RECEIVED
APR 17 2009
By

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51048d-89de-4736-bb9d-aaa2f31757c2

COMMONWEALTH OF KENTUCKY
SUPREME COURT
2009-SC-000043

COMMONWEALTH OF KENTUCKY,
J. MICHAEL BROWN, SECRETARY,
JUSTICE AND PUBLIC SAFETY
CABINET **APPELLANT**

V.

VICSBINGO.COM AND INTERACTIVE
GAMING COUNCIL **APPELLEES**

ON APPEAL FROM COURT OF APPEALS
ORIGINAL ACTION NOS. 2008-CA-002019; 2008-CA-002000; 2008-CA-002036

ORIGINAL ACTIONS ARISING FROM
FRANKLIN CIRCUIT COURT, DIVISION II
CIVIL ACTION NO. 08-C1-1049
HON. THOMAS D. WINGATE, JUDGE

BRIEF FOR AMICUS CURIAE eBAY INC.

Laura D'Angelo
WYATT, TARRANT & COMBS, LLP
250 West Main Street, Suite 1600
Lexington, KY 40507-1746
Tel: (859) 233-2012
Fax: (859) 259-0649

Daniel G. Dougherty *(pro hac vice motion pending upon grant of leave to enter case)*
eBAY INC.
2065 Hamilton Avenue
San Jose, CA 95125
Telephone: (408) 376-6380
Fax: (408) 376-7514
Email: ddougherty@ebay.com
COUNSEL FOR AMICUS CURIAE, eBAY INC.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Amicus Brief for eBay, Inc. was served by First Class U.S. Mail, postage prepaid, on April 16 2009, upon Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; D. Eric Lycan, William H. May III, William C. Hurt, Jr., HURT, CROSBIE & MAY, PLLC, 127 Main Street, Lexington, KY 40507; Robert M. Foote, Mark Bulgarelli, FOOTE, MEYERS, MIELKE & FLOWERS, LLC, 28 N. First Street, Suite 2, Geneva, IL 60134; Lawrence G. Walters, WESTON, GARROU, WALTERS & MOONEY, 781 Douglas Avenue, Altamonte Springs, FL 32714; P. Douglas Barr, Palmer G. Vance II, Alison Lundergan Grimes, STOLL KEENON OGDEN PLLC, 300 W. Vine Street, Suite 2100, Lexington, KY 40507; William E. Johnson, JOHNSON, TRUE & GUARNIERI, LLP, 326 W. Main Street, Frankfort, KY 40601; John L. Krieger, Anthony Cabot, LEWIS & ROCA LLP, 3993 Howard Hughes Parkway, Suite 600, Las Vegas, NV 89169; Patrick T. O'Brien, GREENBERG TRAURIG, LLP, 401 E. Las Osas Blvd., Suite 2000, Ft. Lauderdale, FL 33301; Kevin D. Finger, Paul D. McGrady, GREENBERG TRAURIG, LLP, 77 W. Wacker Drive, Suite 2500, Chicago, IL 60601; Timothy B. Hyland, STEIN, SPURLING, BENNETT, DE JONG, DRISCOLL & GREENFEIG, P.C., 25 W. Middle Lane, Rockville, MD 20850; Michael R. Mazzoli, COX & MAZZOLI, 600 W. Main Street, Suite 300, Louisville, KY 40202; Merrill S. Schell, David A. Calhoun, WYATT, TARRANT & COMBS, LLP, 500 W. Jefferson Street, Suite 2800, Louisville, KY 40202; Phillips S. Corwin, Ryan D. Israel, BUTERA & ANDREWS, 1301 Pennsylvania Avenue, N.W., Suite 500, Washington, DC 20004; John L. Tate, Ian T. Ramsey, Joel T. Beres, STITES & HARBISON, PLLC, 400 W. Market Street, Suite 1800, Louisville, KY 40202; Bruce F. Clark, STITES & HARBISON, PLLC, 421 W. Main Street, P.O. Box 634, Frankfort, KY 40602-0634; A. Jeff Ifrah, Jerry Stouck, GREENBERG TRAURIG, LLP, 2101 L Street, NW, Suite 1000, Washington, DC 20037; and Hon. Thomas D. Wingate, Franklin Circuit Court, 218 St. Clair Street, Frankfort, KY 40601

Laura D'Angelo
WYATT, TARRANT & COMBS, LLP

Daniel G. Dougherty *(pro hac vice motion pending upon grant of leave to enter case)*
eBAY INC.

