIC COMMERCE 580-586 (2002).

[5] For instance, the singer Madonna brought an arbitration proceeding against a pornographer who registered the name "madonna.com" for his pornographic web site. Madonna Ciccone p/k/a Madonna v. Dan Parisi and "Madonna.com," at

name and the parties negotiate a transfer of the name. [6] Some people have registered generic names as domain names, such as sex.com and travel.com. Despite the fact that these names can have great monetary value (for instance, one domain broker claimed on its website that the name "wine.com" sold at auction for $3.5 million)[7] some say that the legal nature of these names is not settled. There have been numerous articles and cases questioning whether a domain name constitutes property and examining the implications of characterizing a domain name as a property right or not. Academics and practitioners are asking questions about how to value domain names, how to perfect security interests in domain names, and how domain names will be handled in bankruptcy.[8] The case that sparked the controversy, *Network Solutions, Inc. v. Umbro International, Inc.*,[9] held that a judgment creditor could not, under Virginia law, force the sale of domain names through a garnishment action.

The question of whether a domain name constitutes a property right or not is essentially irrelevant because under the laws governing creditors' rights, almost any right with monetary value can be made available to creditors. The *Umbro* case is significant because it illustrates the difficulties that creditors face when trying to reach new economy assets such as domain names using the existing laws governing enforcement of judgments. These difficulties affect not only judgment creditors but also secured creditors and creditors in bankruptcy because their rights depend, in part, upon state laws governing enforcement of judgments. While the Internet and domain names are new, the problem of applying debt collection laws to new assets is not,[10] and

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http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0847.html

[6] In September 2000, the Philadelphia law firm of Morgan Lewis transferred its domain name, www.mlb.com (the firm had been known as Morgan, Lewis and Bockius) to Major League Baseball, which was one of the firm's clients. It was reported that Morgan Lewis did not receive any payment from Major League Baseball for the transfer. *See* "Morgan Lewis Pitches Web Address to Major League Baseball," at http://old.sportsline.com/u/baseball/mlbcom/pressrelease/mlbcom_090600.htm; "Stuck in the Bullpen," at http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZP0C7EEVC.

[7] http://www.1stdomainbrokers.com/ (last visited October 28, 2002).

[8] *See* notes 73 - 83 *infra* and accompanying text.

[9] 529 S.E.2d 80 (Va. 2000).

[10] *See, e.g.*, Joann P. Henderson, *Garnishment and Execution of Property Rights (Part I)*, 24 IDAHO L. REV. 1 (1988) (discussing garnishment of contract rights); Robert D. Hillman, *Other People's Money: Problems in Attaching Securities Under Three Versions of U.C.C. Article 8*, 16 J.L. & COM. 89 (1996) (discussing the history of applying creditors' remedies to corporate shares); Lois R. Lupica, *The Technology-Rich "Dot-Com" in Bankruptcy: The Debtor as Owner of Intellectual Property*, 53 ME. L. REV. 361 (2001) (discussing creditors' rights in intellectual property; Charles Shafer, *The Virtual Clerk's Office: A Proposed Model Judgment*

in both the emerging law of domain names and the existing laws governing enforcement of judgments, the means to allow enforcement of judgments against domain names exist.

The thesis of this article is that judges can rework existing laws governing creditors' remedies to account for new technologies. Courts have been adapting such remedies to new assets for more than a century and there is nothing inherent in domain names to suggest that courts cannot do the same with respect to them. Thus, the question of whether domain names are "property," a question that has fascinated commentators since *Umbro*, is simply a red herring.

To support this thesis, Part II of this article will explain what a domain name is and the rights that a person acquires upon registration of such a name. Part III will analyze the *Umbro* case in depth to show that it simply held that the Virginia law of garnishment does not apply to domain names. Part IV will discuss the various theories of property to illustrate that, for the purpose of creditors' rights laws, a domain name is property. Part V of the article will survey the confusing laws governing enforcement of judgments and discuss how courts have historically applied them to intangible rights. Finally, Part VI will suggest that because all of the legal and practical mechanisms to enable judgment creditors to seize domain names exist today, courts should allow judgment creditors to seize and sell domain names.

II. WHAT IS A DOMAIN NAME AND HOW DO YOU GET ONE?

It is necessary to have at least a basic understanding of what a domain name is and how the Domain Name System ("DNS") works in order to suggest an appropriate collection remedy to be used against domain names. Every computer connected to the Internet has an Internet Protocol (IP) address, which consists of four numbers of up to three digits, each number separated by a period. Anyone sitting at a computer connected to the Internet can type in the IP address of another computer and connect to that other computer. Most individuals have difficulty remembering numbers, however, so the DNS was developed to connect IP addresses to names which allows individuals to type in a name and connect to a computer whose IP address is connected to that name.[11] In the early days of the Internet, such a system was unnecessary because only United States government and university research facilities used the network. Today, because of the explosion in computer use, the DNS is essential to the operation of the Internet.

A domain name consists of at least three parts. A skier wishing to find a house for rent in Whistler, British Columbia would find a rental company at "www.accommodationwhistler.com".

Lien Act for the Computer Age, 15 J.L. & COM. 295, 308-317 (1995) (discussing the problems that creditors have enforcing judgments against various types of intangible property).

[11] *See* IAN C. BALLON, E-COMMERCE AND INTERNET LAW § 11.02 (2001); Jonathan Zittrain, *ICANN: Between the Public and the Private – Comments Before Congress*, 14 BERKELEY TECH. L.J. 1071, 1073 (1999).

Moving from right to left, ".com" is the top-level domain ("TLD"). The ".com" TLD is generic, meaning that it is not restricted to residents of a particular country, and open, because it is not restricted to particular types of institutions. "Accommodationwhistler" is the second-level domain and the name of the rental company. The first part of the address, "www," tells the web searcher that the "accommodationwhistler" domain can be found on a World Wide Web server. All references to domain names in this article will be to second-level names. These second-level names are tremendously valuable in part because many people, such as the hypothetical skier looking for accommodations, simply guess at domain names to find the goods or services that they want. The limited number of "open" TLDs adds to the value of the names. Top-level domains such as .com, .net and .org are available to anyone. On the other hand, the ".edu" TLD is available only to colleges and universities and the ".gov" TLD is available only to United States federal governmental entities. There are also country-specific TLDs, such as .ca for Canada and .fr for France. Some of these country-specific TLDs are open to everyone in the world regardless of residence and others are restricted to residents of the country to which the TLD refers.[12]

When the skier looking for her vacation rental types the web address "http://www.accommodationwhistler.com" into her computer, the request goes through the DNS in order to connect the skier with the correct site. The DNS provides the means by which the skier's computer can locate the rental company's computer. The DNS translates, or "resolves" the domain name into an IP number. There are many detailed descriptions of the DNS, so only an attempt at a simple description follows here.[13] The operation of the system can be described as a series of questions that the skier's computer asks the system. For instance, if I am the skier and I am making my plans at work (assuming that I am allowed to), my computer will ask my local domain name server (the server for widener.edu) if it knows the location of "www.accommodationwhistler.com." If my server does not know the answer, it will ask a "root" server. The root servers make up the top of the DNS pyramid and the root servers contain the authoritative directory of the IP addresses of all of the top-level domain servers. So in the ski trip hypothetical, the root server will tell my name server where to find the top-level domain server for ".com." The ".com" server will, in turn, tell my computer where the local name server for

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[12] *See generally*, ELLEN RONY & PETER RONY, THE DOMAIN NAME HANDBOOK: HIGH STAKES AND STRATEGIES IN CYBERSPACE 42-55 (1998); ICANN "Frequently Asked Questions" page, located at http://www.icann.org/general/faq1.htm (last visited November 18, 2002); MIT Information Systems "Help" page, located at http://web.mit.edu/is/help/network/ip.html (last visited November 18, 2002).

[13] More detailed descriptions can be found in RONY & RONY, *id.* at 58-87; A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 37-50 (2000); Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 194-199 (2000). A simpler explanation can be found on the InterNIC web site (operated by ICANN) at http://www.internic.net/faqs/authoritative-dns.html (last visited February 13, 2003).

"www.accommodationwhistler.com" is located.[14]

Today, the Internet Corporation for Assigned Names and Numbers ("ICANN") manages the DNS under a Memorandum of Understanding ("MOU") with the United States Department of Commerce. ICANN is a private, not-for-profit organization designed to represent the interests of the various worldwide Internet constituencies, including domain name registries and registrars, the technical community, Internet service providers (ISPs), and commercial, not-for-profit, and individual Internet users.[15] ICANN was formed to place control of the DNS in private hands and the MOU with the Department of Commerce is designed to facilitate the transition to private control. ICANN's oversight of the domain name system is controversial but continues.[16] In its role as manager of the DNS, ICANN controls the root server system.

Two entities involved in the registration of every domain name are the domain registry and the domain name registrar. ICANN is responsible for designating registries and accrediting registrars. Each TLD is maintained exclusively by one registry. For example, VeriSign GRS serves as the registry for ".com" names.[17] As the registry, VeriSign GRS controls the master file containing the domain name registry for all ".com" domain names. So, in the above example, when my computer asks the DNS where to find ".com" addresses, the DNS will point my computer to a server controlled by VeriSign GRS. VeriSign GRS compiles its master file from all of the registrations for ".com" domain names submitted by all of the authorized registrars. The file contains all ".com" domain names and their corresponding IP numbers.[18] The registry is obligated to update this file daily. Under their contracts with ICANN, VeriSign GRS and the other registries must provide a "whois" service that allows the public to determine the registrar

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[14] This description of the DNS was compiled from all of the sources listed in the previous footnote.

[15] *See* Froomkin, supra note 13, at 68.

[16] *See generally*, MANN & WINN, *supra* note 4, at 19-20; Froomkin, *id*. ICANN's contract with the Department of Commerce has been extended to September 30, 2003. *See* Department of Commerce Statement Regarding Extension of Memorandum of Understanding with ICANN, *available at* http://www.ntia.doc.gov/ntiahome/domainname/agreements/docstatement_09192002.htm (last visited February 13, 2003).

[17] VeriSign GRS is also the exclusive registry for the ".net" and ".org" top-level domains. Web page of VeriSign GRS, at http://www.verisign-grs.com (last visited February 13, 2003).

[18] *See* VeriSignGRS Frequently Asked Questions, http://www.verisign-grs.com/aboutus/faq.html (last visited February 13, 2003)

for any domain name within each registry's TLD.[19]

Within each TLD, there are numerous accredited registrars. To obtain a domain name, a person who wants to establish a presence on the World Wide Web can visit the web site of a domain name registrar.[20] The registrars must be accredited by ICANN in order for .com, .net and .org names to be entered in the domain name registry.[21] Network Solutions, an affiliate of VeriSign GRS, is, at the time of this writing, the world's largest registrar.

When the potential registrant visits a registrar's site, he is asked to type in a proposed domain name. The registrar then compares the desired name to the domain name registry. Names are allocated on a first-come, first-served basis. The registrar does not inquire as to whether anyone else has trademark rights in the name. If no one else has registered the name, then the applicant can have the name upon payment of a small yearly fee.[22] A registrant can register a domain name for periods ranging from one to ten years and the registration is renewable.

Registrants were not always required to pay for domain name services. Prior to 1995, Network Solutions was not only the exclusive registry for the ".com" top-level domain, it was also the exclusive registrar, pursuant to an agreement with the National Science Foundation. From 1993 to 1995, Network Solutions registered domain names free of charge to the registrant and the National Science Foundation paid Network Solutions to register the names. When the demand for domain names swelled, the National Science Foundation realized that the cost for registration services would exceed its budget and decided to shift the burden of paying for domain name registration from the government to the people who use the Internet. As a result, Network Solutions began collecting fees from registrants.[23]

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[19] *See, e.g.,* ICANN .com Registry Agreement, May 25, 2001, at http://www.icann.org/tlds/agreements/verisign/registry-agreement-com-25may01.htm (last visited February 27, 2003).

[20] A list of registrars accredited by ICANN can be found at http://www.icann.org/registrars/accredited-list.html (last visited October 21, 2002).

[21] *See* http://www.icann.org/general/faq1.htm (last visited February 13, 2003).

[22] This fee varies. For instance, Network Solutions charges $35 for a one-year registration and $19 per year for a five-year registration. *See* http://www.networksolutions.com/en_US/name-it/popup-multiyear.jhtml (last visited February 13, 2003). GoDaddy charges $8.95 for a one-year registration in the .com TLD and $6.95 per year for a 10-year registration in the .com TLD. *See* http://www.godaddy.com/gdshop/default.asp?e=com (last visited February 13, 2002).

[23] Weinberg, *supra* note 13, at 200; *see also* Oppedahl & Larson v. Network Solutions, Inc., 3 F.Supp. 2d 1147, 1148-1153 (D. Colo. 1998).

The duration of a domain name registrant's rights in a domain name, although for a renewable term, is in fact potentially unlimited. Some registrars provide a service by which they will automatically renew a name by charging the registrant's credit card.[24] Otherwise, registrars will renew names upon receipt of a renewal fee and renewal is automatic. In other words, the original registrant can have the rights to his original name in perpetuity.[25]

A domain name registrant, when registering a domain name, must agree to the registrar's contract. Each registrar has its own form of registration agreement and while there are some important differences among them, all of the agreements share certain characteristics.[26] A typical Registration Agreement places a number of duties on the registrant. First, the registrant must keep payments current. If the registrant fails to do so, the registrar can cease providing domain name services and delete the domain name from its records.[27] In fact, under the Accreditation Agreement that ICANN enters into with its registrars, the registrar is required to cancel the domain name if the registrant fails to pay.[28] The registrant also agrees to maintain current and accurate information about itself during the term of the agreement.

All ICANN-accredited registrars must incorporate the Uniform Domain Name Dispute Resolution Policy ("UDRP") in their registration agreements. The UDRP is a mechanism for resolving trademark disputes through arbitration. Because of the first-come, first-served nature

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[24] *See* Register.com Services Agreement ¶ 6.b.

[25] Some registrars state this in their registration agreements. *See, e.g.,* Signature Domains Service Agreement ¶ 1, at http://www.signaturedomains.com/agreement.jsp (last visited February 13, 2003).

[26] For examples of registration agreements, *see* http://www.domainpeople.com/registration_agreement.html (Domainpeople Registration Agreement, last visited October 21, 2002); http://www.register.com/service-agreement.cgi?1|3404941088| (Register.com Services Agreement, last visited October 10, 2002); https://www.registersite.com/regagreementgtld.nihtml (RegisterSite.com Regsitration Agreement, last visited October 21, 2002); and http://www.netsol.com/en_US/legal/static-service-agreement.jhtml (Network Solutions Service Agreement Version Number 6.6, last visited February 13, 2003).

[27] Domainpeople Registration Agreement, ¶ 2; Network Solutions Service Agreement, Schedule A, ¶ 2. Failure to pay the yearly renewal fee can have dire consequences, since a domain name registrar can sell an expired name to a new buyer. *See* Mylene Mangalindan, "Renew It or Lose It," WALL ST. J., July 15, 2002, at R10.

[28] ICANN Registrar Accreditation Agreement (17 May 2001) at ¶ 3.7.5, available at http://www.icann.org/registrars/ra-agreement-17may01.htm#3.7.5 (last visited February 13, 2003)

of domain name registration, it is possible for a registrant to register a name in which another party has trademark rights.[29] Under all of the registrars' agreements, the registrant must agree to be bound by the UDRP if a third party complains that the registrant registered a domain name in violation of that third party's trademark rights.[30]

In return, the registrar provides domain name registration services. The agreements limit the registrar's liability for any breach of its obligations under the agreement to the amount paid for the domain name registration. Some of the registrars acknowledge that some states might not honor this almost complete limitation of liability and their agreements state that the registrar's liability is limited to the extent permitted by law.[31]

Domain name registrars acknowledge that domain names can be sold to third parties. They also allow the names to be transferred to other registrars. It is in the transfer provisions where the uniformity among registrars ends. Generally, registrars permit transfer to a third party upon payment of a transfer fee. They also require that the transferee agree to the terms of the Registration Agreement.[32]

Some registration agreements prohibit specified types of transfers. One agreement that purports to restrict the transfer of a domain name is the Network Solutions Service Agreement. Under this agreement, a domain name is freely transferable if the transfer is voluntary. On the Network Solutions web site, there is a "Help" page devoted to selling domain names.[33] In order to transfer the rights to a domain name, the registrant and transferee must participate in the Registrant Name Change Agreement process.[34] Other registrars allow and facilitate voluntary

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[29] For a lengthy list of potentially trademark-infringing registrations, see the list of World Intellectual Property Organization UDRP decisions at http://arbiter.wipo.int/domains/decisions/index-gtld.html (last visited February 13, 2003).

