1 of 5 DOCUMENTS

GARY KREMEN, an individual, Plaintiff-Appellant,
and ONLINE CLASSIFIEDS, INC., a Delaware Company,
v.
STEPHEN MICHAEL COHEN, an individual;
OCEAN FUND INTERNATIONAL, LTD., a foreign company;
SAND MAN INTERNACIONAL LTD., a foreign company;
SPORTING HOUSES MANAGEMENT CORPORATION, a Nevada company;
SPORTING HOUSES OF AMERICA, a Nevada company;
SPORTING HOUSES GENERAL INC., a Nevada company;
WILLIAM DOUGLAS, Sir, an individual;
VP BANK (BVI) LIMITED, a foreign company;
ANDREW KEULS, an individual;
MONTANO PROPERTIES LLC, a California Limited Liability Company;
YNATA LTD., Defendant, and
NETWORK SOLUTIONS, INC., a Delaware company

No. 01-15899

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

337 F.3d 1024*; *2003 U.S. App. LEXIS 14830*; *67 U.S.P.Q.2D (BNA) 1502*; *2003 Cal. Daily Op. Service 6565*; *2003 Daily Journal DAR 8245

July 25, 2003, Filed

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the Northern District of California. D.C. No. CV-98-20718-JW. James Ware, District Judge, Presiding.
Kremen v. Cohen, 99 F. Supp. 2d 1168, 2000 U.S. Dist. LEXIS 8476 (N.D. Cal., 2000)

KOZINSKI, Circuit Judge:

We decide whether Network **[**2]** Solutions may be liable for giving away a registrant's domain name on the basis of a forged letter.

Background

"Sex on the Internet?," they all said. "*That'll* never make any money." But computer-geek-turned-entrepreneur Gary Kremen knew an opportunity when he saw it. The year was 1994; domain names were free for the asking, and it would be several years yet before Henry Blodget and hordes of eager NASDAQ day traders would turn the Internet into the Dutch tulip craze of our

times. With a quick e-mail to the domain name registrar Network Solutions, Kremen became the proud owner of sex.com. He registered the name to his business, Online Classifieds, and listed himself as the contact.

[3]** Con man Stephen Cohen, meanwhile, was doing time for impersonating a bankruptcy lawyer. He, too, saw the potential of the domain name. Kremen had gotten it first, but that was only a minor impediment for a man of Cohen's boundless resource and bounded integrity. Once out of prison, he sent Network Solutions what purported to be a letter he had received from Online Classifieds. It claimed the company had been "forced to dismiss Mr. Kremen," but "never got around to changing our administrative contact with the internet registration [sic] and now our Board of directors has decided to *abandon* the domain name sex.com." Why was this unusual letter being sent via Cohen rather than to Network Solutions directly? It explained:

> Because we do not have a direct connection to the internet, we request that you notify the internet registration on our **[*1027]** behalf, to delete our domain name sex.com. Further, we have no objections to your use of the domain name sex.com and this letter shall serve as our authorization to the internet registration to transfer sex.com to your corporation. [2]

Despite the letter's transparent claim that a company called "*Online* Classifieds" had no **[**4]** Internet connection, Network Solutions made no effort to contact Kremen. Instead, it accepted the letter at face value and transferred the domain name to Cohen. When Kremen contacted Network Solutions some time later, he was told it was too late to undo the transfer. Cohen went on to turn sex.com into a lucrative online porn empire.

> 2 The letter was signed "Sharon Dimmick," purported president of Online Classifieds. Dimmick was actually Kremen's housemate at the time; Cohen later claimed she sold him the domain name for $ 1000. This story might have worked a little better if Cohen hadn't misspelled her signature.

And so began Kremen's quest to recover the domain name that was rightfully his. He sued Cohen and several affiliated companies in federal court, seeking return of the domain name and disgorgement of Cohen's profits. The district court found that the letter was indeed a forgery and ordered the domain name returned to Kremen. It also told Cohen to hand over his profits, invoking the constructive trust **[**5]** doctrine and California's "unfair competition" statute, *Cal. Bus. & Prof. Code § 17200 et seq.* It awarded $ 40 million in compensatory damages and another $ 25 million in punitive damages.

Kremen, unfortunately, has not had much luck collecting his judgment. The district court froze Cohen's assets, but Cohen ignored the order and wired large sums of money to offshore accounts. His real estate property, under the protection of a federal receiver, was stripped of all its fixtures-- even cabinet doors and toilets -- in violation of another order. The court commanded Cohen to appear and show cause why he shouldn't be held in contempt, but he ignored that order, too. The district judge finally took off the gloves -- he declared Cohen a fugitive from justice, signed an arrest warrant and sent the U.S. Marshals after him.

Then things started **[**6]** getting *really* bizarre. Kremen put up a "wanted" poster on the sex.com site with a mug shot of Cohen, offering a $ 50,000 reward to anyone who brought him to justice. Cohen's lawyers responded with a motion to vacate the arrest warrant. They reported that Cohen was under house arrest in Mexico and that gunfights between Mexican authorities and would-be bounty hunters seeking Kremen's reward money posed a threat to human life. The district court rejected this story as "implausible" and denied the motion. Cohen, so far as the record shows, remains at large.