Counsel for Amicus Curiae, eBay Inc.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

STATEMENT OF POINTS AND AUTHORITIES

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

INTRODUCTION AND STATEMENT OF AMICUS CURIAE

In this case, the appellant, the Justice and Public Safety Cabinet ("Cabinet"), could have proceeded, consistent with due process, either *in personam* in Kentucky, by serving the domain name owners, or "registrants," and affording them notice and an opportunity to appear (or to contest jurisdiction), or *in rem,* by suing in the jurisdictions where the domain names are registered, which is where they are deemed to be located. The appellant did neither. Without any pretense or attempt to comply with the constitutional mandates set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *Shaffer v. Heitner*, 433 U.S. 186 (1977), the appellant sued in Kentucky, a forum that has no tangible connection with any of the domain names. As a matter of fact and law, Kentucky is not home to any of the registrars or registrants, and the domain names cannot be said to be *located* in Kentucky for purposes of *in rem* jurisdiction.[1]

The trial court's assertion of *in rem* jurisdiction and seizure of 141 domain names of companies located and lawfully conducting business in foreign countries pursuant to a Kentucky civil statute raises serious concern for U.S. businesses such as eBay Inc. because the lower court's ruling, if allowed to stand, would invite reciprocal assertions of extra-territorial jurisdiction. Foreign countries may be tempted to apply the same flawed logic to their local laws to seize the domain names of U.S. companies that are engaged in activities that are lawful in the United States but allegedly not permissible abroad.

eBay Inc. ("eBay") expresses no opinion on the issues particular to Kentucky's anti-gambling laws, but opposes the appellant's attempt to shut down global websites

---

[1] "Registrants" are the owners of the websites and obtain the right to use the domain names under contracts with "registrars," which in turn contract with a "registry" to make the domain names and websites accessible on the Internet.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

engaged in lawful activities in the countries where they are based, where the sole basis for jurisdiction is that the websites may be accessed from computers in the forum state. Merely because a website is accessible over the Internet is insufficient to confer jurisdiction. *See, e.g., CompuServ, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996).

Where jurisdiction is *in rem*, "minimum contacts" must be met *in addition* to the prerequisite that the *res* be located in the forum. *See Shaffer*, 433 U.S. at 207-10. However, through a misreading of *Shaffer*, the trial court *substituted* its version of the "minimum contacts" test for the location requirement, and thus ruled that the 141 websites were subject to jurisdiction in Kentucky simply because they could be accessed on the Internet and, therefore, through computers based in Kentucky, among other locations. Since this test would be met by virtually all other websites engaged in some form of enterprise, the trial court, by equating "presence" on the Internet with a domain name's "presence in Kentucky," effectively has created nationwide (and indeed, worldwide) *in rem* jurisdiction for all domain names. That is not the standard required by the Due Process Clause (nor is it permissible under the dormant Commerce Clause). To the contrary, courts analyzing constitutional challenges to jurisdiction over domain names under *Shaffer* have flatly refused to impose this type of overbroad, universal jurisdiction. These courts have instead held that the proper forum for *in rem* jurisdiction, consistent with due process, is where the registrar or registry is located. *See Mattel, Inc. v. Barbie-club.com*, 310 F.3d 293, 302 (2d Cir. 2002); *FleetBoston Fin. Corp. v. Fleetbostonfinancial.com*, 138 F. Supp. 2d 121, 134 (D. Mass. 2001).