[30] *See, e.g.*, Domainpeople Registration Agreement ¶ 17.e; Registersite.com Registration Agreement ¶ 7; Network Solutions Service Agreement Schedule A, ¶ 5. The UDRP can be found at http://www.icann.org/dndr/udrp/policy.htm (last visited November 21, 2002).

[31] Domainpeople Registration Agreement ¶ 9;Network Solutions Service Agreement ¶ 7; Register.com Services Agreement ¶ 13; Registersite.com Registration Agreement ¶ 12.

[32] Domainpeople Registration Agreement ¶ 3; Registersite.com Registration Agreement ¶ 14; Network Solutions Service Agreement Sch. A, ¶ 3.

[33] http://www.netsol.com/en_US/help/sell-your-name.jhtml

[34] *See* http://www.networksolutions.com/en_US/name-it/rnca-transfer.jhtml (last visited February 18, 2003). Only a domain name registrant can view the Registrant Name Change Agreement online. A similar one can be found at https://www.godaddy.com/gdshop/agreements.asp?isc=&se=%2B&from_app=&pl_id=1&mscss

transfers as well.[35] Like the original registration process, the transfer process is conducted online. As part of the transfer process, the registrar will send an e-mail message to the registrant's administrative contact (listed in the "whois" database) asking the registrant to confirm the transfer to the new owner. Under the Network Solutions agreement, the administrative contact has 14 days to respond to the request. After the administrative contact confirms the transfer, Network Solutions will disassociate the transferred name from the host server and register it to the transferee.[36]

Forcible transfers by creditors, however, are forbidden by the agreement. The agreement provides that any attempt by creditors to obtain rights in a domain name, "whether by attachment, garnishment, levy or otherwise," will allow Network Solutions to void the agreement.[37] This provision, combined with the provision explained in the prior paragraph, leads to an interesting result: a registrant can transfer its name to whomever it wants, but if a creditor wants the domain name sold to satisfy the registrant's debts, the registrant can lose the name. The result, of course, is that creditors are deprived of any value that the name might have.

Notwithstanding any prohibition on transfers to satisfy debts, registrars and registrants must agree to one type of forcible transfer. Under the UDRP, an arbitral tribunal or court of competent jurisdiction can order the transfer of a domain name if the registrant is found to have registered its name in violation of another party's trademark rights. All ICANN-accredited registrars agree to abide by such orders.[38]

It is clear that by registering a domain name, a registrant obtains the exclusive right to use that name as his Internet moniker. This right continues as long as the registrant pays his fees. During that time, the registrar will ensure that the name is in the DNS and thus usable as an Internet identifier. The registrant can sell the name and reap the benefits of such a sale and can lose the name only if he is found to have registered it in bad faith. Yet it remains unclear if and how a creditor can reap the benefits of the registrant's valuable rights in his name.

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id=&authGuid= (last visited December 30, 2002).

[35] Web Site for GoDaddy, at http://www.godaddy.com (last visited December 16, 2002).

[36] *See* http://www.networksolutions.com/en_US/help/reg-name-chg-12.jhtml (last visited February 18, 2003).

[37] Network Solutions Service Agreement ¶ 20. This provision is found in several other service agreements. *See, e.g.,* Signature Domains Service Agreement ¶ 22, at https://www.signaturedomains.com/agreement.jsp (last visited February 13, 2003), 123 Registration Customer Service Agreement ¶ 22, at https://www.123registration.com/Help/123ServiceAgreement21.cfm (last visited February 13, 2003).

[38] UDRP ¶ 3, at http://www.icann.org/dndr/udrp/policy.htm#3.

III. *UMBRO* AND ITS SIGNIFICANCE

A. What *Umbro* Says (With a Note on its Prequel, *Dorer v. Arel*)

In 2000, the Virginia Supreme Court decided *Network Solutions, Inc. v. Umbro International, Inc.*,[39] sparking vigorous discussion about the legal characteristics of domain names. Virginia is an important jurisdiction in the domain name universe, as it is the home of Network Solutions, the largest domain name registrar in the world. In holding that a judgment creditor could not obtain rights in domain names by garnishment, the court characterized the right to use a domain name as "the product of a contract for services."[40] Interestingly, while the court nowhere said that rights to a domain name do not constitute property rights, the case is widely cited for throwing into doubt whether domain name registrants have property rights in their names.[41] As a result, many have questioned whether a domain name can be used as collateral for a loan, whether a domain name can be properly considered an asset of the registrant's bankruptcy estate, and whether a judgment creditor can ever obtain an enforceable lien against a domain name.[42]

To understand what the *Umbro* holding stands for, it is important to know both the facts of the case and the Virginia garnishment statute. Umbro, a manufacturer of soccer clothing and equipment, sued 3263851 Canada, Inc.("Canada, Inc.") for trademark infringement. Canada, Inc. was a distributor of Internet pornography and an accomplished collector of domain names, having registered names such as "picsofchics.com" and "pornplaza.com," as well as "umbro.com," which incorporated Umbro's trademark.[43] Umbro obtained a default judgment against Canada, Inc. in South Carolina. The court's order enjoined Canada, Inc. from using the

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[39] 529 S.E.2d 80 (Va. 2000).

[40] *Id.* at 81, *quoting* Dorer v. Arel, 60 F. Supp. 2d 558, 561 (E.D. Va. 1999).

[41] *See, e.g.*, Francis G. Conrad, *Dot.Coms In Bankruptcy Valuations Under Title 11 or www.snipehunt in the Dark.Noreorg/Noassets.com*, 9 AM. BANKR. INST. L. REV. 417, 430-431 (2001); Jonathan C. Lipson, *Financing Information Technologies: Fairness and Function*, 2001 WIS. L. REV. 1067, 1087 (2001); Xuan-Thao N. Nguyen, *Cyberproperty and Judicial Dissonance: The Trouble With Domain Name Classification*, 10 GEO. MASON L. REV. 183, 198-199 (2001) (hereinafter Nguyen, *Cyberproperty*).

[42] Conrad, *id.*; Nguyen, *Cyberproperty*, *id.* at 185; Marjorie Chertok & Warren E. Agin, *Restart.com: Identifying, Securing and Maximizing the Liquidation Value of Cyberassets in Bankruptcy Proceedings*, 8 AM. BANKR. INST. L. REV. 255, 280 (2000); discussion on the UCC-L list serve, June, 2000 (on file with author).

[43] Umbro Int'l, Inc. v. 3263581 Canada, Inc., 48 Va. Cir. 139, 140 (1999), *rev'd sub nom* Umbro Int'l v. Network Solutions, Inc., 529 S.E.2d 80 (Va. 2000).

"umbro.com" domain name and awarded Umbro $23,489.98 in attorney's fees and expenses.[44]

Like many judgment debtors, Canada, Inc. did not write a check to Umbro, so like many judgment creditors, Umbro was forced to find property against which to enforce its judgment. Canada, Inc. had registered at least 38 domain names with Network Solutions, so Umbro sought to enforce its judgment in Virginia. Umbro obtained a writ of *fieri facias*[45] from the Circuit Court of Fairfax County, Virginia. To execute the writ, Umbro brought a garnishment action against Network Solutions, seeking to garnish 38 domain names that Canada, Inc. had registered with Network Solutions. The garnishment summons directed Network Solutions to deposit control of the domain names into the registry of the court so that the names could be sold to the highest bidder.[46]

Network Solutions refused to give control of the names to the court, claiming that it did not hold any garnishable property belonging to Canada, Inc. In support of its position, Network Solutions made four arguments: 1) that the writ of *fieri facias* "does not attach to contractual rights that are dependent on unperformed conditions;" 2) that as contracts for services, domain name registration agreements are not subject to garnishment; 3) that "domain name services do not have a readily ascertainable value;" and 4) that "domain name services are not similar to patents and other forms of intellectual property."[47] The trial court, focusing primarily on the question of whether a domain name is the type of "property" to which a writ of *fieri facias* extends, disagreed with every one of Network Solutions' arguments and held that Umbro could garnish the 38 domain names.[48] In its opinion reversing the trial court, the Virginia Supreme Court focused on Network Solutions' second argument, that domain names are not the type of property covered by the Virginia garnishment statute.[49]

The trial and appellate court decisions illustrate some of the problems that courts have long faced in applying collection remedies to intangible rights. Both courts applied, as they were required to, the Virginia garnishment statute. Garnishment, an action that did not exist at

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[44] Umbro Int'l, Inc. v. 3263851 Canada, Inc., slip. op., No. 697-2779-20 at 8 (D.S.C. Dec. 31, 1997).

[45] A writ of *fieri facias* directs the sheriff to seize and sell a debtor's property to satisfy a debt. *See* notes 161-172 *infra* and accompanying text.

[46] Network Solutions, Inc. v. Umbro Int'l, Inc., 529 S.E. 2d 80 (Va. 2000).

[47] *Id*. at 81-82.

[48] Umbro Int'l, Inc. v. 3263851 Canada, Inc., 48 Va. Cir. at 144.

[49] 529 S.E. 2d at 86.

common law, is a creature solely of statute.[50] In Virginia, garnishment is one method by which the sheriff can execute a writ of *fieri facias*, which in Virginia creates a lien on all tangible and intangible property of the judgment debtor, whether or not that property is subject to levy.[51] The Virginia garnishment statute is specific as to what types of property it covers and under the statute, only a "liability" to the judgment debtor can be garnished.[52]

The trial court focused on whether the writ of *fieri facias* extends to domain names, concluding that it does. With little discussion, other than a recognition that domain names can receive trademark protection, the trial court concluded that domain names are "a form of intellectual property."[53] The court correctly recognized that once a registrant pays the registration fee, it is entitled to use the name. Although use of that name is subject to the conditions of the Registration Agreement, the court recognized that the existence of those conditions does not make the rights so uncertain that they cannot be subject to garnishment. The court correctly noted that the uncertain value of rights is irrelevant to the analysis of whether such rights are subject to seizure by creditors, and noted that some domain names in fact have "substantial value." Finally, the court rejected Network Solutions' argument that domain name registration agreements should be analogized to personal service contracts by noting the purely ministerial nature of the registrar's role in the domain name registration procedure. The registrars do not vet their registrants (Canada, Inc. was a pornographer) and they do not verify that domain name registrants have the rights to the names they register (Canada, Inc. had successfully registered Umbro's trademark).[54]

The Virginia Supreme Court focused its analysis on the creditor's ability to execute the writ of *fieri facias* by garnishment. Importantly, the court *did not* say that a Virginia *fieri facias* writ does not extend to domain names. In fact, the court refused to rule on whether a domain name is a form of intellectual property, stating that such a determination was irrelevant to the outcome of the case.[55] The question of whether a writ extends to a right is a question separate from that of whether the right can be garnished, and the court recognized this distinction in a

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[50] *See, e.g.*, Town & Country Bank of Springfield v. James M. Canfield Contracting Co., 370 N.E.2d 630, 636 (Ill. App. 1977); William E. Mussman & Stefan A. Riesenfeld, *Garnishment and Bankruptcy*, 27 MINN. L. REV. 1,7 (1942).

[51] VA. CODE ANN. §§ 8.01-478, 8.01-501(2000); *In re* Dulaney, 29 B.R. 79, 82 (Bankr. W.D. Va. 1982). A detailed discussion of the writ of *fieri facias* and creditors' remedies generally follows in Part V. *infra*.

[52] VA. CODE ANN. § 8.01-511.

[53] 48 Va. Cir. at 145.

[54] *Id*. at 144-145.

[55] Network Solutions, Inc. v. Umbro Int'l, Inc., 529 S.E.2d 80, 86 (Va. 2000).

footnote, noting that intangible intellectual property rights have historically not been subject to levy and sale under execution statutes.[56] As noted above, in Virginia only a "liability" can be garnished. The court began its analysis by defining "liability" as, among other things, a legal obligation enforceable by a civil remedy.[57] While the court recognized that registration of a domain name results in a period of time during which the registrant has the exclusive right to use the name, the court was convinced that the right to use the domain name was "inextricably bound" to the services provided by the domain name registrar. It then concluded that a contract for services is "not a 'liability' as that term is used in [the statute] and hence is not subject to garnishment." The opinion reflects the court's fear that if it ruled that domain names could be garnished, then all services would be garnishable.[58]

Both courts recognized the challenge facing courts in the Internet age. The trial court saw no problem in bringing domain names under the umbrella of the garnishment statute, ending its decision by proclaiming that "[t]he problem of shaping the new to the old, of reconciling the dual demands of stability and change, is surely congenial to legally trained minds."[59] On the other hand, the Supreme Court was reluctant to interpret the language of the garnishment statute broadly, stating that because garnishment did not exist at common law, "the provisions of the statute must be strictly satisfied."[60] The court ended its decision by recognizing that while the Internet is a "new avenue of commerce," courts "cannot extend established legal principles beyond their statutory parameters."[61] Although the Supreme Court gave a host of reasons why it would not hold that domain names were garnishable property, it noted its strong deference to the legislature by stating, "without statutory changes, we are not willing to allow such results in Virginia. . ."[62]

Although the trial court arrived at the correct result by allowing the creditor to enforce a judgment against a domain name, the court's reliance on trademark protection for the conclusion that domain names are property is flawed. Such reasoning might create a dangerous precedent.[63]

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[56] *Id*. at 86, fn. 13.

[57] *Id.* at 85.

[58] *Id*. at 86-87

[59] 48 Va. Cir. at 145.

[60] 529 S.E.2d at 85.

[61] *Id*. at 88.

[62] *Id*. at 87.

[63] *See generally* Nguyen, *Cyberproperty*, *supra* note 41, at 205-214.

A trademark cannot be sold independently of the goodwill attached to the mark.[64] Following the court's reasoning to its logical (or illogical) conclusion, a domain name that incorporates a trademark is property although it has no independent market value; on the other hand, one that cannot receive trademark protection is not property despite the fact that it can have enormous market value. As I will explain in Part IV of this article, the court was not required to find that a domain name is "intellectual property" to hold that it is property subject to creditors' remedies.

Umbro argued that one can separate the debtor's right to use a domain name from the domain name registrar's obligation to provide services relating to the domain name, with the former being a property right subject to garnishment. In rejecting this argument, the Virginia Supreme Court took a fairly simplistic view of property, almost ignoring the entire field of intangibles. Today, no one would argue that a deposit account held by a bank is not the property of the depositor. But, if the bank kept no records of the depositor's money, the depositor would have a very hard time enforcing its rights in the account. Thus, it seems that bank accounts are inextricably bound to the services that banks provide. Uncertificated securities provide another example. It is impossible for a stockholder to take physical possession of an uncertificated security. In fact, evidence of the stockholder's interest exists only on the books of the corporation. Both the intangible bank account and the intangible stock certificate have value, but the valuable rights would be unusable without the services of someone. The same holds true for domain names. The owner of the domain name, "wine.com" can sell it, but unless someone associates the name with the IP number of the buyer's computer, it is useless.