Given his limited success with the bounty hunter approach, it should come as no surprise that Kremen seeks to hold someone else responsible for his losses. That someone is Network Solutions, the exclusive domain name registrar at the time of Cohen's antics. Kremen sued it for mishandling his domain name . . .

Breach of Contract

Kremen had no express contract with Network Solutions . . .

Breach of Third-Party Contract

We likewise reject Kremen's argument based on Network Solutions's cooperative agreement with the National Science Foundation. A party can enforce a third-party contract only if it reflects an "express or implied intention of the parties to the contract to benefit the third party." *Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1211 (9th Cir. 1999)*. "The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended by the parties to benefit from the contract." *Id.* When a contract is with a government entity, a more stringent test applies: "Parties that benefit . . . are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary." *Id.* The contract must establish not only an intent to confer a benefit, but also "an intention . . . to grant [the third party] enforceable rights." *Id.*

Kremen relies on language in the agreement providing that Network Solutions had "primary responsibility for ensuring the quality, timeliness and effective management of [domain **[**12]** name] registration services" and that it was supposed to "facilitate the most effective, efficient and ubiquitous registration services possible." This language does not indicate a clear intent to grant registrants enforceable contract rights. We accordingly reject Kremen's claim.

Conversion

Kremen's conversion claim is another matter. To establish that tort, a plaintiff must show "ownership or right to possession of property, wrongful disposition of the property right and damages." *G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Service, Inc., 958 F.2d 896, 906 (9th Cir. 1992)*. The preliminary question, then, is whether registrants have property rights in their domain names. Network Solutions all but concedes that they do. This is no surprise, given its positions in prior litigation. *See Network Solutions, Inc. v. Umbro Int'l, Inc., 259 Va. 759, 529 S.E.2d 80, 86 (Va. 2000)* ("[Network Solutions] acknowledged during oral argument before this

Court that the right to use a domain name is a form of intangible personal property."); *Network Solutions, Inc. v. Clue Computing, Inc., 946 F. Supp. 858, 860 (D. Colo. 1996)* **[**13]** (same). [5]The district court **[*1030]** agreed with the parties on this issue, as do we.

Property is a broad concept that includes "every intangible benefit and prerogative susceptible of possession or disposition." *Downing v. Mun. Court, 88 Cal. App. 2d 345, 350, 198 P.2d 923 (1948)* (internal quotation marks omitted). We apply a three-part test to determine whether a property right exists: "First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established **[**14]** a legitimate claim to exclusivity." *G.S. Rasmussen, 958 F.2d at 903* (footnote omitted). Domain names satisfy each criterion. Like a share of corporate stock or a plot of land, a domain name is a well-defined interest. Someone who registers a domain name decides where on the Internet those who invoke that particular name -- whether by typing it into their web browsers, by following a hyperlink, or by other means -- are sent. Ownership is exclusive in that the registrant alone makes that decision. Moreover, like other forms of property, domain names are valued, bought and sold, often for millions of dollars, *see* Greg Johnson, *The Costly Game for Net Names*, L.A. Times, Apr. 10, 2000, at A1, and they are now even subject to in rem jurisdiction, *see 15 U.S.C. § 1125(d)(2)*.

Finally, registrants have a legitimate claim to exclusivity. Registering a domain name is like staking a claim to a plot of land at the title office. It informs others that the domain name is the registrant's and no one else's. Many registrants also invest substantial time and money to develop and promote websites that depend on their domain names. Ensuring that they **[**15]** reap the benefits of their investments reduces uncertainty and thus encourages investment in the first place, promoting the growth of the Internet overall. *See G.S. Rasmussen, 958 F.2d at 900*.

Kremen therefore had an intangible property right in his domain name, and a jury could find that Network Solutions "wrongfully disposed of" that right to his detriment by handing the domain name over to Cohen. *Id. at 906*. The district court nevertheless rejected Kremen's conversion claim. It held that domain names, although a form of property, are intangibles not subject to conversion. This rationale derives from a distinction tort law once drew between tangible and intangible property: Conversion was originally a remedy for the wrongful taking of another's lost goods, so it applied only to tangible property. *See Prosser and Keeton on the Law of Torts* § 15, at 89, 91 (W. Page Keeton ed., 5th ed. 1984). Virtually every jurisdiction, however, has discarded this rigid limitation to some degree. *See id.* at 91. Many courts ignore or expressly reject it. Others reject it for some intangibles but not others. The *Restatement*, for example, recommends the following test: **[*1031]**

> (1) Where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights.
>
> (2) One who effectively prevents the exercise of intangible rights of the kind customarily *merged in a document* is subject to a liability similar to that for conversion, even though the document is not itself converted.

Restatement (Second) of Torts § 242 (1965) (emphasis added). An intangible is "merged" in a document when, "by the appropriate rule of law, the right to the immediate possession of a chattel and the power to acquire such possession is *represented by* [the] document," or when "an intangible obligation [is] *represented by* [the] document, which is regarded as equivalent to the obligation." *Id. cmt. a* (emphasis added). . . .