The trial court's seizure order, if allowed to stand, would impact all businesses with websites located anywhere in the world. Like virtually all other entities engaged in

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

e-commerce, eBay has a substantial interest in the outcome of this appeal because it is the owner and/or registrant of multiple domain names used in the U.S. and worldwide.

eBay operates the world's largest online marketplace by bringing together buyers and sellers through an online auction-style trading format. Enabled by a global network connecting households, businesses and the like in 39 markets, eBay has provided a platform for over 200 million buyers and sellers worldwide, of which approximately 85 million are active users. In addition, roughly one million people around the globe report that they earn all or a substantial portion of their income from activities on eBay. Businesses like eBay, therefore, have a huge economic and social impact.[2]

eBay is headquartered in San Jose, California, but its website, located at the ebay.com domain name, may be accessed by users all across America. Although ebay.com is directed to domestic users, given the nature of the Internet the website can also be accessed from locations outside the United States. The same is true of eBay's international sites. In addition to ebay.com, eBay has almost 30 domain names registered in foreign countries and maintains territory-specific websites. Those sites can also be accessed from locations outside of those territories, including from within the United States.

Neither eBay nor any of its acquired companies engage in the business of online gaming. But eBay's interest in this action is nonetheless substantial because subjecting domain names to universal jurisdiction and seizure in any state (or by extension foreign country) imposes great and unfair burdens on online businesses and ultimately hinders e-

---

[2] Since eBay became a publicly traded company in 1998, it acquired several online businesses, including PayPal, Skype, shopping.com, Stubhub, rent.com, StumbleUpon, and various online classified sites, all of which are based in either the U.S. or abroad, and share the same concerns expressed here.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

commerce. Although the trial court's order purports to regulate activities within the state of Kentucky, by seizing domain names located in other jurisdictions such as India, Germany, Canada, Australia, France, the United Kingdom and New Zealand -- i.e., where the 141 domain name registrars and/or registries are located -- the Cabinet, through the trial court, sought to close businesses that are lawful in the countries where they operate simply because they could be accessed over the Internet, including in Kentucky. The lawlessness of this order under international law has been recognized in a parallel action brought in the U.K. against the State of Kentucky by the registrant of one of the affected domain names, *Pocket Kings Ltd. v. SafeNames Ltd. & Anor.*, [2008] EWHC 3076 (Ch.). In that case the High Court, in granting an application to effectuate service on the Commonwealth, stated that it is "clearly strongly arguable that this court should not recognize the seizure order" because "[i]t would amount to the enforcement of a foreign penal provision . . . [and] was made in proceedings [in] which the claimant [here] was not a party." *See id.* (Judgment dated December 3, 2008).

While the Cabinet perhaps could have lawfully sought to assert *in rem* jurisdiction in those venues where it was proper or by serving the domain name owners and proceeding *in personam*, it did not do so. By validating jurisdiction without due process, the trial court invites international retaliation against lawful U.S. businesses that operate over the Internet.

ARGUMENT

A. Kentucky Is Not The Proper Forum To Assert *In Rem* Jurisdiction Where All 141 Domain Names Are Registered In Other States Or Countries

The trial court lacked jurisdiction to issue its seizure order where neither the registrars nor any other authority that registered the 141 domain names are located in

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

Kentucky. Where an action proceeds *in rem*, due process is not satisfied simply because the domain name appears on a website accessible through the Internet.[3]

1. *Shaffer v. Heitner* does not substitute "minimum contacts" for the requirement that property be located within the state to assert *in rem* jurisdiction

The trial court's order does not comply with *Shaffer* because it allowed the appellant to proceed against the domain names in a forum where none of the registrars or registries are located. The trial court misread *Shaffer* by merging the *in rem* and *in personam* standards for jurisdiction under the same "minimum contacts" test expounded by *International Shoe*. *See* Opinion and Order by the Franklin Circuit Court ("Order"), entered on October 16, 2008, at 18 ("Thus, as the law stands on state court jurisdiction, the requirement of 'presence' is seen through the lens of 'minimum contacts,' for both *in rem* and *in personam* actions.").[4]