To find that the right to use a domain name is "inextricably bound" to the registrar's services, the court relied on cases involving the attempted garnishment of an insurer's duty to defend, the assignability of personal service contracts, and the treatment of telephone numbers in bankruptcy.[65] These analogies are not helpful. To use the telephone number cases as the sole examples of cases in which property rights cannot be separated from services ignores the fact that records must be kept of all intangible rights. In addition, the fact that telephone services are highly regulated compounds the bad analogy. The court's reliance on cases involving personal service contracts is also faulty. As noted several times earlier in this article, registrars do not vet registrants before registering names. As a result, a registrar will register the available "juliet.com" to anyone who pays, whether that person is a Shakespeare fan, a woman named Juliet or a pornographer.

It is wrong to cite *Umbro* for the proposition that a domain name is not property. The court simply said that a domain name did not constitute a "liability" for the purpose of the Virginia garnishment statute. To say that there is no liability owing from the registrar to the registrant ignores the fact that the registrar and registrant are parties to a contract. Under that

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[64] *See* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18.2 (1996).

[65] Network Solutions, Inc. v. Umbro Int'l, Inc., 529 S.E.2d 80, 86-88 (Va. 2000).

contract, the registrant can direct the registrar to transfer the domain name to someone else. If the registrar ignores such a direction, it can be held liable for breach of contract. Breach of contract liability will also result if the registrar deletes the domain name.[66]

Adding to the confusion about the nature of domain names for financing purpose is the earlier case of *Dorer v. Arel*.[67] Because of the paucity of cases dealing with the application of creditors' remedies to domain names and because the court in *Umbro* relied on *Dorer* in reaching its decision, it is necessary to address the case in order to show that it is of little use in determining how to enforce a judgment against domain names. In *Dorer*, the plaintiff wanted to use garnishment in an unconventional way. *Dorer* was a trademark infringement action in which the court enjoined the defendant's use of the plaintiff's trademark in its domain name and awarded money damages to the plaintiff. The court's order, however, did not order the domain name registration transferred to the prevailing plaintiff. In order to have the infringing domain name transferred to itself, the plaintiff wanted to institute garnishment proceedings. Unlike the plaintiff in *Umbro*, the plaintiff in *Dorer* did not want the domain name sold to satisfy a judgment. Selling the name would have been senseless because the domain name incorporated the plaintiff's trademark. The court in *Dorer*, like the court in *Umbro*, applied the Virginia garnishment statute but ultimately based its holding that garnishment was not appropriate on the fact that there were other remedies available to the plaintiff.

Unnecessarily, the court addressed whether a domain name can be subject to a writ of *fieri facias* and concluded that "it is unclear."[68] The court examined the property characteristics of trademarks in reaching its conclusion that domain names (at least domain names incorporating trademarks) should not be treated as personal property subject to judgment liens. Important to the court's reasoning is the fact that a trademark has no value apart from the goodwill to which it is attached. Since a trademark cannot be traded in an open market, a domain name that includes a trademark cannot have value in itself. As a result, the court reasoned, since a judgment creditor cannot seize and sell a trademark alone, a judgment creditor might not be able to seize a domain name.[69]

The court then turned to generic domain names. While the court recognized that generic domain names (the court gave the example of "computer.com") can have value in themselves

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[66] Registrars have tried to contractually limit such liability. *See* notes *supra* and accompanying text. At the time of this writing, the question of whether the registrar can incur conversion liability as a result of these acts remains unsettled. *See* discussion of *Kremen v. Cohen*, notes 141 - 147 *infra* and accompanying text.

[67] 60 F. Supp. 2d 558 (E.D. Va. 1999).

[68] *Id*. at 559.

[69] *Id*. at 560-561.

and that there is a "lucrative market for certain generic or clever domain names,"[70] the court doubted whether the rights attached to these names were property rights as opposed to contract rights. The court did not discuss the services provided by the domain name registrar. Instead, the court discussed the uncertain value of domain names, noting that often the only value of a domain name comes from the value added by the user.

Ultimately, the court declined to decide whether or not a domain name was property subject to the writ of *fieri facias* because there were alternative methods by which the plaintiff in the case could obtain relief. The first was the registrar's policy that if a domain name was involved in litigation, and the complainant notified the registrar of the litigation, then the registrar would deposit control of the domain name with the court and abide by court orders regarding its disposition. In addition, the registrar had a domain name dispute resolution procedure available to trademark holders who claimed that a domain name infringed upon their marks. Using either of these mechanisms, the plaintiff might have been able to force the transfer of the domain name to itself.[71]

There are several problems with the *Dorer* case that render it useless to creditors wishing to enforce judgments against domain names. It is unfortunate that the court in *Dorer* addressed whether a domain name could be subject to the writ of *fieri facias* at all, because garnishment was not the appropriate remedy. The court analyzed the garnishment statute and correctly noted that there was no provision for the transfer of the judgment debtor's property to the judgment creditor.[72] The court could have ended its analysis by holding that since the judgment creditor was not seeking to collect a debt, garnishment was not the appropriate action. Also, the court should not have relied on the uncertain value of domain names in analyzing whether or not the garnishment statute was applicable. The question of whether or not something is available to creditors should be considered separately from whether the thing has value at all. In fact, the collection remedies theoretically test the value. A car is available to its owner's creditors whether it is worth $40,000 or $400, and it is up to the creditor to decide whether or not it is worth taking.

With both *Umbro* and *Dorer* questioning whether a domain name is the type of property that creditors can use to satisfy a judgment, it is natural that people started to ask questions about the nature of domain names. The following discussion illustrates some of the confusion.

B. What People are Saying About *Umbro*

As the first reported case dealing with a creditor's right seize to a domain name to satisfy a monetary obligation, *Umbro* spawned a fair amount of commentary. Some commentators

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[70] *Id*. at 561.

[71] *Id*. at 559.

[72] *Id.* at 559.

expressed concern that a domain name might not be property at all. Soon after the case was decided, a number of practicing lawyers wondered online if *Umbro* meant that domain names could not serve as collateral for secured loans.[73] Academics and other authors have also contributed to the discussion. Professors Ronald Mann and Jane Winn, in their casebook on electronic commerce, wonder whether *Umbro* means that domain names should not be forcibly transferred by creditors.[74] Another author, Professor Xuan-Thao Nguyen, examining domain names from the trademark law perspective, echoed the fear of the practicing lawyers by questioning whether cases like *Umbro* mean that domain names cannot be used as collateral.[75] She notes that *Umbro* might mean that domain names cannot be part of the bankruptcy estate of a bankrupt company. [76] After surveying the treatment of domain names by courts and legislatures, she argues that domain names should be treated as property for all purposes. Although certainly rights of value can be treated as property for some purposes but not others,[77] she makes the interesting point that under trademark law, domain names incorporating trademarks are treated as property while generic domain names arguably are not.[78] If that is the state of the law today, and if courts look solely to the trademark analogy to ascertain the rights arising from a domain name registration, the result for creditors is unfortunate. Generic domain names are tremendously valuable but if they are not "property," they are useless to creditors. Domain names incorporating trademarks are similarly useless to creditors, because a creditor, secured or unsecured, cannot force the transfer of a trademark without a transfer of the underlying goodwill of the trademark holder.

Two practitioners writing from the bankruptcy perspective, Warren Agin and Marjorie Chertok, fear that if courts follow *Umbro*, creditors of Internet companies will be in a worse position in bankruptcy than creditors of brick and mortar companies.[79] While this is often true because of the uncertain value of the assets of Internet companies, their point is a good one. Unsettled law compounds the difficulties that all creditors of Internet companies face in bankruptcy.

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[73] UCC List serve discussion (discussion thread on the UCC-L list serve, available at http://lists.washlaw.edu/mailman/private/ucclaw-l/2001-November/001240.html. Earlier discussions on the UCC-L list serve are on file with the author).

[74] MANN & WINN, *supra* note 4, at 551.

[75] Nguyen, *Cyberproperty*, *supra* note 41, at 212.

[76] *Id*. at 201-203, 212-213.

[77] *See* the discussion of non-assignable rights under Article 9 of the Uniform Commercial Code, notes 156 - 159 *infra* and accompanying text.

[78] Nguyen, *Cyberproperty*, *supra* note 41, at 207-212.

[79] Chertok & Agin, *supra* note 42, at 280.

Others posit that rights in domain names are, or should be considered property rights, but differ as to what the law is today regarding perfecting and enforcing secured creditors' interests in domain names. Although an analysis of the rights of secured creditors under Article 9 of the Uniform Commercial Code is beyond the scope of this article, the commentary on that topic illustrates some of the uncertainty that people have about the extent of creditors' rights in domain names. Professor Thomas Ward, in a treatise published before the Virginia Supreme Court's decision in *Umbro*, argues that since the right to use a domain name is a "general intangible" for the purpose of Article 9 of the Uniform Commercial Code, a secured creditor should be able to perfect its right by simply filing a financing statement as prescribed by Article 9.[80] Others are not certain that a simple UCC-1 filing[81] will suffice in the wake of *Umbro*. Some suggest that in order to properly perfect a security interest in a domain name, an extra step is required. Prudent lawyers, they say, will not only comply with Article 9 but will also obtain the consent of the domain name registrar to the security interest.[82] Others urge ICANN to develop a method to accommodate domain name financing.[83]

All of the people who have discussed *Umbro* agree that there is one major open question. In light of *Umbro*, how do creditors turn domain names into money in order to satisfy debts? The *Umbro* case sheds light on the antiquated nature of debt collection remedies and the uncertainty caused by the case extends beyond the rights of judgment creditors.

C. Why *Umbro* Is Important

In his article about financing information technologies, Professor Jonathan Lipson concedes that many information technology assets probably embody property rights for financing purposes, but he then stresses that the important question for financiers "should not be 'Is it property?,' but 'Who cares?'"[84] The same observation could me made about the *Umbro* case. Although it is impossible to discuss enforcement of judgments against domain names without disposing of the property question, *Umbro* is not important for its statements on

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[80] THOMAS M. WARD, INTELLECTUAL PROPERTY IN COMMERCE § 1.14 (2001); *see also* Alexis Freeman, *Internet Domain Name Security Interests: Why Debtors Can Grant Them and Lenders Can Take Them in this New Type of Hybrid Property*, 10 AM. BANKR. INST. L. REV. 853, 883-888 (2002).

[81] Under Article 9 of the UCC, a creditor must file a financing statement, known as a UCC-1, to perfect its security interest in general intangibles.

[82] MANN & WINN, *supra* note 4, at 551; UCC-L discussion, June 1, 2000 (on file with author).

[83] Brent R. Cohen & Thomas D. Laue, *Acquiring and Enforcing Security Interests in Cyberspace Assets*, 10 J. BANKR. L. & PRAC. 423, 436 (2001).

[84] Lipson, *supra* note 41, at 1092.

property. By implying that property and contract are two mutually exclusive concepts, the court in *Umbro* was wrong. The real importance of *Umbro*, therefore, lies in its ultimate holding, that domain names cannot be the subject of a garnishment proceeding because the governing statute does not allow for garnishment of such property.

The answer to Lipson's question of "who cares whether or not a domain name is property?" is easy: creditors. Secured creditors care because the Uniform Commercial Code defines "security interest" as an "interest in personal property."[85] Unsecured creditors care because under the laws governing enforcement of judgments, the object of enforcement must constitute property of the debtor.[86] The trustee in bankruptcy cares because the debtor's bankruptcy estate is made up of all of the interests of the debtor in "property," so if a domain name is not considered property for the purposes of state law collection remedies, it is probably not property of the bankruptcy estate.[87] As I will discuss in the next section of this article, an interest in a domain name is easily classified as a property interest under existing law. Because a domain name registrant is free to transfer his name and receive the benefit of potentially millions of dollars in exchange for the name, a domain name registrant should also be forced to bear the burden of holding such a valuable right. The domain name should be made available to satisfy its registrant's debts.

The answer to the question of how creditors can enforce rights in a domain name is far more elusive and important not just to unsecured judgment creditors seeking to seize and sell assets but also to secured creditors and the trustee in bankruptcy. The Bankruptcy Code gives the trustee in bankruptcy the rights of a lien creditor and allows the trustee to avoid any security interests that could be avoided by such a creditor.[88] To determine which security interests are avoidable, the trustee must rely on the Uniform Commercial Code, which governs priorities between secured creditors and lien creditors. The applicable U.C.C. section subordinates certain security interests to the rights of a "person who becomes a lien creditor."[89] To determine when a person becomes a lien creditor, it is necessary to turn to the relevant state's laws governing

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[85] U.C.C. § 1-201(37).

[86] *See, e.g.*, MISS. CODE ANN. § 11-7-191 ("a judgment so enrolled shall be a lien upon . . . all the property of the defendant"); N.Y. CPLR § 5232 ("the sheriff . . . shall levy upon any interest of the judgment debtor . . . in personal property"); PA. R.C.P. 3107, 42 PA. C.S.A. (2002) ("real or personal property of the defendant may be levied upon").

[87] 11 U.S.C. § 541 (2000); Butner v. U.S., 440 U.S. 48, 55 (1979) (holding that property rights "are created and defined by state law").

[88] 11 U.S.C. § 544(a).

[89] U.C.C. § 9-317(a) (under this section, the lien creditor prevails if that person becomes a lien creditor before: a) the security interest is perfected; or b) the debtor and secured party have entered into a security agreement and the secured party has filed a financing statement).

enforcement of judgments. For secured creditors outside of bankruptcy, the enforcement process is relevant because while Article 9 permits a creditor to seize collateral by self-help repossession, when such repossession is impossible, Article 9 allows the secured party to enforce its interest by "any available judicial procedure."[90] *Umbro* questions the availability of such judicial procedures. In the remainder of this article, I will illustrate that while property is an important concept in creditors' rights it is an extremely broad concept and broad enough to encompass nearly all rights of value. I will then illustrate why the enforcement question is the true open question and suggest some approaches to solving the problem of enforcing creditors' rights in domain names.

IV. ADDRESSING THE PROPERTY QUESTION: WHY NOT?

A. The Myriad Theories of Property

Throughout history, technological and societal advances have led to the creation of new property rights. The rich literature tracing the historical evolution of these rights teaches us that changes in knowledge lead to the creation of new property rights.[91] For better or worse, American commercial law recognizes an enormous assortment of rights, tangible and intangible, as rights available to creditors, thus enabling enterprises of all types to raise money. In the law of secured transactions, as codified in Revised Article 9 of the Uniform Commercial Code, nearly every right of value is assignable as collateral.[92] The Bankruptcy Code adopts a similarly broad view of property rights, stating that, with few exceptions, every interest of the debtor in property becomes part of the bankruptcy estate.[93] Given the history of property rights, the economic view of such rights and the propertization of nearly every right of value in American debtor-creditor law, the holder of a domain name should be deemed to have property rights in such a name sufficient to be used to satisfy debts.

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[90] U.C.C. § 9-601(a)(1).

[91] For a sampling of this literature, *see* HERNANDO DESOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 113-140 (2000) (discussing the legitimization of squatters' rights in colonial America); DEBORA L. SPAR, RULING THE WAVES: CYCLES OF DISCOVERY, CHAOS AND WEALTH FROM THE COMPASS TO THE INTERNET 125-189, 327-366 (2001) (discussing the development of radio and the Internet); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS AND PROCEEDINGS 347, 350-353 (1967) (discussing the research of Eleanor Leacock, who studied the evolution of land rights in 17th century Labrador in connection with the fur trade).

[92] In order for a security interest to attach, the debtor must have "rights in the collateral." U.C.C. § 9-203. Even rights that are non-assignable by contract or by law can be used as collateral under Article 9. *See* U.C.C. §§ 9-406, 9-408.