Kremen's domain name falls easily within this class of property. He argues that the relevant document is the Domain Name System, or "DNS" -- the distributed electronic database that associates domain names like sex.com with particular computers connected to the Internet. We **[*1034]** agree that the DNS is a document (or perhaps more accurately a collection of documents). That it is stored in electronic form rather than on ink and paper is immaterial. *See, e.g.*, *Thrifty-Tel, 46 Cal. App. 4th at 1565* (recognizing conversion of information recorded on floppy disk); *A & M Records, 75 Cal. App. 3d at 570* (same for audio record); **[**26]** *Lone Ranger Television, 740 F.2d at 725* (same for magnetic tape). It would be a curious jurisprudence that turned on the existence of a *paper* document rather than an electronic one. Torching a company's file room would then be conversion while hacking into its mainframe and deleting its data would not. That is not the law, at least not in California. [11]

11 The *Restatement* requires intangibles to be merged only in a "document," not a *tangible* document. *Restatement (Second) of Torts § 242*. Our holding therefore does not depend on whether electronic records are tangible.

[27]** The DNS also bears some relation to Kremen's domain name. We need not delve too far into the mechanics of the Internet to resolve this case. It is sufficient to observe that information correlating Kremen's domain name with a particular computer on the Internet must exist somewhere in some form in the DNS; if it did not, the database would not serve its intended purpose. Change the information in the DNS, and you change the website people see when they type "www.sex.com."

Network Solutions quibbles about the mechanics of the DNS. It points out that the data corresponding to Kremen's domain name is not stored in a single record, but is found in several different places: The components of the domain name ("sex" and "com") are stored in two different places, and each is copied and stored on several machines to create redundancy and speed up response times. Network Solutions's theory seems to be that intangibles are not subject to conversion unless they are associated only with a *single* document.

Even if Network Solutions were correct that there is no single record in the DNS architecture with which Kremen's intangible property right is associated, that is no impediment under California **[**28]** law. A share of stock, for example, may be evidenced by more than one document. *See Payne, 54 Cal. at 342* ("The certificate is only evidence of the property; and it is not the only evidence, for a transfer on the books of the corporation, without the issuance of a certificate, vests title in the shareholder: the certificate is, therefore, but additional evidence of title . . . ."); . . .

Network Solutions also argues that the DNS is not a document because it is refreshed every twelve hours **[**29]** when updated domain name information is broadcast across the Internet. This theory is even less persuasive. A document doesn't cease being a document merely because it is often updated. If that were the case, a share registry would fail whenever shareholders were periodically added or dropped, as would an address file whenever business cards were added or removed. Whether a document is updated by inserting and deleting particular records or by replacing an old file with an entirely new one is a technical detail with no legal significance.

Kremen's domain name is protected by California conversion law, even on the grudging reading we have given it. Exposing Network Solutions to liability when it gives away a registrant's domain name on the basis of a forged letter is no different from holding a corporation liable when it gives away someone's shares under the same circumstances. We have not "created new tort duties" in reaching this result. We have only applied settled principles of conversion law to what the parties and the district court all agree is a species of property. . . .

We must, of course, take the broader view, but there is nothing unfair about holding a company responsible for giving away someone else's property even if it was not at fault. Cohen is obviously the guilty party here, and the one who should in all fairness pay for his theft. But he's skipped the country, and his money is stashed in some offshore bank account. Unless Kremen's luck with his bounty hunters improves, **[**31]** Cohen is out of the picture. The question becomes whether Network Solutions should be open to liability for its decision to hand over Kremen's domain name. Negligent or not, it was Network Solutions that gave away Kremen's property. Kremen never did anything. It would not be unfair to hold Network Solutions responsible and force *it* to try to recoup its losses by chasing down Cohen. This, at any rate, is the logic of the common law, and we do not lightly discard it.

The district court was worried that "the threat of litigation threatens to stifle the registration system by requiring further regulations by [Network Solutions] and potential increases in fees." *Kremen, 99 F. Supp. 2d at 1174*. Given that Network Solutions's "regulations" evidently allowed it to hand over a registrant's domain name on the basis of a facially suspect letter without even contacting him, "further regulations" don't seem like such a bad idea. And the prospect of higher fees presents no issue here that it doesn't in any other context. A bank could lower its ATM fees **[*1036]** if it didn't have to pay security guards, but we doubt most depositors would think that was a good idea.

The district court **[**32]** thought there were "methods better suited to regulate the vagaries of domain names" and left it "to the legislature to fashion an appropriate statutory scheme." *Id.* The legislature, of course, is always free (within constitutional bounds) to refashion the system that courts come up with. But that doesn't mean we should throw up our hands and let private relations degenerate into a free-for-all in the meantime. We apply the common law until the legislature tells us other-wise. And the common law does not stand idle while people give away the property of others.

The evidence supported a claim for conversion, and the district court should not have rejected it.