But *Shaffer* does not set forth a test to determine the location of tangible or intangible property. *Shaffer* did not address whether the seized stock was located in Delaware, as that was determined by statute. *See id.*, 433 U.S. at 192 ("So far as the record shows, none of the certificates representing the seized property was physically present in Delaware. The stock was considered to be in Delaware, and so subject to seizure, by virtue of Del. Code. Ann., Tit. 8, s 169 (1975), which makes Delaware the situs of ownership of all stock in Delaware corporations."). The issue, instead, was

---

[3] Jurisdiction is also lacking because the appellant failed to give notice of any kind to the registrants, which learned of the initial seizure order through media reports and not through any constitutionally mandated means of providing notice. *See Shaffer*, 433 U.S. at 207 n.22 ("[W]e have held that property cannot be subject to a court's judgment unless reasonable and appropriate efforts have been made to give the property owners actual notice of the action.").

[4] The Order is attached as Exhibit 15 to the Writ Petition filed by Vicsbingo.com and the Interactive Gaming Council.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

whether the mere presence of property in the forum is sufficient by itself to support a judgment *in rem* where the underlying action is unrelated to the property. *See id.* at 189 ("The controversy in this case concerns the constitutionality of a Delaware statute that allows a court of that State to take jurisdiction of a lawsuit by sequestering any property of the defendant that happens to be located in Delaware."). The Supreme Court concluded that it is not, adding on the *additional* requirement that there must be sufficient contacts between the forum and the *property owner*. *See id.* at 208-09; *see also id.* at 213-17 (reversing judgment where "[t]he Delaware courts based their assertion of jurisdiction in this case solely on the statutory presence of appellants' property in Delaware," but there were insufficient ties between Delaware and the owners of the stock). This is because "an adverse judgment in rem directly affects the property owner by divesting him of his rights in the property before the court." *Id.* at 206. "Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, *the presence of the property alone would not support the State's jurisdiction.*" *Id.* at 209 (emphasis added); *see also, e.g., Citizens Bank & Trust Co. of Paducah v. Collins*, 762 S.W.2d 411, 413 (Ky. 1988) (concluding that the presence of real property in Kentucky was insufficient to support a *quasi in rem* action where there were no forum contacts with the property owner).

The trial court took the *Shaffer* opinion and turned it on its head by purporting to apply the "minimum contacts" (*in personam*) test to determine whether the domain names - not the owners, or registrants, who admittedly were never served - were present in Kentucky. *See* Order at 18, 21-22 ("[T]he Court finds that the Commonwealth has

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

established a prima facie case that the presence of the *operators* of the casino websites and the Internet domain names which identify these gambling operators with [sic] is continuous and systematic . . . . Accordingly . . . the Court finds reasonable bases to conclude that the Internet gambling *operators and their property*, the Internet domain names, are present in Kentucky." (emphasis added)). What *Shaffer* held was the opposite -- that "the presence of property in a State may bear on the existence of jurisdiction." *Id.*, 433 U.S. at 207 ("For example, when claims to the property itself are the source of the underlying controversy . . . it would be unusual for the State where the property is located not to have jurisdiction."). *Shaffer* did not, as the trial court misinterpreted, substitute "minimum contacts," a test applied to assert jurisdiction over nonresidents, with the requirement that the property be present within the forum in the first place.[5]

2. *In rem* jurisdiction over a domain name exists only in the judicial district of the registrar

Both the appellant and the trial court ignore precedent under *Shaffer* and the Due Process Clause holding that the judicial district within which the registrar or other domain-name authority is located is the proper forum to bring an *in rem* action against a domain name. *See, e.g., FleetBoston*, 138 F. Supp. 2d at 134; *Mattel*, 310 F.3d at 302 (2d Cir. 2002) (concluding that it was consistent with *Shaffer* to establish the location of the registrar or other similar domain-name registration authority as the exclusive forum for *in rem* jurisdiction over a domain name) ("[I]t is the presence of the domain name itself -- the 'property [that] is the subject of the jurisdiction' -- in the judicial district in which the