[93] 11 U.S.C. § 541

Theories of property abound and the term "property" evades a simple definition. For hundreds of years, legal scholars have fashioned different definitions of property but most of these generic descriptions seem inadequate today. Blackstone's definition of property as the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe,"[94] does not ring true today, with limitations on the use of property and the evolution of intangible rights.[95] Numerous scholars looking for a definition of property cite to Wesley Hohfeld's "bundle of sticks,"[96] which became the definition of property incorporated in the Restatement of Property. The Restatement defines property as "legal relationships between persons with respect to a thing."[97] At least one of those scholars concedes that these legal relationships, or "sticks"- rights, privileges, immunities and powers - do not necessarily help us distinguish between legal relationships that are considered property and those that are not.[98] Richard Posner proposes an economic definition of property right: the right to "the exclusive use of valuable resources."[99] Again, while this definition encompasses many rights thought of as property, it does not seem to account for non-exclusive rights. Other scholars distinguish property rights from contract rights by explaining that property rights are regarded as *in rem* rights that bind the entire world, while contract rights are *in personam* and thus bind only the parties to the contract.[100]

From the various definitions of property, one can distill a number of components. One important component of property rights that can be distilled from the definitions is legal enforceability. This important element of property is incorporated in the definition of property proposed by Professor Felix Cohen, who, in his synthesis of the various definitions of property, defined property as that to which the following label can be attached: "To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private Citizen.

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[94] 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1766).

[95] David Frisch, *Remedies as Property: A Different Perspective on Specific Performance Clauses*, 35 WM. AND MARY L. REV. 1691, 1702 (1994) (Frisch, *Remedies*); Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 362 (1954-55).

[96] A. Mechele Dickerson, *From Jeans to Genes: The Evolving Nature of Property of the Estate*, 15 BANK. DEV. J. 285, 287 - 288 (1999); Frisch, *Remedies*, *id.* at 1695-1696.

[97] RESTATEMENT OF PROPERTY, Introductory Note to Chapter 1 (1936).

[98] David Frisch, *The Implicit "Takings" Jurisprudence of Article 9 of the Uniform Commercial Code*, 64 FORDHAM L. REV. 11, 16 (1995).

[99] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 35 (5TH ED. 1998).

[100] Thomas W. Merrill and Henry E. Smith, *What Happened to Property in Law and Economics*, 111 YALE L.J. 357, 360 (2001); Thomas W. Merrill and Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 776-777 (2001).

Endorsed: The State."[101] As another scholar has noted, the rights of possession, use, management, income, capital and security would be meaningless if the holder of those rights could not use or threaten legal force against persons wishing to exercise dominion over the "thing."[102]

Other characteristics of property rights can be distilled from the foregoing. One is value. Under Posner's definition, the resource to which the right applies must have value to someone. Another is transferability. Under the same definition, the property rights must be transferable because not everyone can utilize her rights in the most efficient manner.[103]

While the search for a general definition of property makes for an interesting academic exercise, whether a right is a property right or not is not a question often asked in a vacuum. Sometimes, the question is one of degree – to what extent does a person have a property right in a thing? Often, the question is focused on whether a right should be considered property for a specific purpose.[104] For instance, property scholars have published a large number of articles analyzing whether certain rights should be considered property for the purpose of determining the compensation the holder of such should receive in the event of a taking.[105] In that literature, the characterization of a right as property is crucial to the determination of the remedy available for the deprivation of that right. There are also numerous cases and articles in the family law area analyzing whether specific types of rights should be considered property.[106] Even rights commonly recognized as revocable privileges, such as broadcast licenses, embody sufficient property characteristics to be deemed by some to be *de facto* property.[107] It seems that one can fit

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[101] Cohen, *supra* note 95, at 374.

[102] Frisch, *Remedies*, *supra* note 95, at 1710.

[103] POSNER, *supra* note 99, at 37.

[104] Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 694 (1938) ("what is property may depend on the action that is dependent on the answer").

[105] *See generally* Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127 (1990) and sources cited therein; Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[106] For instance, courts in divorce cases have held that an advanced degree can be a marital asset and that the value of the degree should be a factor in awarding alimony. *See, e.g.*, Beckett v. Beckett, 463 N.W. 2d 211, 212 (Mich. App. 1990); O'Brien v. O'Brien, 507 N.Y.S. 2d 719, 720 (App. Div. 1986).

[107] POSNER, *supra* note 99, at 52 (Posner notes that although broadcast rights are initially allocated in a licensing proceeding, they can later be sold with the physical assets of a radio or television station). *See also In re* Next Wave Personal Communications, Inc., 244 B.R. 253, 267 (Bankr. S.D.N.Y. 2000); *In re* Ridgely Communications, Inc., 139 B.R. 174 (Bankr. D. Md.

almost any right into a definition of property to reach a desired result. In the law of creditors' rights, the desired result is the availability of the value of the right for the payment of debts.

Theories aside, states have legislatively decreed that a variety of rights are to be deemed "property rights" for some purposes. This is not a recent development. More than one hundred years ago, when the nature of corporate stock was not yet settled, some states enacted statutes specifically designating stock as property.[108] More recently, states have designated rights that are not commonly thought of as freely alienable as property rights for some purposes. For instance, under the laws of several states, a person's right to profit from his fame is a property right that can be sold and passed by will.[109] In Pennsylvania, a liquor license is statutorily defined as a revocable privilege, except as to third persons,[110] thus preserving the transfer value of the license for creditors.[111]

B. Applying Property Theory to the Evolution of Rights In Domain Names

An examination of the evolution of rights in domain names shows that the development of such rights fits into the pattern of property rights developing in response to the economic effects of technological change. As the Internet became accessible to the masses, cyber-rights were created and as cyber-rights developed, cyber-wrongs emerged. Courts and legislatures have been forced to respond to these new rights and wrongs in order to give certainty to the relationships among cyberspace participants. The following discussion of business and legal developments will illustrate how rights in domain names are evolving into protected property interests. The cases and statutes discussed are less important for their statements about whether domain names are property interests or not than they are for their illustration of the emerging law of domain names.

1992).

[108] *See* Jellenik v. Huron Copper Mining Co., 177 U.S. 1 (1900) (discussing Michigan statute designating shares of stock as personal property and providing that such shares could be "taken in execution or reached by attachment").

[109] *See* Melissa B. Jacoby and Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploiting the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1324 (2002) (advocating the availability of such rights to creditors in bankruptcy cases).

[110] 47 P.S. § 4-468(d) (2002) ("The license shall constitute a privilege between the board and the licensee. As between the licensee and third parties, the license shall constitute property").

[111] *See* Jackson v. Miller (*In re* Jackson), 93 B.R. 421 (Bankr. W.D. Pa. 1988) (explaining the effect of the amendment to the Pennsylvania Liquor Code that characterized a liquor license as property for some purposes).

1. The Business of Domain Name Registration: People Own Words

Before the advent of the Domain Name System, the ability of people to own words was sharply limited by trademark law. Today, however, domain name registrars are telling potential registrants that the registration of a domain name results in an ownership interest in the name. For instance, one of the "Frequently Asked Questions" on the "GoDaddy" web site is "[i]f I buy a domain from GoDaddy, will I be listed as its owner?" The answer assures the potential registrant that he will be the owner of any name that he registers and that as owner, he will be able to transfer, renew or cancel his name.[112] GoDaddy is right: once a person registers a domain name, the person owns the right to use that name as an Internet identifier. While the right is created by contract, it prevents all other persons in the world from doing the same.

The ability of persons to buy words makes the business of domain name registration antithetical to the law of trademarks. In the domain name business, the first person to register a domain name has the exclusive right to use that name as an Internet identifier[113] while the law of trademarks restricts the exclusive, unfettered ownership of words.[114] For instance, more than one company can have trademark rights in the word "united." United Air Lines has exclusive use of the word "united" to identify its airline and United Van Lines has exclusive use of the word "united" to identify its moving company. As a result, no other airline or van company can use the word "united" in its name, but companies providing other goods and services might be able to use it. On the other hand, the number of people who can use "united" as an Internet identifier is limited by the number of available top-level domains. As a result, United Air Lines, which has registered "united.com," can exclude everyone else in the world from using "united.com" as a domain name.[115]

Trademark law contains numerous restrictions on a person's ability to own words. The law of trademarks does not allow the propertization of generic terms. For instance, a wine merchant cannot obtain trademark protection for the word "wine."[116] Generally, a person's

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[112] *See* the "FAQ" page at http://registrar.godaddy.com (last visited December 16, 2002).

[113] *See* note 22 *supra* and accompanying text.

[114] This tension is discussed in detail in David J. Franklyn, *Owning Words in Cyberspace: The Accidental Trademark Regime*, 2001 WIS. L. REV. 1251 (2001). According to Professor Franklyn, the Internet "confers word ownership with abandon." *Id*. at 1252.

[115] WARD, *supra* note 80, at § 1.14 (2001). United Air Lines has also registered united.ca for its Canadian site and united.fr for its French site. United.net is owned by United Telephone and united.org by the United Federal Credit Union.

[116] *See* 2 MCCARTHY, *supra* note 64, at §12:1; Xuan-Thao N. Nguyen, *Shifting the Paradigm in E-Commerce: Move Over Inherently Distinctive Trademarks – The E-Brand, I-Brand and Generic Domain Names Ascending to Power?*, 50 AM. U. L. REV. 937, 963 (2001).

trademark rights in a word are not protected unless the person actually uses the word to identify its product. A trademark in a word gives the holder a property right that has value, and is assignable, only with the goodwill of the person behind the mark.[117] The rights that a trademark owner has to prohibit others from use of her word is limited: a trademark holder may prohibit use only to the extent that the competing use damages the owner's goodwill.[118] As a result, United Air Lines and United Van Lines can coexist while two airlines called "United Air Lines" cannot. These restrictions are necessary in trademark law because trademark law protects competition: allowing only one person the right to use the word "wine" to sell wine could lead to monopolization of the wine industry.[119] On the other hand, the business of domain names allows one and only one person to own the domain name "wine.com."

While intellectual property law has not allowed people to claim absolute property rights in words, the Internet has made ownership of words, in the form of domain names, not only economically desirable, but necessary. If there were no domain name system, it would be nearly impossible for individuals to find web sites and the volume of goods, services and information provided through the Internet would likely be a minuscule fraction of what it is today. Within the DNS, registrants must have some protected rights in order to make the use of their names possible. If there were no protected rights in domain names and anyone could use a word at any time, there would be no certainty in the system and no market for domain names. A system is emerging under which a person can purchase a domain name pursuant to a binding contract with a domain name registrar and receive a valuable right that can be sold for a large amount of money. While it may take some time for courts to bless every aspect of a domain name transaction, the domain name business has already created rights of value.[120]

2. Domain Names and Trademark Law: Congress Calls the Domain Name Property

Because trademark law grants no ownership rights in words standing alone, the trademark analogy is a poor one for creditors seeking to enforce their judgments against domain names. In one sense however, the recent evolution of trademark law to recognize rights in domain names illustrates how our legal system is developing to solidify rights in this new type of property.

The law governing the interface of domain names and trademarks emerged early and continues to emerge. The growth of the DNS spawned two now well-publicized cyber-wrongs: cybersquatting and cyberpiracy. Cybersquatting is the wrongful registration, as a domain name,

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[117] MCCARTHY, *supra* note 64, at §§ 2:15, 18:1; Franklyn, *supra* note 114, at 1272-1274.

[118] Marshak v. Green, 746 F.2d 927, 929 (7th Cir. 1984).

[119] 2 MCCARTHY, *supra* note 64, at § 12:2; Franklyn, *supra* note 114, at 1254.

[120] *See* Franklyn, *supra* note 114, at 1281-1282.

of the name of another person.[121] A cybersquatter often registers the name of another person for the purpose of selling that name to the trademark holder. One notorious cybersquatter registered, among other names, crateandbarrel.com, deltaairlines.com, eddiebauer.com and neiman-marcus.com.[122] Cyberpirates register names that incorporate famous trademarks for a variety of reasons. Sometimes, the cyberpirate hopes to lure viewers to his site by the famous-sounding domain name.[123] One early cyberpirate registered the names "porschecar.com," "porschagirls.com" and "porsch.com" all of which led Internet surfers to pornographic web sites.[124]

Both ICANN and the United States Congress have acted to combat these two wrongs. ICANN promulgated the UDRP, explained in Part II of this article, in 1999.[125] That same year, the United States Congress also acted to address the competing interests of those concerned with the integrity of domain name registration and those concerned with trademark protection by enacting a set of amendments to the Lanham Act known as the Anticybersquatting Consumer Protection Act ("ACPA"). Because government recognition and protection are important elements of property rights, this discussion will focus on the ACPA.

The ACPA is significant both for its substance and its procedure. Substantively, it solidifies rights in domain names. The ACPA reins in the unfettered use of words by a first-in-time domain name registrant by giving a federal cause of action to a trademark holder whose mark has been wrongfully registered, as a domain name, by another person.[126] A prevailing

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[121] In the legislative history to the Anti-Cybersquatting Consumer Protection Act, cybersquatting is defined as "registering, trafficking in, or using domain names (Internet addresses) that are identical or confusingly similar to trademarks with the bad-faith intent to profit from the goodwill of trademarks." H.R. Rep. 106-412, at 7 (1999).

[122] *Intermatic, Inc. v. Toeppen*, 947 F. Supp. 1227, 1230 (N.D. Ill. 1996).

[123] Thomas R. Lee, *In Rem Jurisdiction in Cyberspace*, 75 WASH. L. REV. 97, 105 (2000).

[124] *Id*. at 108.

[125] *See* notes 28-29, 37 *supra* and accompanying text. The policy can be found at http://www.icann.org/dndr/udrp/policy.htm. All ICANN-accredited registrars must require domain name registrants to follow the UDRP. The ICANN Registrar Accreditation Agreement is found at http://www.icann.org/registrars/ra-agreement-17may01.htm (last visited February 28, 2003). *See also* MANN & WINN, *supra* note 4, at 37-39.

[126] 15 U.S.C. § 1125(d) (2000). The ACPA also gives a cause of action to a person whose personal name is protected as a mark. For a discussion of the history of the ACPA, *see* Xuan-Thao N. Nguyen, *Blame It on the Cybersquatters: How Congress Partially Ends the Circus Among the Circuits With the Anticybersquatting Consumer Protection Act*, 32 LOY. U. CHI. L.J. 777 (2001).

plaintiff can recover statutory damages of up to $100,000 per domain name and can request that the court order cancellation or transfer of the domain name.[127] However, a mark holder can only prevail if the registrant is found to have registered the mark with a bad faith intention to profit from the mark.[128] The ACPA provides a non-exhaustive list of factors that a court may consider in determining whether a name has been registered in bad faith.[129] If a registrant is not found to have registered her name in bad faith, the name belongs to the registrant for so long as she pays her fees.

Procedurally, the ACPA is significant because it allows courts to exercise *in rem* jurisdiction over domain names. A court can do so when it finds that the plaintiff cannot obtain *in personam* jurisdiction over the would-be defendant or cannot locate the would-be defendant by sending a notice to that person's address as listed with the domain name registrar and publishing notice of the action.[130] For the purpose of *in rem* jurisdiction, the domain name is deemed to be located at the location of the registrar or registry for the infringing domain name or in the judicial district in which "documents sufficient to establish control and authority regarding the use or disposition of the domain name are deposited with the court."[131] The ACPA limits the remedy available to a plaintiff who proceeds against a domain name *in rem* to forfeiture, cancellation or transfer of the domain name.[132]

While at least one author points to the ACPA's grant of *in rem* jurisdiction as support for the proposition that rights in domain names are property rights available to creditors,[133] the ACPA, and the cases preceding its enactment, are more significant as illustrations of how legal institutions are adapting to new rights. The grant of *in rem* jurisdiction over domain names is a response to problems created by the online domain name registration process. Prior to the ACPA's enactment many aggrieved trademark owners were deprived of an effective remedy against cyberpirates and cybersquatters because of the difficulty of obtaining jurisdiction over

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[127] 15 U.S.C. §§ 1117(d); 1125(d)(1)(C).

[128] 15 U.S.C. § 1125(d)(1)(A).

[129] 15 U.S.C. § 1125(d)(1)(B).

[130] 15 U.S.C. § 1125(d)(2).

[131] *Id.*

[132] 15 U.S.C. § 1125(d)(2)(D)(i).