---

[5] The Court's confusion between *in rem* and *in personam* jurisdiction is evident in its statement that a long-arm statute (authorizing personal jurisdiction) could be applied to determine the situs of property. *See* Order at 18 ("On the legislative front, states and federal legislative bodies have enacted statutes, i.e., long-arm statutes, assigning a *situs* for purposes of determining presence."). Kentucky's long-arm statute is inapplicable to *in rem* actions. *See* Ky. Rev. Stat. Ann. § 454.210 (2009).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

registry or registrar is located that anchors the *in rem* action and satisfies due process and international comity."); and *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 224-25 (4th Cir. 2002) (citing *Shaffer* and concluding that the Virginia district court's *in rem* jurisdiction was supported by, among other things, registration of the domain names with a registrar in Virginia). Due process is met because a domain name registrant is "expected to benefit from the State's protection of his interest" and has voluntarily submitted to the forum of the registrar by the act of registration. *See Shaffer*, 433 U.S. at 208.

More importantly, these cases hold that due process *prohibits* imposing nationwide *in rem* jurisdiction over domain names. *See FleetBoston*, 138 F. Supp. 2d at 134 (D. Mass. 2001) (dismissing plaintiff's complaint for lack of *in rem* jurisdiction where neither the registry nor registrar was located in Massachusetts and there was no evidence that registrant had any contacts with the state); *Mattel*, 310 F.3d at 300-02 (also concluding that a plaintiff cannot obtain *in rem* jurisdiction simply by depositing the registration certificates with the district court because the requisite nexus could not be "supplied by domain-name documentation alone").

What the appellant and the trial court propose here would render virtually all domain names (and especially those used in e-commerce) subject to nationwide - and, indeed, worldwide - *in rem* jurisdiction anywhere that a potential plaintiff could access the Internet (i.e., *everywhere*). Yet this type of broad jurisdictional scheme with no territorial limitation plainly exceeds the constitutional limits of due process and has been soundly rejected by all appellate courts, including those within the Sixth Circuit. *See CompuServ*, 89 F.3d at 1262 (concluding that jurisdiction does not exist by the mere fact

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

that a defendant operates an international business "from a desktop"; "[t]hat business operator . . . remains entitled to the protection of the Due Process Clause, which mandates that potential defendants be able 'to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit'"); *Bradley v. Mayo Found.*, No. CIV. A. 97-204, 1999 WL 1032806, at * 19 (E.D. Ky. Aug. 10, 1999) ("Similarly, the maintenance of 51 toll-free telephone lines and two Internet web sites for use by physicians and citizens of various states including Kentucky should not subject the defendant to jurisdiction in every state. With rare exception, virtually every court on similar facts has held that such contacts are insufficient to subject a defendant to personal jurisdiction") (distinguishing *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996), which concluded that the defendant purposefully availed itself by "direct[ing] its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states" and making its website "available continuously to any Internet user"); *see also,* Ian C. Ballon, *E-Commerce and Internet Law 2d Edition* § 53.04 (West 2009) (arguing that early cases such as *Inset* that held jurisdiction to be permissible premised on the accessibility of a website are inconsistent with U.S. Supreme Court precedent and have since been roundly rejected by all appellate courts).[6]

---

[6] *See also McBee v. Delica Co., Ltd.,* 417 F.3d 107, 124 (1st Cir. 2005) ("The mere existence of a website does not show that a defendant is directing its business activities towards every forum where the website is visible; as well, given the omnipresence of Internet websites today, allowing personal jurisdiction to be premised on such a contact alone would 'eviscerate' the limits of a state's jurisdiction over out-of-state foreign defendants.") (citation omitted); *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 451-53 (3d Cir. 2003) (concluding that mere "operation of a commercially interactive web site accessible in the forum state" is insufficient to support specific personal jurisdiction; there must be additional evidence of "purposeful availment" that "reflect[s] intentional interaction with the forum"); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 715 (4th Cir. 2002) (finding the forum state lacked sufficient

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

Were *in rem* jurisdiction found in this case, every state - and every country - would be tempted to regulate Internet businesses for conduct occurring wholly outside their boundaries, and companies such as eBay would be subject to overlapping and, inevitably, potentially inconsistent obligations. Other countries, in retaliation or simply to favor domestic businesses, could adopt the same myopic approach as the lower court here to eliminate competition by foreign (U.S.) businesses. Even more troubling, the lower court's decision, if affirmed, could encourage foreign attempts to seize domain names lawfully registered and operating in the U.S. (removing U.S. businesses entirely from the Internet), knowing that U.S. courts have similarly seized the assets of lawful foreign companies without affording them due process. The consequence of the order, if allowed to stand, is summed up by a question posed by the *National Law Journal* reporting on the opinion: "What if China seized the domain names of U.S. web sites promoting religions that China bans?" Marcia Coyle, "Ky. Suit has Web world in tizzy," *National Law Journal*, Feb. 2, 2009, at 1.

This risk is not merely hypothetical. In one case, a French court sought to fine Yahoo! Inc., a U.S. corporation, for offering materials protected by the First Amendment in the United States (but not in France) on its U.S. website. *See, e.g., Yahoo! Inc. v. La*

---

contacts with an Internet service provider that "engaged in no activity in Maryland, and its only contacts within the State occur when persons in Maryland access Digital's website"); *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002) ("[T]he fact that the newspapers' websites could be accessed anywhere, including Virginia, does not by itself demonstrate that the newspapers were intentionally directing their website content to a Virginia audience. Something more than posting and accessibility is needed to 'indicate that the [newspapers] purposefully (albeit electronically) directed [their] activity in a substantial way to the forum state'...."); *Revell v. Lidov*, 317 F.3d 467, 469 & 475-76 (5th Cir. 2002) (finding a lack of jurisdiction over a defamation claim based on a Columbia University professor's posting of an article on the university's online bulletin board, where there was no evidence that the professor's conduct was specifically directed at Texas, the forum state); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) (rejecting the plaintiff's reliance on *Inset* and concluding that the defendant's contacts were insufficient to establish "purposeful availment" where the defendant merely posted a home page on the web and did not conduct commercial activity over the Internet in the forum).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006).[7] Here, the trial court went much further by not only seeking to regulate activities lawful in the U.K. and other countries where the companies that own the domain names are located -- it actually seized the domain names.

3. The *in rem* seizure of 141 domain names cannot be justified *ex post facto* by arguing that personal jurisdiction could have been asserted

Whether the trial court potentially *could have* asserted personal jurisdiction over the registrants of the domain names is beside the point because the appellant elected to proceed *in rem* and not *in personam*. The appellant did not attempt to serve the registrants or afford them an opportunity to appear to contest personal jurisdiction. Once the appellant proceeded *in rem*, the trial court could not, *ex post facto,* justify its seizure by holding that personal jurisdiction would have been proper. *See U.S. v. Real Property Located at: 1447 Plymouth, S.E., Grand Rapids, Mich.*, 702 F. Supp. 1356, 1359 (W.D. Mich. 1988) (finding that the court did not have *in rem* jurisdiction because it no longer had control over the *res*, and it could not proceed *in personam* because the action was brought *in rem*) (["T]he in personam criminal action does not provide personal jurisdiction in the in rem civil action. In the present cases, the government has proceeded solely on an in rem basis. Accordingly, no personal jurisdiction exists.").