[133] Nguyen, *Cyberproperty*, *supra* note 41, at 208-212; Xuan-Thao N. Nguyen, *Commercial Law Collides With Cyberspace: The Trouble With Perfection – Insecurity Interests in the New Corporate Asset*, 59 WASH. & LEE L. REV. 37, 72-74 (2002) ("By recognizing a domain name as a 'thing' for *in rem* civil actions, the ACPA lends support to the classification of domain names as a form of intangible property").

some of them. Some wrongful registrants are foreign corporations. Others, the "cyberpirates," do not want to be found, so they register their domain names using fictitious names or addresses. Because the registration process is conducted over the Internet and the process involves no investigation of the registrant and that registrant's possible rights to the name, anonymity is easily achieved. As a result, even if the trademark owner had an action for trademark infringement, the owner could not pursue the action because of the impossibility of obtaining *in personam* jurisdiction over the registrant.[134]

To eliminate the obstacle of obtaining jurisdiction over foreign and anonymous cyber-wrongdoers, the ACPA allows a court to exercise *in rem* jurisdiction over domain names. Before Congress enacted the ACPA, several plaintiffs attempted to obtain *in rem* jurisdiction over domain names and some courts rejected such attempts, stating that a domain name was not a proper *res* over which *in rem* jurisdiction could be exercised.[135]

For purposes of the ACPA's jurisdiction provision, a domain name is property. Traditionally, *in rem* jurisdiction gave a forum's courts authority to adjudicate ownership rights to property located within that forum's borders.[136] As intangible rights have become more significant economically, courts have expanded the reach of *in rem* jurisdiction to include intangible rights. In doing so, courts have rejected the argument that the impossibility of manual seizure of an intangible right is a barrier to the exercise of *in rem* jurisdiction.[137] Despite the difficulties in determining the location of intangible property, courts can and do exercise jurisdiction over intangibles, including shares of stock, insurance policies and payment rights.[138]

Defendants continue to challenge the *in rem* jurisdiction provision of the ACPA. One of the arguments often raised by defendants is that *in rem* jurisdiction is inappropriate because a domain name is not property. Courts have dismissed this argument by stating that legislatures can decide whether or not something is property. In the words of one court, "[e]ven if a domain name is no more than data, Congress can make data property and assign its place of registration

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[134] *See generally* Lee, *supra* note 123, at 106.

[135] *See, e.g.*, Porsche Cars N. Am. v. Porsche.com, 51 F.Supp. 2d 707, 712-713 (E.D.Va. 1999) (dismissing complaint because the Trademark Dilution Act did not permit *in rem* actions). This opinion was subsequently vacated and the case remanded. *See* Porsche Cars N. Am. v. Porsche.com, 215 F.3d 1320 (4th Cir. 2000). *See also* Lee, *supra* note 123, at 107-110.

[136] *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1070 (2000); Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denckla, 357 U.S. 235 (1958).

[137] Lee, *supra* note 123, at 134.

[138] *Id*.

as a situs."[139] Indeed, many rights are given a property label by statute.[140]

While Congress simply anointed domain names with property status to find a basis for *in rem* jurisdiction over them, the very fact that Congress did so shows that our legal system views domain names as rights worthy of protection. The ACPA stabilizes rights in domain names by giving courts the means to adjudicate the question of whether or not a domain name registrant is entitled to use a word as its domain name. If the court finds that the domain name was not registered in bad faith, then the registrant's rights, and thus the marketability of the name, are protected.

The judicial and then legislative expansion of *in rem* actions to domain names illustrates the adaptation of legal institutions to problems introduced by the Internet. In the case of cybersquatting and cyberpiracy, the very registration procedure that creates rights in domain names creates an opportunity for fraud because of its anonymity. Prior to passage of the ACPA, courts were presented with this problem and found no clear existing solution. They then looked to traditional jurisdictional principles and found that by characterizing a domain name as property and giving it a situs, aggrieved trademark holders could get the relief that would otherwise have been denied to them. The ACPA is evidence of the logical progression of the law. Concepts that were originally fashioned to enable litigants to ascertain rights in tangible property have necessarily been modified to account for intangible rights. Domain names are among the most recently minted of such rights. Cybersquatting and cyberpiracy cases were the result of early abuses of the domain name registration system and the large number of such cases forced Congress to find a solution to the jurisdiction problem. The fact that other legal problems arising out of the use of domain names remain unsolved in no way indicates that domain names are not legally protected property rights.

3. Domain Names and Tort Law: Can a Domain Name Be Converted?

Other cyber-wrongs remain in search of remedies. The decision in *Kremen v. Cohen*[141] is a good example of one that might seem, at first blush, to indicate that rights in domain names are not protected property rights. The plaintiff, Gary Kremen, registered the domain name "sex.com" with Network Solutions. About a year and a half after he registered the domain name, another person, purporting to act for Kremen, contacted Network Solutions and asked it to cancel the domain name. Sometime later, this impostor registered "sex.com" for his own company. Kremen sued the impostor and Network Solutions. One of the causes of action that he alleged against

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[139] Caesars World, Inc. v. Caesars-Palace.com, 112 F.Supp.2d 502, 504 (E.D. Va. 2000).

[140] *See* notes 108-111 *supra* and accompanying text.

[141] 99 F. Supp. 2d 1168 (N. D. Cal. 2000).

Network Solutions was "conspiracy to convert property."[142]

The court granted Network Solutions' motion for summary judgment and in doing so ruled that a domain name could not, at least in California, serve as the basis for a conversion claim. The court discussed the elements of conversion and explained that while the tort was historically limited to tangible property, some states, including California, have extended the tort of conversion to specified types of intangible property. The intangible property in California that can be the basis for a conversion action includes stock certificates and notes, property that is either "customarily merged in or identified with some document."[143] The court recognized that the California legislature's decision to extend the tort of conversion to negotiable instruments and other reified intangible obligations might have been arbitrary because that extension expanded the notion of tangibility for the purpose of conversion actions.[144]

The court's reluctance to extend the tort of conversion to domain names seems based less on the characteristics of domain names than the recognition that certain matters are best left to legislatures. Because conversion is a strict liability tort, the court was reluctant to impose liability on NSI for performing its purely ministerial functions. The court concluded by recognizing the "imprudence of superimposing the archaic principles governing the tort of conversion onto the nebulous realm of the Internet."[145] Therefore, while the court said that the domain name could not be the subject of a conversion action, the court did not say that the domain name was not property. The court recognized that there are many types of intangible property rights, and most of those can not be the subject of a conversion action. In its order certifying the conversion question to the California Supreme Court, the Ninth Circuit acknowledged that domain names are "a kind of property."[146]

Nor did the court say that the plaintiff had suffered no harm. While the court in *Kremen* did not grant the plaintiff his requested relief, it did acknowledge that a wrong had been

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[142] 99 F. Supp. 2d at 1170-1171. The plaintiff also sued Network Solutions for breach of contract but the court granted summary judgment on that claim, finding no contract. When "sex.com" was registered, registrants were not required to pay for their names. *See* notes *supra* and accompanying text.

[143] *Id*. at 1173. A court applying Pennsylvania law came to the same conclusion. Famology.com, Inc. v. Perot Systems Corp., 158 F. Supp. 2d 589 (E.D. Pa. 2001).

[144] 99 F. Supp. 2d at 1174.

[145] *Id*.

[146] Kremen v. Cohen, Order Certifying Question to the California Supreme Court, 314 F.3d 1127 (9th Cir. 2003). Indeed, under the California Civil Code, property includes "all inanimate things which are capable of appropriation or of manual delivery." CAL. CIV. CODE §§ 654, 655.

committed and restored registration of the domain name to Kremen. The court also rendered a $65 million judgment against the wrongdoer, Stephen Cohen, but that judgment proved uncollectible, hence the action against Network Solutions.[147] The reluctance of the court in *Kremen* mirrors the reluctance of the court in *Umbro*: it did not want to expand an existing body of laws, initially developed to protect tangible rights, to intangible rights. The very fact that the issue in *Kremen* remains unsettled is evidence that courts are struggling to find ways to protect registrants' right in domain names.

C. If It Has Value, the Creditor Can Have It: Property and Creditors' Rights

A right can be considered property for some purposes but not for others. When considering whether a creditor should be able to enforce a judgment by forcing the sale of a domain name, it is necessary to consider the purpose behind the laws governing creditors' rights. For the purpose of those laws, a debtor's rights in property need not be absolute; so long as a debtor has rights in something a creditor can convert into money, those rights can be made available to creditors.[148] This principle is codified in the Bankruptcy Code and the Uniform Commercial Code and it has been recognized by courts for more than a century.

Property plays an important role in the Bankruptcy Code. The moment a debtor files a bankruptcy petition, an estate is created consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case."[149] The value of the property in this estate determines the amounts that must be paid to creditors, both in a reorganization and a liquidation.[150] If a debtor's rights are considered estate property, then the automatic stay prevents creditors from taking any actions to obtain or exercise control over the rights.[151]

The definition of property is sufficiently broad to encompass nearly every right of value possessed by the debtor. The breadth of the definition has increased over time. The Bankruptcy Act of 1898 defined property in terms of its transferability; the Bankruptcy Code of 1978 contains no such restriction.[152] The term property, for the purpose of inclusion in the bankruptcy

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[147] Kremen v. Cohen, Order Certifying Question to the California Supreme Court, 314 F.3d 1127 (9th Cir. 2003).

[148] Under the Bankruptcy Code and the Uniform Commercial Code, those rights need not even be transferable by the debtor. *See* 11 U.S.C. § 541; U.C.C. §§ 9-406, 9-408.

[149] 11 U.S.C. § 541(a)(1) (2000).

[150] 11 U.S.C. §§ 726, 1129.

[151] 11 U.S.C. § 362(a)(3).

[152] *Compare* Bankruptcy Act of 1898, § 70(a)(5), 30 Stat. 544, *with* 11 U.S.C. § 541(a)(1).

estate under the Bankruptcy Code of 1978, was intended to include all "choses in action and claims by the debtor against others."[153] The Bankruptcy Code does not consider "property" and "contract" to be mutually exclusive terms, and there are many cases holding that rights arising from contractual relationships constitute property of the bankruptcy estate, even if those contractual rights are non-assignable.[154] In addition, the Bankruptcy Code specifically invalidates restrictions on the transfer of rights if the restriction is triggered by a bankruptcy filing.[155]

Under Article 9 of the UCC, a debtor can grant a security interest in almost every right of value. Prior to the most recent revision of Article 9, accounts receivable could be assigned as collateral, even if the contract creating the account receivable provided that the right was not assignable.[156] Current Article 9 expands the invalidation of restrictions on assignment beyond contractual restrictions on the assignment of accounts. Under Revised Article 9, all legal and contractual restrictions on the assignment of accounts receivable and general intangibles are rendered invalid at least to the extent that such restrictions hinder a debtor's ability to grant a security interest in the right.[157] For some types of collateral, the restrictions are completely invalidated; that is, not only can a debtor grant the security interest in the collateral but the secured party can also enforce the security interest.[158] The effect of these sections is to make non-assignable, but valuable, rights available to creditors, enabling debtors to obtain additional credit. Debtors can receive value from the sale of certain rights, such as license and franchise rights, which, by agreement or law, might not be assignable without the consent of another person. Revised Article 9 recognizes this and allows debtors to use that value as collateral for loans.[159]

Courts analyzing whether rights constitute property rights for debt collection purposes, have taken a similarly broad approach in line with the purposes behind debt collection laws. For more than a century, courts have held that if a right is transferable by its owner, its value can be

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[153] S. REP. NO. 95-989 at 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868; H. REP. NO. 95-595 at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323-24.

[154] *See, e.g., In re* I.D. Craig Service Corp., 138 B.R. 490 (Bankr. W.D. Pa. 1992) (right to purchase season tickets for Pittsburgh Steelers football games held to be property of the estate notwithstanding restrictions on sale). For a good general discussion of the concept of "property of the estate" as it applies to intellectual property rights, *see* WARD, *supra* note 80, at § 4.15.

[155] 11 U.S.C. § 541(c)(1).

[156] Former Article 9, § 9-318.

[157] U.C.C. § 9-408(c)(d).

[158] U.C.C. § 9-406(d)(f).

[159] Official Comments 7 & 8 to U.C.C. § 9-408.

made available to creditors. In the late 19th and early 20th centuries, there was some question as to whether a share of corporate stock was the type of property that could be a *res* for the purpose of attachment proceedings. In one early case involving a prejudgment attachment, a New York court ruled that a paper stock certificate was property, stating:

> Certificates of stock are treated by business men as property for all practical purposes. They are sold in the market and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand and they are the subject of larceny.[160]

Ninety-five years later, a Maryland court used similar reasoning to hold that a liquor license was property for the purpose of debt collection laws. In so ruling, the court distinguished the right to sell liquor from personal privileges that are the result of intellectual attainment, such as the right to practice medicine. To illustrate that the right arising from a liquor license is property while the privilege of holding a license to practice medicine is not, the court focused on market realities. There is no value on the open market for a professional license. For that reason, and because a professional license cannot be sold, transferred, pledged or inherited, a professional license is not property available to judgment creditors.[161] The same court defined property as "everything that has exchangeable value or goes to make up a man's wealth – every interest or estate which the law regards of sufficient value for judicial recognition."[162] Arguably this definition is too broad in that it would probably encompass professional licenses, but nevertheless, the idea is correct. The court itself conceded that what it might consider property for some purposes would not be property for others, a concession echoed by other courts ruling that a liquor license (or the value therefrom) could be made available to creditors.[163] These courts focused on the value of a license on the open market and the transferability of such a license, without losing sight of the fact that the state can revoke such a license in accordance with the applicable statute. In one case, the court, after explaining the market value of liquor licenses, concluded that there was no good reason to exempt liquor licenses, and their tangible evidence, from "the same process as that to which other property rights are subject."[164]

A domain name is transferable. Throughout history, the laws governing enforcement of judgments have evolved to provide that any right that can be transferred by the debtor can be

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[160] Simpson v. Jersey City Contracting Company, 58 N.E. 896, 898 (N.Y. 1900).

[161] Dodds v. Shamer, 663 A.2d 1318, 1323 (Md. 1995).

[162] *Id*. at 1322.

[163] *See, e.g.*, Springsteen v. Meadows, Inc., 534 F. Supp. 504 (D. Mass. 1982) (recognizing that while a liquor license has market value, the state can revoke it in accordance with the applicable statute).

[164] *Id*. at 506.

forcibly transferred by that debtor's creditors. Any interpretation of *Umbro* that would remove domain names from the pool of property available to creditors thwarts that very policy behind collection laws.

V. ADDRESSING THE ENFORCEMENT QUESTION: HOW?

A. The Enforcement System and Its Critics

The general policy behind collection remedies is to "lend the creditor all reasonable assistance for the enforcement of his claim, especially against a debtor who, though possessed of the means to pay, seeks to evade his obligation."[165] In expanding collection remedies to provide for enforcement of judgments against domain names and other intangible assets, it is important to keep this policy in mind and to think in broad terms about the existing collection statutes. All the mechanisms that would allow creditors to enforce judgments against domain names exist today in our legal system in various forms and should be interpreted flexibly to allow creditors to realize the value of emerging intangible assets.

While the policy behind collection remedies is clear, the method of effecting them is anything but. The law of enforcement of judgments comes from a confusing conglomeration of state legislation, much of it antiquated. In describing its own state's array of collection statutes, the Connecticut Supreme Court stated that "the ancient writs of execution have become so encrusted with procedural barnacles that frequently they are not suited to the needs of modern society."[166] Much of the difficulty in interpreting enforcement of judgment statutes is due to the arcane terminology used in them.[167] A few general rules emerge from this collection of statutes, however. The first is that the rendition of a judgment, by itself, usually does not create a lien on any property of the judgment debtor. One reason for this general rule is that the rendition of a judgment does not provide sufficient notice to the public of an interest in the subject property.[168] Therefore, the judgment creditor must take additional steps to obtain rights in his debtor's property. The type of property involved determines the additional steps that are necessary to create a lien. A "judicial lien" on property can be created by a judgment lien, by execution, or by

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[165] Jacobs, Bell and Baumol v. Curtis, 556 A.2d 817 (N.J. Super. 1989) *quoting* Passaic Nat'l Bank v. Eelman, 116 N.J.L. 279, 286 (1936); *see also* Burchett v. Roncari, 434 A.2d 941, 942 (Conn. 1980) ("It has long been the policy of our law that all of the property of a debtor should be available for the satisfaction of his debts . . .").