If the websites' activities created a legitimate basis for jurisdiction, the appellant should have brought suit against the registrants in a manner consistent with due process. *See CompuServ*, 89 F.3d at 1262 ("[T]he due process rights of a defendant should be the

---

[7] Indeed, Yahoo's exposure to a similar seizure attempt is a concern given that the French judgment is still outstanding and fines accrue daily. *See id.* at 1243 (Fisher, R., concurring in part and dissenting in part).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

courts' primary concern where personal jurisdiction is at issue.")[8] It cannot, however, sustain the illegal assertion of *in rem* jurisdiction over 141 domain name registrations by arguing that it could have sued the registrants directly and obtained *in personam* jurisdiction, where the registrants in fact were neither sued nor served and were never afforded an opportunity to appear to contest jurisdiction.[9]

B. The Trial Court's Order Violates The Commerce Clause

The trial court's order also violates the dormant Commerce Clause because by seizing the domain names, it directly regulates activities occurring outside of Kentucky and considered lawful in those other territories. *See* U.S. Constitution, Art. I, § 8, cl. 3 (granting Congress power to regulate commerce "with foreign Nations" and "among the several States"). The Commerce Clause limits a state's authority to enact laws affecting interstate and international commerce. Even "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will [not] be upheld [if] the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce*

---

[8] As *Shaffer* explained, "to the extent that presence of property in the State indicates the existence of sufficient contacts under *International Shoe*, there is no need to rely on the property as justifying jurisdiction regardless of the existence of those contacts." *Id.*, 433 U.S. at 209 n. 31. The rationale for allowing jurisdiction to be premised on property located within a forum state is that "a wrongdoer 'should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit." *Id.* at 120. However, that is not the case here.

[9] Equally unavailing is the argument that the "UDRP clearly contemplates that a 'court of competent jurisdiction' is one that has jurisdiction over the dispute" (Appellant's brief at 49) because it assumes the UDRP conferred broad jurisdiction in any forum that simply has an interest but otherwise has no nexus with the domain name. Jurisdiction must still comport with due process. *See Mattel*, 310 F.3d at 301 ("Congress's reference to 'a court of appropriate jurisdiction receiv[ing] a complaint filed pursuant to this section' [of ACPA] would be practically meaningless if it were read to suggest that the filing of a complaint in any district court in the United States could render that court one of 'appropriate jurisdiction.' Clearly, 'appropriate jurisdiction' is a status that precedes and is independent of the filing of the complaint, and is conferred by the presence of the registrar or other domain-name authority within that judicial district.").

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

Church, Inc., 397 U.S. 137, 142 (1970). The Commerce Clause also "precludes the application of a state statute to commerce that takes place wholly outside the State's borders, whether or not the commerce has effects within the state." *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 175 (S.D.N.Y. 1997) (citing *Healy v. The Beer Inst.*, 491 U.S. 324, 336 (1989)).[10] Here, the seizure order is invalid because it directly regulates conduct taking place wholly outside of Kentucky (in countries where the conduct is lawful). *See id.*[11]

Courts have struck down other laws effectively regulating interstate commerce over the Internet, such as laws regulating the dissemination of obscene material to minors (even though states plainly have a strong interest in protecting children).[12] Even if a statute is not aimed at Internet regulation and its effect on interstate commerce is only

---

[10] "[T]he Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Id.* It also "precludes a state from enacting legislation that has the practical effect of exporting that state's domestic policies." *Id.* at 174 (citing *Edgar v. MITE*, 457 U.S. 624 (1982)).

[11] Although Congress passed the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. §§ 5361 *et seq.*, and permitted states to regulate gambling on the Internet, Congress did not authorize states to do so in a manner that impacts interstate or foreign commerce.

[12] *See, e.g., Am. Booksellers Found. v. Dean,* 342 F.3d 96 (2d Cir. 2003) (holding a Vermont statute regulating the dissemination of obscene speech to minors was unconstitutional because in practical effect Vermont "has projected its legislation into other States and directly regulated commerce therein."); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004) (finding it technologically infeasible for a website operator to limit access by geographic location); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (finding New Mexico's interest in regulating dissemination of obscene materials to minors was outweighed by the fact that many Internet communications originated or terminated outside of New Mexico in states with different laws and would subject Internet users to inconsistent regulations); *Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 661-63 (E.D. Pa. 2004) (holding that a statute requiring Internet service providers to block access to websites displaying child pornography was *per se* invalid because it regulated activity occurring wholly outside the state's borders); *Cyberspace Commc'ns, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001) (holding that a statute was unconstitutional because it attempted to control commerce occurring wholly outside the state, placed an unreasonable burden on interstate commerce, and subjected Internet users to inconsistent regulations).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

incidental, it is unconstitutional if the resulting burden on interstate commerce is excessive.[13]