[166] Burchett v. Roncari, 434 A.2d at 942.

[167] *See generally*, William J. Woodward, Jr., *New Judgment Liens on Personal Property: Does "Efficient" Mean Better?*, 27 HARV. J. ON LEGIS. 1, 1-7 (1990). Professor Woodward calls the judgment collection system "a legal eyesore." *Id.* at 2.

[168] THOMAS D. CRANDALL, RICHARD B. HAGEDORN & FRANK W. SMITH, JR., THE LAW OF DEBTORS AND CREDITORS ¶ 6.05[2][c] (Revised Edition 1991 & Supp. 2001).

garnishment. If, due to the nature of the property, the creditor cannot obtain a judicial lien, he can force a transfer of the debtor's property by use of a creditor's bill.

In most states, if the property is real estate, a judgment creates a lien on the property when it is docketed or recorded in the records specified in the applicable statute.[169] The resulting lien is known as a "judgment lien." When the real property is sold, the judgment lien will be satisfied according to its priority. This general rule exists because all American states have real estate recording systems and everyone buying or financing real estate is expected to search those records and the judgment records before buying or extending credit. In a tiny minority of states, the judgment lien extends to personal property as well.[170]

If a judgment creditor cannot perfect her lien against the debtor's property by recording a document, the judgment creditor must seize or otherwise gain control over the property in order to obtain and perfect her lien. A judgment creditor has no right to use self-help to seize a debtor's property to satisfy the judgment but instead must enlist the help of the sheriff.[171] After winning a judgment, a creditor has the right to a writ of execution, originally known and still known in some places as a writ of *fieri facias*. In the form imported from the English common law, the writ of *fieri facias* extended to all goods and chattels of the debtor but not to contract rights, debts and other intangible property.[172]

The creditor must deliver the writ to a sheriff and it is the sheriff's job to execute the writ. The sheriff does so by way of a levy. When the property is easily movable, to "levy" means to take actual physical possession of the property. At common law, a sheriff could execute the writ of *fieri facias* only by physical seizure of tangible property.[173] When the property cannot be moved easily, constructive possession can result in a levy.[174] Whether the seizure is actual or

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[169] *Id*. at ¶ 6.05[2][a].

[170] In some states, the judgment creates a lien on the personal property when docketed. CODE OF ALA. §§ 6-9-210, 6-9-211 (1993); GA. CODE ANN. § 9-12-81 (1993); MISS. CODE ANN. § 11-7-191 (1972 & Supp. 2002). In others, the creditor must record the judgment in the office in which Uniform Commercial Code records are filed. CAL. CODE CIV. PROC. 697.510 (1987); CONN. GEN. STAT. § 52-355a (1991 & Supp. 2002); FLA. STAT. §§ 55.202-.205 (1994 & Supp. 2003). *See also* Woodward, *supra* note 167, at 4.

[171] Woodward, *supra* note 167, at 4.

[172] William H. Loyd, *Executions at Common Law*, 62 U. PA. L. REV. 354, 358-363 (1914).

[173] Houghton v. Pacific Southwest Trust & Savings Bank, 295 P. 1079 (Cal. App. 1931).

[174] CRANDALL, HAGEDORN & SMITH, *supra* note 168, at ¶ 6.05[3][b]. *See also* Credit Bureau of Broken Bow v. Moninger, 284 N.W. 2d 855, 857 (Neb. 1979); MINN. STAT. ANN. §

constructive, notice is key. So long as the owner of the property and third parties have notice that the property is levied upon and will be sold, the levy is effective.[175] One well-stated rule, from the 1901 case of *Battle Creek Valley Bank v. First National Bank*, is that a levy "is sufficient if the property is present and subject for the time being to the control of the officer holding [the] writ and that he in express terms asserts his dominion over it by virtue of such writ."[176] The levy perfects the judgment creditor's lien on the subject property and places the property in *custodia legis*.[177] In some states, the date of levy is the date as of which the lien has priority over competing interests in the property, in others, the lien relates back to the date on which the writ was delivered to the sheriff.[178]

When the property sought is intangible or in the hands of a third party, enforcement is more complicated. Although people commonly think of garnishment as a remedy available only against intangible property such as debts owing to the judgment debtor, it is available under most statutes whenever a defendant's property is in the hands of a third party.[179] Garnishment was developed in medieval times to compel the appearance of a foreign merchant. A plaintiff could sue a foreign merchant and attach the goods of such merchant in the hands of third persons in the plaintiff's jurisdiction or stop the payment of debts owed to the foreign merchant by persons located in the plaintiff's jurisdiction.[180] The garnishment remedy exists because a writ of execution could not reach such property. When a creditor proceeds by garnishment, the creditor directs the sheriff to serve notice of garnishment on the person holding the debtor's property. The person holding the property must answer the writ by stating what property of the debtor is in his hands.[181] If the third party answers the writ incorrectly and does not turn over the debtor's

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550.13 (allowing a sheriff to levy on bulky items by serving notice of the execution on the person holding the property and filing a copy of the execution within three days in the Uniform Commercial Code records).

[175] *See, e.g.*, Johnson v. Dahlquist, 225 P. 817 (Wash. 1924) (holding that a levy on a debt owed the judgment debtor was effective and rejecting the position that intangible property is not subject to execution).

[176] 88 N.W. 145, 145 (Neb. 1901)

[177] CRANDALL, HAGEDORN & SMITH, *supra* note 168, at ¶ 6.05[3][b].

[178] *Id*. at ¶ 6.05[3][f], ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 66 (4th ed. 2001).

[179] CRANDALL, HAGEDORN & SMITH, *supra* note 168, at ¶ 6.05[4] ; WARREN & WESTBROOK, *id*. at 81-82.

[180] Mussman & Riesenfeld, *supra* note 50, at 8

[181] CRANDALL, HAGEDORN & SMITH, *supra* note 168, at ¶ 6.05[4].

property, the third party can be liable for the entire judgment against the debtor.[182] Often, this remedy is used to collect debts owing to the judgment debtor such as wages and bank accounts. If the property is a debt owing to the judgment debtor, the garnishee is ordered to pay the amount owing to the judgment creditor.[183]

Once a sheriff has obtained possession of property, the property is sold at a public auction. The statutes governing the sale process are specific as to the nature of the notice that the public must be given of the sale. The statutes usually specify that notices be posted at several places within the sheriff's county.[184] The policy behind statutes governing execution sales is to attract as many potential bidders as possible in order to achieve the best possible price for the property sold.[185] If the sale price of the property is more than the amount owed to the judgment creditor, the creditor must turn the excess proceeds over to subordinate lien creditors or if no such creditors exist, to the debtor.[186] If the sales proceeds are less than the amount owed to the creditor, the creditor must find other property to seize and sell.

A fourth method of subjecting a debtor's property to his debts is the creditor's bill. The creditor's bill is an equitable remedy that was originally developed to assist a creditor who was unsuccessful in locating the debtor's property. Because the common law writ of *fieri facias* did not extend to contract rights and other intangible property, creditors were required to enlist the help of the court of chancery or the legislature for relief.[187] By the use of a creditor's bill, a creditor can request that the court order the defendant to sell the intangible property or assign it to satisfy the judgment.[188] Some courts hold that if there is no statute specifically authorizing a

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[182] Loftin v. Rush, 767 F.2d 800, 808 (11th Cir. 1985)(applying Georgia law); Webb v. Erickson, 655 P.2d 6 (Ariz. 1982).

[183] CRANDALL, HAGEDORN & SMITH, *supra* note 168, at ¶ 6.06[2][a].

[184] *Id.* at ¶ 6.06 [2][b]; *see also* VA. CODE. ANN. § 8.01-492 (in Virginia, the sheriff must fix a time and place for the sale fo seized property and post notice of same at least 10 days before the sale at some place near the debtor's home and at two other public places in the sheriff's county or city); PA. R.C.P. 3128, 42 PA. C.S.A.(2002) (In Pennsylvania, notice of sale of personal property must be given at least six days before the scheduled sale, "by handbills posted at the sheriff's office, the place of levy, and the place of sale").

[185] Manufacturers Hanover Trust v. Koubek, 396 S.E. 2d 669, 672 (Va. 1990).

[186] CRANDALL, HAGEDORN & SMITH, *supra* note 168, at ¶ 6.06[2][c].

[187] Loyd, *supra* note 172, at 363; Newman v. Willetts, 52 Ill. 98, 101-102 (1869).

[188] DAN B. DOBBS, DOBBS LAW OF REMEDIES § 1.4 (Practitioner Treatise Series 2nd Ed. 1993).

levy on intangibles, then a levy on such property is not possible.[189] When a creditor must resort to a creditor's bill to subject property to its owner's debts, it is solely because of the intangible nature of the property and not for any public policy reason.[190]

The foregoing description belies the actual confusion in state laws and in no respect are the governing laws more confusing than they are with respect to intangible property. While judgment creditors everywhere can seize tangible personal property through the execution process, a comparable mechanism for the seizure of intangible property is not universally available. Some states retain the common-law writs,[191] others do not. When enforcement of judgment statutes cling to the common-writs of execution, many intangible rights are immune from levy.[192] While the Virginia statute at issue in *Umbro* provides for a writ of *fieri facias*, the lien of that writ is not restricted to tangible personal property but extends to all personal property of the debtor, whether tangible or not.[193] Garnishment is carried out under a writ of garnishment in some states, while in others, garnishment is one method by which a creditor can execute a writ of *fieri facias* or other writ of execution.[194] Some legislatures have abolished the common-law writs and have replaced them with one writ that covers all of the debtor's property.[195] New Jersey calls the seizure of some types of intangible property a levy, and the seizure of other types of intangible property an attachment.[196] In New York, a sheriff can levy on intangible property by serving a copy of the execution upon any person in possession or custody of property in which

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[189] *See, e.g.*, Greene v. Johnston, 99 A.2d 627, 633 (Del. 1953).

[190] Ager v. Murray, 105 U.S. 126, 129 (1881).

[191] For instance, Connecticut retains the writ of *scire facias*, which must be used to reach debts owing to the debtor other than debts owing from banks. *See* CONN. GEN. STAT. § 52-381; Burchett v. Roncari, 434 A.2d 941, 942 (Conn. 1980).

[192] Greene v. Johnston, 99 A.2d 627, 634 (Del. 1953).

[193] VA. CODE ANN. § 8.01-501 (2000).

[194] *See, e.g.*, PA. R.C.P. 3108, 42 PA. C.S.A. (2002); VA. CODE ANN. § 8.01-511 (2000).

[195] CRANDALL, HAGEDORN & SMITH, *supra* note 168, at ¶ 6.05[4]; PA. R.C.P. 3102, 42 PA. C.S.A (2002). (In Pennsylvania, garnishment is one method by which a writ of execution can be served).

[196] *Compare* N.J.S.A. § 2A: 17-51 (2000) (providing for a levy on wages and debts) *with* N.J.S.A. § 2A:17-57, 26-2 (2000) (providing that "rights and credits" shall be taken "as property is taken under writs of attachment against nonresident debtors).

"he knows or has reason to know that the judgment debtor . . . has an interest."[197] In Florida, goods, chattels and stock in corporations are subject to execution, but some courts have extended the term chattels to include intangible property.[198] Article 8 of the Uniform Commercial Code avoids terms like levy and garnishment and allows a creditor to reach a debtor's interest in an uncertificated security by "legal process upon the issuer."[199]

Neither levy nor garnishment will generally suffice to reach a debtor's interest in a patent or copyright, so to reach those assets a creditor must resort to a creditor's bill. As a result, judgment creditors must go to court to compel the debtor to transfer its rights to such intellectual property rights.[200] The requirement that a judgment creditor resort to a creditor's bill to reach intellectual property rights is a vestige of the distinction between law and equity, as applied in the 1881 Supreme Court case of *Ager v. Murray*.[201] In *Ager*, the Court held that since a patent, although property, is not tangible property, a creditor can only reach a debtor's rights in the patent through a creditor's bill in equity. Tracing the early history of creditors' rights in intellectual property, the court noted that patents and copyrights, being incorporeal, cannot exist in any particular state and moreover, since they exist under federal law, are "coextensive with the United States." Importantly, in finding that a patent could not be the subject of execution, the court relied on the fact that "there is nothing in any act of Congress . . . to give them locality anywhere."[202] As a result, the court could not allow execution of the judgment against the patent, because the patent was not within its jurisdiction, but could order the assignment of the patent upon a creditor's bill since the patent holder was within its jurisdiction and decrees of a court of equity are *in personam*.[203] Courts have come to similar conclusions about copyrights, holding that they can be reached by a compelled assignment, not by the seizure of any physical manifestation of the copyright.[204]

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[197] N.Y. CPLR § 5232. Minnesota has a similar rule. MINN. STAT. § 550.135 (personal property not capable of manual delivery shall be levied upon by "leaving a copy of the writ of execution and a notice specifying the property levied on with the person holding it").

[198] FLA. STAT. § 56.061; Jeffrey Davis, *Fixing Florida's Execution Lien Law Part Two: Florida's New Judgment Lien on Personal Property*, 54 FLA. L. REV. 119, 123 (2002).

[199] U.C.C. § 8-112.

[200] *See* Shafer, *supra* note 10, at 314.

[201] 105 U.S. 126 (1881).

[202] *Id.* at 130.

[203] *Id*.

[204] Kingsrow Enterprises v. Metromedia, Inc. 203 U.S.P.Q. 489 (1978).

The same rule tends to hold true for trademarks, but not only because trademarks are intangible. The reason that trademarks cannot be seized and sold is that trademarks are not transferable "in gross," that is, without a transfer of the goodwill of the business to which the trademark is related. Even states that permit judgments to be enforced against all types of tangible and intangible property require that the property sought to be transferred for the benefit of a creditor be in some way transferable.[205] As a result, courts have found that the only remedy available to judgment creditors trying to seize a debtor's trademark rights is the imposition of an equitable lien on the trademark, which lien is recorded in the United States Patent and Trademark Office.[206]

The above-described confusion has not gone unnoticed. For nearly a century, scholars have noted the difficulty that creditors face in enforcing their judgments against intangible rights. In 1914, William Loyd surmised that the law of collection remedies suffered from neglect because procedural reforms were justifiably more concerned with the law's delays before judgment. The underlying assumption behind most procedural reforms was that the losing party would pay. Because of this lack of attention to the process of collecting a judgment from a nonpaying debtor, the common law writs remained in American law unmodified. When legislatures turned their attention to the problems of collection, they did so in response to specific problems, such as the problem of enforcing judgments against choses in action and modified the writs to account for such specific problems. The result, according to this early 20th century author, was "a patchwork system with equity as a last resort."[207] Even in 1914, Loyd noted that there "are few titles or interests" that are immune from the claims of creditors, but "the procedure by which this is accomplished is too often dilatory and imperfect.[208] He concluded by urging the adoption of one method of enforcing judgments to replace the ancient writs that had been imported into American law. His point is an excellent one, and bears repeating today as the types of intangible rights multiply while the judgment remedies remain static.

In 1957, Professor Stefan Riesenfeld echoed Loyd's concerns. His article is remarkably prescient in identifying the very same issues that today's courts are facing. Riesenfeld traced the evolution of creditors' judgment remedies from the common law processes, which did not reach intangible rights such as debts owed to the judgment debtor, through specific legislation allowing

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[205] Marshak v. Green, 746 F.2d 927 (2nd Cir. 1984)

[206] *See, e.g.*, Adams Apple Distributing Co. v. Papeleras Reunidas, S.A., 773 F.2d 925 (7th Cir. 1985); Jacobs, Bell & Baumol v. Curtis, 556 A.2d 817 (N.J. Super. 1989).

[207] Loyd, *supra* note 172, at 367.

[208] *Id*.

for garnishment, which began to appear in the American colonies in the early 18th century.[209] As early as the early 19th century, the drafters of the Code of Civil Procedure in New York envisioned a mechanism whereby intangible property could be levied upon by leaving a copy of the writ and the notice of levy with the person holding such property as could not be delivered manually. If the intangible property was a debt, the value of the property would be realized by collection, if not, it would be sold publicly. By the mid-1800s, states began to follow this approach by allowing a levy on corporate stock to be executed by notification to the corporate officers.[210]

The domain names of today are the debts and stocks of the 1800s. Riesenfeld's description of collection remedies is as appropriate today as it was then when he wrote that the hopeless diversity of collection laws is due to

> the unhappy tendency of American jurisdictions on the one hand to cling with amazing tenacity to outmoded preconceptions and traditions of the common law, and on the other hand to give haphazard and unsystematic legislative relief to the pressing needs of the business community.[211]

It is this "unhappy tendency" that courts should avoid when faced with the problem of enforcing judgments against domain names and other emerging intangible assets.

B. Enforcement of Judgments Against Intangible Rights: The System at Work

Courts recognized the problem of enforcing judgments against intangible property as early as the beginning of the 20th century. As intangible rights have become economically important, courts have been asked to find ways for creditors to seize and sell them to satisfy judgments. The basic question in *Umbro* has been addressed many times as courts have been presented with similar issues in cases involving various types of intangible rights. In such cases, as in the *Umbro* case, the question of the method of obtaining an interest in the intangible asset is combined with that of whether the intangible asset is property at all. In many cases, once the court determined that an interest constituted an interest in property, it construed the governing statute to allow the creditor to use existing methods to obtain and sell the asset. Over the past century, courts have moved away from requiring creditors to resort to the creditor's bill, citing the merger of law and equity as a reason for expanding traditional creditors' remedies to reach

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[209] Stefan A. Riesenfeld, *Collection of Money Judgments in American Law – A Historical Inventory and a Prospectus*, 42 IOWA L. REV. 155, 178-179 (1957) (Riesenfeld, *Collection*).

[210] Riesenfeld, *id*., at 180-181 (noting that in 1851, Iowa passed a law allowing levy on corporate stock by notice to the corporation).

[211] Riesenfeld, *id*., at 155.

intangible assets.[212] The development of creditors' remedies against two types of intangible property, corporate securities and liquor licenses, illustrates this expansion.

1. Corporate Securities

The development of laws allowing the enforcement of judgments against corporate stock provides one good backdrop against which to view the current debate over domain names. As corporations and share ownership grew in popularity, legal conceptions of the nature of stock evolved and as those conceptions evolved, so did the methods by which courts and legislatures allowed creditors to seize and sell shares. Several authors have traced the evolution of the propertization of corporate shares from the common law through specific state legislation and the Uniform Stock Transfer Act to the promulgation and enactment of Article 8 of the Uniform Commercial Code.[213] The problems associated with enforcing creditors' rights in securities were ultimately solved by uniform legislation specifically tailored to that type of property.

In the 19th century, whether securities were property rights available to creditors was unclear. At common law, shares of corporate stock were not subject to execution, as the property represented by corporate stock was deemed to be of "such a shadowy nature there was nothing capable of being seized."[214] Some courts applied the same rule to corporate debt obligations. In the 1888 case of *Tweedy v. Bogart*,[215] a Connecticut court refused to allow the attachment of railroad bonds.[216] In so ruling, the court focused on the nature and quality of debt obligations generally and recognized that while some of them had a "settled market value" and could easily be sold, others did not have a readily ascertainable value. Expressing its desire for a uniform rule applicable to all debt obligations, the court held that no such obligations could be reached by creditors because of the difficulty of valuation and sale.[217]

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[212] Houghton v. Pacific Southwest Trust & Savings Bank, 295 P. 1079, 1081 (1931).

[213] *See, e.g.*, Hillman, *supra* note10; Pierre R. Loiseaux, *Liability of Corporate Shares to Legal Process*, 1972 DUKE L.J. 947 (1972); Riesenfeld, *Collection*, *supra* note 209 at 177-182.

[214] Moys v. Union Trust Co., 119 A. 738, 738 (Pa. 1923); *see also* Trade Bond and Mortgage Co. v. Schwartz, 24 N.E.2d 892 (Ill. App. 1940).

[215] 15 A. 374 (Conn. 1888).

[216] Many of the cases involving securities arise from attempts at prejudgment attachment. They are applicable here because the postjudgment remedies of execution and garnishment are procedurally equivalent to prejudgment remedies of attachment and garnishment. *See* CRANDALL, HAGEDORN AND SMITH, *supra* note 168, at ¶ 6.05[4].

[217] Tweedy v. Bogart, 15 A. at 375. As late as 1946, a Massachusetts court reached a similar conclusion. Jordan v. Lavin, 66 N.E. 2d 41, 45 (Mass. 1946).

As stock ownership grew, courts and legislatures began to recognize equity securities as assets available to creditors. Several states designated stock as property by statute.[218] Courts also began to recognize that shares of stock had all of the characteristics of property.[219] However, just as today the affirmative answer to the question of whether a domain name is property does not answer the enforcement question, in the early 1900s, the characterization of stock as property did not necessarily tell a creditor how to convert the stock into money. The answer to that question depended on whether the stockholder's rights were considered tangible rights *embodied* in the stock certificate or intangible rights merely *represented* by the certificate. The answer to that question determined the situs of the stock and also the method by which the shares could be seized to satisfy debts.

It took years, however, for that question to be definitively answered. By the mid-1800s, states began to enact laws specifically prescribing the method by which the ownership interests in corporations could be reached by creditors. By the early 1900s, many states had changed by statute the rule that stock certificates, bonds, promissory notes and choses in action were not subject to execution.[220] During this period, states deemed corporate stock to be intangible property, and their statutes mandated service on the corporation at its headquarters.[221] The issues raised in the 1900 case of *Simpson v. Jersey City Contracting Company*[222] were very similar to the issues raised 100 years later in *Umbro*. The New York court of 103 years ago applied a statute that mandated physical seizure of personal property "capable of manual delivery" and levy by notice to the person in control of "other personal property." It first determined that the shares of stock in a foreign corporation were personal property and then determined that the shares were intangible and located at place of business of the pledgee.[223]

As more wealth came to be embodied in share ownership people became more concerned about the protection of the market for shares. Under the existing scheme requiring levy on shares by notice to the corporation, buyers and creditors had difficulty ascertaining whether they were

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[218] *See* Jellenik v. Huron Copper Mining Co., 177 U.S. 1 (1900) (discussing Michigan statute providing that "the stock of every . . . corporation shall be deemed personal property").

[219] Simpson v. Jersey City Contracting Co., 58 N.E. 896, 898 (N.Y. 1900).

[220] Johnson v. Dahlquist, 225 P.2d 817 (Wash. 1924).

[221] *See* Jellenik v. Huron Copper Mining Company, 177 U.S. 1 (1900) (applying Michigan statute); Holmes v. Camp, 114 N.E. 841 (N.Y. 1916) (applying New York statute). *See also*, Fletcher R. Andrews, *Situs of Intangibles in Suits Against Nonresident Claimants*, 49 YALE L.J. 241, 261-273 (1939).

[222] 58 N.E. 896 (N.Y. 1900).

[223] *Id.* at 898.

acquiring good title to the stock.[224] In 1909, to provide more protection for purchasers of and lenders against stock, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Stock Transfer Act ("USTA").[225]

By the early 1900s, several states had adopted the USTA. The USTA reified the shareholder's rights so the stock certificates were seen as the embodiment of the shareholder's rights and thus capable of manual seizure. As a result, one method by which a creditor could obtain rights in the stock was by seizure of the paper shares. Another was by enjoining transfer of the shares by the holder.[226] Reification of the shareholder's interest answered the situs question: the shareholder's interest in the corporation was located at the location of the paper shares.

The USTA did not solve all of the problems that creditors faced in obtaining rights in stock. Specifically, questions arose as to the correct procedure to be followed when the shares were in the hands of a third party, such as a bank or a broker.[227] In those cases, courts were called upon to coordinate their existing debt collection statutes with the mandates of the USTA. In *Tryon v. Silverstein*,[228] a debtor's stock was in the hands of a bank as secured party. An Arizona court held that the service of a garnishment writ against the bank (which, under the applicable statute, did not result in physical seizure of the certificate) was an effective seizure under the USTA because the garnishment writ served to enjoin the transfer of the stock.[229] Again, there are important parallels to today's debates over intangible property. The USTA was not clear about the methods of seizure when the stock was held by a third party, but modern business practices made such situations common. The courts adapted the laws to modern practice.

In the early 1960s, the first version of Article 8 of the Uniform Commercial Code was promulgated to replace USTA. This version of Article 8 incorporated reification and provided that levy was effected by manual seizure of the shares.[230] Since the 1960s, the volume of outstanding securities has increased dramatically and to recognize the changes in the securities business, Article 8 has been revised twice. In the first revision, the drafters anticipated (wrongly,

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[224] Loiseaux, *supra* note 213, at 950

[225] Id. at 950-951.

[226] *See* Elgart v. Mintz, 197 A. 717 (N.J. Eq. 1938); Hillman, *supra* note 10, at 92.

[227] Loiseaux, *supra* note 213, at 954-957.

[228] 455 P.2d 474 (Ariz. 1969).

[229] *Id*. at 479.

[230] Hillman, *supra* note 10 at 93-94.

it turned out) a paperless system in which most securities would be uncertificated.[231] As a result, the 1977 version of Article 8 provided for an additional method by which a creditor could reach a security: by legal process upon the issuer of an uncertificated security.[232]

Today, most shares of publicly traded corporations are held indirectly through a broker or another intermediary.[233] Because the first two versions of Article 8 were not drafted with indirect holding in mind, creditors seeking to enforce remedies against indirectly held stock had to convince courts to fashion remeides not provided by Article 8. In *Enterprise Bank v. Magna Bank of Missouri*,[234] a court did exactly that – it allowed the creditor to use the Missouri garnishment law to garnish the debtor's brokerage account.[235] To protect the market for securities and the rights of creditors, the uniform law had to adapt further. The most recent version of Article 8 provides several different ways for a creditor to reach a security, including physical seizure of a certificated security, legal process upon the issuer of an uncertificated security and legal process upon a securities intermediary, such as a broker, when the security is held through such an intermediary.[236] Article 8 recognizes the different methods of holding securities and allows a creditor to "seize" a security by taking action against the person in a position to control the transfer of that security.

The story of the evolution of creditors' rights against corporate stock is useful because it is a story of the law recognizing a new form of property and adapting to transactions in that new form of property. In the case of corporate securities, uniform law was seen as desirable because of the national market for securities.

2. Liquor Licenses

The cases involving liquor licenses are interesting in that they illustrate how courts have modified the rules to allow creditors to reach property by levy and execution, even when the property is intangible and not freely assignable. A liquor license is granted by the state and the

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[231] *See* Prefatory Note to Revised Article 8 (1994 Revision).

[232] Robert Laurence, *Enforcing a Money Judgment Against a Defendant's Stocks and Bonds: A Brief Foray Into the Forbidding Realms of Article 8 and the Fourth Amendment*, 38 ARK. L. REV. 561, 594 (1985).

[233] *See generally*, Russell A. Hakes, *U.C.C. Article 8: Will the Indirect Holding of Securities Survive the Light of Day?*, 35 LOY. L. A. L. REV. 661 (2002); Prefatory Note to Revised Article 8 (1994 Version).

[234] 92 F.3d 743 (8th Cir. 1996).

[235] *Id*. at 748.

[236] U.C.C. § 8-112.

relevant state agency must consent to any transfer of the license to assure that the assignee is of the appropriate character to sell liquor.[237] From the state's point of view, the license is in the nature of a personal privilege that can be revoked by the state under specified conditions[238]. From the license holder's point of view, the license is a thing of value; because the number of licenses issued by a state is limited, potential assignees will pay large amounts of money to license holders for the right to have the license transferred.[239]

In the early 1900s, courts generally ruled that a liquor license could not be seized by creditors. The reasoning in these cases is similar to that in the early cases addressing whether or not corporate securities could be seized by creditors. Some courts simply ruled that a license holder had no property rights in a liquor license.[240] Others ruled that the liquor licenses were the property of the licensee, but that the statutes allowing for seizure by execution did not extend to the licenses because the license rights were intangible. As a result, the physical seizure of the paper certificate representing the liquor license could not constitute an effective levy. Because the early execution statutes did not extend to intangible rights unless those rights were specifically provided for in the statute, some courts ruled that the only way that a creditor could transfer a liquor license to satisfy a debt was by way of a creditor's bill.[241]

As was the case with corporate securities and as is the case with Internet domain names, the characterization of a liquor license as property did not necessarily solve the problem of seizing and selling it. Some courts recognized this problem early and solved it. In 1902, a Connecticut court held, in *Quinnipiac Brewing Co. v. Hackbarth*, that the paper certificate representing the licensee's rights was in fact the tangible embodiment of such rights and thus subject to execution.[242] The court recognized that the right to attach liquor licenses was unusual at the time, but relied on a statute that provided that the "license . . . shall be holden to respond to

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[237] For an explanation of the different types of liquor license statutes, *see* Linda L. Munden, *Comment: Retail Liquor Licenses and Due Process: The Creation of Property Through Regulation*, 32 EMORY L.J. 1199, 1199-1201 (1983).

[238] *See, e.g.*, 47 P.S. § 4-468 (in Pennsylvania, "the license shall constitute a privilege between the board and the licensee").

[239] For instance, in 2002 the price of a liquor license in Cambridge, Massachusetts was said to be $400,000. Alison Arnett, *Waiting for a License to Drink*, THE BOSTON GLOBE, Jan. 30, 2002, at E1.

[240] *See, e.g.*, Barnard v. State, 48 So.2d 303 (Ala. 1909).

[241] Mc Neeley v. Welz, 53 N.E. 697 (N.Y. 1901) (holding that the New York statute subjecting a debtor's "goods and chattels" to levy did not extend to a "liquor tax certificate" because that certificate was "not a chattel, but an intangible right").

[242] Quinnipiac Brewing Co. v. Hackbarth, 50 A. 1023 (Conn. 1902).

execution." Because the court was unable to find any distinction in the governing statute between the use of the word "license" to describe the holder's intangible rights and the use of the same word to describe the paper certificate, it held that the sheriff, by seizing the paper certificate, had seized the license within the meaning of the statute.[243]

Courts applying a number of different state statutes using different terms to describe leviable property have come to the conclusion that liquor licenses can be reached by levy. For instance, the District of Columbia statute at issue in *Rowe v. Colpoys* stated that "[t]he writ of *fieri facias* may be levied on all goods and chattels not exempt . . ."[244] First, the court broadly interpreted the term "chattels" to encompass not only tangible personal property, but all property other than real estate.[245] Even today (the case was decided in the 1940s), this definition of "chattel" is not universally accepted, as some limit the term to tangible personal property. [246] The court compared liquor licenses to licenses to practice law or medicine and concluded that they are different because the state can forbid transfer of the latter in all cases. The court noted that no public policy considerations prevented the levy of execution on a liquor license and allowed the creditor to do so. The court did not say how a creditor could levy on a liquor license, but it implied that the tangible evidence of the liquor license could be subject to levy and that such a levy would extend to the intangible rights evidenced by the paper license.[247] To justify its conclusions, the court noted that in the District of Columbia, the legal and equitable processes for the satisfaction of judgments had been integrated, obviating the need to differentiate the types of property recoverable only in equitable proceedings from those recoverable in legal proceedings.[248]

More recent cases in other jurisdictions have reached similar conclusions regarding liquor licenses. In *Dodds v. Shamer*, a Maryland court expressly approved of the seizure of the paper license over the objection of the license holder, who argued that the paper license itself had no value. The applicable statute in that case allowed a writ of execution to be exercised "upon any legal or equitable interest possessed by the judgment debtor in either real or personal property."[249] After finding that a liquor license possessed the attributes of property (such as

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[243] *Id.* at 1024.