Because the 141 domain names involve websites conducting business worldwide, the trial court's seizure order necessarily implicates not only interstate, but foreign commerce. "In 'the unique context of foreign commerce,' a State's power is further constrained because of 'the special need for federal uniformity.'" *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 311 (1994) (*quoting Wardair Canada Inc. v. Florida Dept. of Revenue,* 477 U.S. 1, 8 (1986)). The Supreme Court has stated that "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 448 (1979). The Supreme Court has thus applied the foreign commerce power more broadly than its interstate counterpart, recognizing the threat of retaliation from foreign nations for discriminatory treatment of foreign commerce. *Japan Line*, 441 U.S. at 448 & n.13 (citing cases); *Kraft Gen. Foods, Inc. v. Iowa Dept. of Revenue*, 505 U.S. 71, 79 (1992).

The seizure order threatens federal uniformity in dealing with foreign commerce by allowing one state, Kentucky, to seize domain names belonging to residents of other

---

[13] *See Consol. Cigar Corp. v. Reilly*, 218 F.3d 30, 56-57 (1st Cir. 2000), *aff'd in part, rev'd in part on other grounds*, 533 U.S. 525 (2001). *Consolidated Cigar* held that a Massachusetts law making it unlawful "for any person to advertise or cause to be advertised within Massachusetts any cigar or little cigar unless the advertising bears one of [several] warning statements," violated the Commerce Clause as applied to advertising on the internet. Applying the *Pike* balancing test, the court found there to be a legitimate local interest, but the resulting burden on interstate commerce, even if only incidental, was "clearly excessive" because the requirement would apply to all ads viewable from a Massachusetts computer.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=e51f048d-89de-4730-bb9d-eaa2f31757c2

countries.[14] Ultimately, the order imposes a burden on both interstate and foreign commerce that is clearly excessive in relation to Kentucky's interest in regulating gaming through the seizure of gaming "devices," because it will subject foreign websites to Kentucky laws, preventing lawful activities in the foreign jurisdictions where the domain name businesses are located. Accordingly, the order violates the Commerce Clause and interferes with Congress' prerogative to set international policy.

CONCLUSION

For the foregoing reasons, the Court of Appeals opinion should be affirmed.

Respectfully submitted,

Laura D'Angelo
WYATT, TARRANT & COMBS, LLP

Daniel G. Dougherty (pro hac vice motion pending upon grant of leave to enter case)
eBAY INC.

Counsel for Amicus Curiae, eBay Inc.

[14] In enacting the Anticybersquatting Consumer Protection Act ("ACPA"), 15 U.S.C. § 1125(d), Congress provided that *in rem* jurisdiction for domain names be *exclusively* brought in the forum of the registrar or registry in order to "satisf[y] due process and international comity." *See Mattel*, 310 F.3d at 302 (concluding that Congress rejected applying a nationwide standard for *in rem* jurisdiction of domain names because it "requires a nexus based upon a U.S. registry or registrar [that] would not offend international comity… [or] due process, since the property and only the property is the subject of the jurisdiction, not other substantive personal rights of any individual defendant"); *see also id.* at 303 ("the legislative history of the ACPA reveals Congress's concern to establish a circumscribed basis for *in rem* jurisdiction that is grounded in the 'nexus' provided by the registrar or other domain- name authority having custody of the disputed property"). Although the ACPA does not apply in this case, it is relevant in evaluating whether the international reach of the trial court's order not only comports with due process, but also with the limitations on interference with foreign commerce that Congress believes appropriate.