[244] 137 F.2d 249, 249-250 (D.C. Cir. 1943).

[245] *Id*. at 250.

[246] *See, e.g.*, WILLIAM B. STOEBUCK AND DALE A. WHITMAN, THE LAW OF PROPERTY § 1.4 (3rd Ed. 2000)

[247] Rowe v. Colpoys, 137 F.2d at 251.

[248] *Id*. at 250-251.

[249] Dodds v. Shamer, 663 A.2d 1318, 1320 (Md. 1995).

value on the open market) and thus could be reached by creditors, the court adopted the reasoning of *Quinnipiac Brewing Co. v. Hackbarth*,[250] and found that seizure of the paper manifestation of the license sufficed as a levy on the property rights represented by the paper because the paper certificate "symbolizes the otherwise intangible franchise that is the valuable privilege to sell liquor."[251] In *Springsteen v. Meadows, Inc.*, the court read the governing Massachusetts statute similarly expansively. Finding no specific prohibition of the seizure of a liquor license in the statute, the court held that there was no good procedural or policy reason to exempt "this form of property right, and its tangible evidence, from the same process as that to which other property rights are subject."[252]

Of course, seizure of a paper certificate does not satisfy a creditor. In order for the creditor's claim to be satisfied, the license must be sold. Although the state must consent to any transfer of a liquor license, this restriction on transferability does not prevent an effective sheriff's sale in states that permit execution against a liquor license. In those states, the purchaser at a sheriff's sale can insist that the license be transferred to her, subject to her meeting the requirements of the liquor control board.[253]

In some of these cases, the courts seem to have fashioned remedies not clearly provided for in the governing statutes by allowing the sheriff to seize the paper certificate representing the license pursuant to the writ of execution. Seizure of tangible property, and of intangible rights reified in paper such as a negotiable instrument, suffices as a levy because the rights to such property can be transferred by physical delivery. The mere physical transfer of the paper representing a liquor license transfers nothing; in fact, no transfer of a liquor license is effective until approval by the state liquor control board. In allowing the seizure and sale of the license by the seizure of the paper, the courts read the governing statute to allow a symbolic levy on an arguably intangible right. No modification of any statute was needed, simply a modification of the concept of "seizure."

VI. ADAPTING EXISTING SYSTEMS TO ALLOW ENFORCEMENT OF JUDGMENTS AGAINST DOMAIN NAMES

There is no reason not to extend existing debt collection remedies to domain names. Courts have stretched debt collection statutes for years to accommodate new types of property. While at least one author has proposed extending judgment lien acts to cover all personal

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[250] 50 A. 1023 (Conn. 1902).

[251] 663 A.2d at 1323.

[252] 534 F. Supp. 504, 506 (D. Mass. 1982).

[253] Stallinger v. Goss, 193 P.2d 810 (Mont. 1948).

property including intangibles,[254] that approach is not ideal because it does not provide a mechanism for selling the intangible property to realize its value. Even in states with judgment lien laws that reach personal property, a creditor who wants the property liquidated must resort to existing execution processes.[255] The incredible diversity in state enforcement of judgment laws makes it impossible to instruct all courts how to apply their laws to domain names, so this section suggests some general guidelines for permitting enforcement of judgments against domain names. The following discussion assumes that any enforcement is effected by seizing a domain name under a writ of execution that extends to all types of property, tangible and intangible.

Purported prohibitions on the involuntary transfer of domain names should not hinder judgment creditors. While some registrars claim that they will terminate a registration agreement if any creditor attempts to seize the registered name, such restrictions should not prevent creditors from reaching the names for two reasons. The restrictions do not make sense and they are unenforceable under the various creditors' rights laws.

As explained in Part I of this article, all domain name registrars permit voluntary transfers. Just as the registrar does not inquire as to the identity of the original domain name registrant (hence the cyberpiracy cases), it does not inquire into the identity of the persons to whom a domain name is transferred. All it asks is that the transferor and transferee agree to the transfer. Unlike other entities that restrict the transfer of rights (such as partnerships, closely-held corporations and state liquor control boards), domain name registrars have no interest in the worthiness of domain name transferees. If the domain name registrar is concerned about fraud, it should not be concerned about the transfer of a domain name to satisfy a judgment, because that transfer takes place under court supervision. A registrar would be required to answer only to a sheriff or other legal officer, not a private party proceeding by a self-help remedy.[256] Because all domain name registrars have already agreed, pursuant to the Uniform Domain Name Dispute Resolution Policy,[257] and are already required, under the ACPA,[258] to comply with the orders of arbitral tribunals and courts with respect to the disposition of domain names, it does not stretch reason to expect them to comply with enforcement procedures conducted by a sheriff. The risk of fraud is practically nonexistent.

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[254] *See generally* Shafer, *supra* note 10.

[255] *See* Davis, *supra* note 198, at 141.

[256] The registrars' concerns might be more valid when the transfer is to an Article 9 secured creditor, who is permitted to use self-help to repossess or otherwise gain control over collateral. *See* U.C.C. §§ 9-607, 9-609. Such transfers are outside of the scope of this article.

[257] UDRP ¶ 3, at http://www.icann.org/dndr/udrp/policy.htm.

[258] 11 U.S.C. § 1125(d)(2)(D) (2000).

Creditors' rights laws routinely ignore restrictions on the transfer of assets, especially those triggered by the debtor's financial condition. Under the Bankruptcy Code, the restriction on transfer found in the Network Solutions agreement would be unenforceable and the domain name would enter the bankruptcy estate.[259] Judgment creditors are also permitted to exercise their remedies against non-assignable property; in one case, a court permitted a judgment creditor to seize shares of a professional corporation, despite the fact that transfer of the shares was restricted by statute and by contract.[260]

Before one can devise a method for enforcing a judgment against a domain name, two questions must be answered. The first, for the purpose of determining the applicable law, is "where is the domain name located?" The second, for the purpose of determining the appropriate target of the enforcement action, is "who controls transfer of the name?" While the answer to the first question depends on the answer to the second, here, it is useful to look to the ACPA for guidance. Under the ACPA, a plaintiff can bring an *in rem* action against domain names.[261] To provide for such actions, Congress was forced to make two decisions about the characteristics of domain names. The first was that, at least for the purpose of obtaining *in rem* jurisdiction, a domain name is the property of its registrant. The second was that a domain name can, despite its lack of tangibility, have a situs.

Determining the situs of some types of intangible property can be difficult, but this is not true in the case of domain names. As discussed earlier in this article, the question of situs for investment securities was open for years. Today, the location of a security is determined by the form of the security and how it is held.[262] While there are several possible places in which a domain name can be located (the ACPA names three), the question of location is easily settled because there is only one method of holding a domain name.

There are two possible targets of an enforcement action, the domain name registrar, of which there are many, and the domain name registry, of which there is only one for any given top-level domain. Under the ACPA, a plaintiff has the choice, if it can bring an action *in rem* against the domain name, of bringing it either in the jurisdiction in which the registrar is located or that in which the registry is located.[263] From the creditors' rights perspective, giving a judgment creditor a choice of persons against whom to proceed is a bad idea. State law governs

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[259] 11 U.S.C. § 541(c)(1).

[260] Gulf Mortgage and Realty Investments v. Alten, 422 A.2d 1090 (Pa. Super. 1980).

[261] *See* notes 130-140 *supra* and accompanying text.

[262] *See* notes 213-236 *supra* and accompanying text.

[263] 11 U.S.C. § 1125(d)(2)(C) (2000). Under the ACPA, the plaintiff can also bring the action in the court in which documents evidencing control of the domain name have been deposited.

collection remedies, so if the registrar and registry were located in two different states, a creditor would have a choice of two sets of laws under which to proceed. Two creditors seeking one domain name could proceed under two different statutes. This would be particularly undesirable for creditors because in the law of creditors' rights, timing is everything. In some states, the priority date of a judicial lien is the date on which the writ is delivered to the sheriff, in others, the lien's priority date is the date on which the property is actually seized.[264] If the laws of two states were to apply to the seizure of one domain name, the difficulty in ascertaining the priorities among creditors would be unacceptable. As a result, national uniformity in determining the location of a domain name would be desirable.

Enforcing a lien by serving notice on a domain name registry is appealing for several reasons. For each top-level domain, there is only one registry in the entire world. While a domain name registrant can fairly easily change its registrar,[265] it cannot change the registry. Of course, if the registrant registered names in several top-level domains, then the creditor looking to seize several names would be required to bring enforcement proceedings in several different jurisdictions. Regardless of how many top-level domains that the registrant registered names in, however, it is easy to determine the identity of the registry.

On the other hand, registrars are already required to follow court orders regarding disposition of domain names.[266] They also routinely deal with the public in registering and transferring domain names. Registries do not deal with parties who wish to register and transfer domain names. They follow orders only from registrars. In addition, as the *Umbro* court noted, it is impossible in some ways to separate the services that a registrar provides from the value of a domain name. Registrars obtain the IP numbers from their registrants and correlate domain names with those numbers. Because such correlation is a necessary element of control, the registrar is probably the appropriate enforcement target. It is also easy to determine the registrar for any given domain name by searching for the name in a "Whois" database. For instance, if the owner of the domain name "juliet.com" is not forthcoming about her registrar, one can look up the name in any registrar's "whois" database and find out the identity of the registrar.[267]

Because the registries follow directions only from registrars and update their information

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[264] *See* note 178 *supra* and accompanying text.

[265] *See, e.g.,* Network Solutions Service Agreement at Sch. A, ¶ 3. *See also* Cable News Network, L.P., L.L.L.P. v. Cnnews.com, 162 F.Supp. 484 (E.D. Va. 2001), in which the domain name registrant, after having been notified that its domain name violated the plaintiff's service mark rights, moved its domain name registration from an American registrar to a Chinese one.

[266] *See* note 38 and accompanying text.

[267] "Juliet.com." is registered through GoDaddy. A search in the Network Solutions "whois" database will tell the searcher that GoDaddy is the registrar. A searcher can then search the "GoDaddy" "whois" database to obtain information about the registrant.

daily, service of legal process on a registrar would be sufficient to give the world notice of a creditor's lien. Any subsequent "whois" search would show that the name was been transferred to the control of a court. In addition, once the registrar transferred the name to the appropriate legal officer, the registrant would no longer have the ability to transfer the name. Since dominion over an asset is crucial to an effective seizure of an asset, notice to the registrar to transfer the domain name to the control of a court would suffice.

Compelling a domain name registrar to follow the directions of a court officer is not a departure from current practice regarding other types of property, both tangible and intangible. Domain names are among the many property interests today that are evidenced by registration in the records of a third party. The systems already in place for those types of property provide for involuntary transfers.

The motor vehicle registration system provides one example. While a person can own a car without having its certificate of title, the certificate of title and its accompanying registration in the state department of motor vehicles provide *prima facie* evidence of the ownership interest. Under state certificate of title laws, automobile owners are required to obtain a certificate of title. Each state maintains a record of all certificates issued by it. When a creditor wants to seize a car to satisfy a judgment, the creditor is required to seize the car itself, not the certificate of title. When the car is sold to satisfy the creditor's judgment, the transferee must submit proof of the transfer and an application for the certificate of title to the state department of motor vehicles and the department will then issue a new certificate. Under the applicable laws, the department must issue the new certificate.[268]

As explained earlier, some state judgment collection statutes already contain provisions allowing for seizure of intangible collateral by notice to the person keeping a record of such collateral.[269] When a creditor's ability to seize corporate stock was still uncertain, corporations argued that they could not be compelled to record involuntary transfers. In one early case, the stockholder argued that a judicial sale of his stock would have no effect because the corporation could not be forced to transfer the shares on its books. The court dismissed this argument as one that "could not stand the test of reason."[270] If the argument did not work for corporations in 1900, it should not work for domain name registrars in the 21st century.

Perhaps the most crucial element of the enforcement process is the liquidation of the property to satisfy the debt. Again, there are already systems in place for the sale of domain names. Domain names are routinely sold by Internet auction. Creditors and bankruptcy trustees

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[268] *See, e.g.*, 75 PA. C.S.A. § 1114 (1996); Uniform Motor Vehicle Certificate of Title and Anti-Theft Act § 16.

[269] *See* note 196 *supra* and accompanying text.

[270] Simpson v. Jersey City Contracting Co., 58 N.E. 896, 899 (N.Y. 1900)..

have been using Internet auction sites as sales venues for several years.[271] Sites such as Bid4Assets.com actively publicize their services in this area and Bid4Assets[272] has an advertisement on the web site for the National Association of Bankruptcy Trustees.[273] While the question of whether an Internet auction of property generally is a reasonable sale for purposes of judgment collection statutes is an open one,[274] it should not be for Internet domain names. Internet domain names are customarily sold on Internet auction pages. Ebay has numerous pages devoted to the sale of domain names.[275] There are several companies devoted to Internet domain name auctions.[276] Although enforcement of judgment statutes routinely require the sheriff to advertise judicial sales locally and sell the property in the county where it is located, some states have revised their sale procedures to allow for the sale of publicly traded securities on any recognized exchange.[277] It would not be much of a leap to allow for advertisement and sale of a domain name through established Internet channels. While Internet auction sites are not recognized markets in the sense that securities exchanges are, an Internet auction for seized domain names makes sense for creditors. The interest in generic domain names is not necessarily local and an Internet auction would reach an enormous number of people, thus potentially resulting in a high price and thus satisfaction for the creditor. Because the Internet is accessible to anyone with a computer and a telephone connection, sheriff's offices would not incur great costs in advertising and selling domain names in this fashion.

VII. CONCLUSION

The impact of the *Umbro* case in the broader financing context has been greatly exaggerated. Since both bankruptcy and commercial law have at their core the utilization of the

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[271] *Bid4Assets to Auction Wards' Software Licenses*, BALTIMORE BUSINESS JOURNAL, Sept. 18, 2002; Tamara Chuang, *Web, Bankruptcy Feed Off Each Other*, ORANGE COUNTY REGISTER, Jan. 17, 2001.

[272] http://www.bid4assets.com (last visited February 14, 2003).

[273] *See* http://www.nabt.com (last visited February 17, 2003).

[274] For a discussion of whether an online auction should qualify as a "commercially reasonable sale" under Article 9 of the U.C.C., *see generally* Michael Korybut, *Online Auctions of Repossessed Collateral Under Article 9*, 31 RUTGERS L.J. 21 (1999).

[275] One visit to eBay found 2500 .com names available for sale. *See* http://listings.ebay.com/pool2/plistings/list/all/category11154/index.html?from=R4 (last visited February 11, 2003).

[276] *See, e.g.* http://www.1stdomainbrokers.com/ (last visited February 11, 2003); http://www.allfordomains.com/sell.htm (last visited February 11, 2003).

[277] *See, e.g.*, PA. R.C.P. 3130, 42 PA. C.S.A. (2002)

value of rights, any rights that can be transferred for value should be considered property for those purposes. Bankruptcy courts have long recognized this principle. The recent revision of Article 9 of the UCC codifies this principle by invalidating restrictions on assignment of rights. There is no compelling reason to remove domain names from the sphere of transferable rights. The questions asked about domain names do, however, illustrate the need for the law to adapt to new intangible rights. Since the laws relating to enforcement of judgments do not, by their terms, address domain names, it is the job of courts and legislatures to update their conceptions of property. Courts should not construe the existing debt collection statutes rigidly to deny judgment creditors rights in domain names. Many garnishment and execution statutes have not been amended in decades and state legislatures could not have anticipated the new types of property that technology would create. It is unquestioned that a domain name registrant can receive the benefits of a domain name. The name leads people to his business and when the registrant no longer wants the name, he is entitled to the potentially enormous proceeds of its sale. The holder of a domain name also should be forced to bear the corresponding burdens of holding valuable rights. Allowing creditors to enforce money judgments by seizing and selling domain names would force domain name registrants to bear these burdens.