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WHEN “SEX” SELLS: EXPANDING THE TORT OF CONVERSION TO ENCOMPASS DOMAIN NAMES

I. INTRODUCTION

When someone forgets the street that his favorite Italian restaurant is on, all he has to do is flip open the phonebook. Immediately at his fingertips is the restaurant’s phone number and address. Equipped with this information, he can drive over to the precise location and indulge in the meal about which he dreamt.

What if once he arrived there the restaurant was gone? In its place stands an entirely different-looking Mexican restaurant. In fact, if not for the address on the facade he would have driven right by, finding the new restaurant unrecognizable—different architecture, different owners, and completely different cuisine. The original owner screams on the sidewalk that the new owners have transformed his property without his consent while he was on vacation. The realtor tries to calm him by explaining that the new owners provided her with documents showing the original owner transferred his rights.

On October 15, 1995, this exact scenario occurred, not on a city street, but instead on the information superhighway.¹ Gary Kremen’s potential female advice site,² intended to provide information pertaining to sexually transmitted diseases, underage pregnancy, and health,³ was developed instead by Stephen Cohen into a site dedicated to pornography.⁴ Although Kremen registered the domain name “sex.com” with the proper authorities on May 9, 1994, Cohen managed to transfer the name for his own use via a fraudulent letter.⁵ While Kremen *did* subsequently bring suit and reacquire the rights to the domain name, Judge James Ware of the United States District Court for the Northern District of California refused

1. See *Kremen v. Cohen*, 99 F. Supp. 2d 1168, 1170 (N.D. Cal. 2000).

2. John Roemer, *Web Domain Name Not Protected by Property Laws*, U.S. Judge Rules, FULTON COUNTY DAILY REP., Dec. 15, 2000, at 1.

3. *Cohen v. Carreon*, No. CV-00-235-ST, 2001 U.S. Dist. LEXIS 7746, at *2 (D. Or. Mar. 9, 2001).

4. See *Sex.com Site Awarded to Its Founder*, 7 THE INTELL. PROP. STRATEGIST 4, Jan. 2001, LEXIS, News & Business, News, News Group Files, All [hereinafter *Sex.com Site Awarded*].

5. See *Kremen*, 99 F. Supp. 2d at 1170.

to extend the tort of conversion to encompass domain names.⁶ Thus, property continued to break its tangible bounds via the new era of the Internet, but tort law did not.

This Comment will examine the development of Internet domain names and their place in American property jurisprudence. In addition, it will discuss the origins of the tort of conversion, as well as the seemingly stagnant state of the doctrine. Furthermore, this Comment will address conversion as applied to domain name disputes and explore a possible resolution. Part II lays a foundation by providing a basic background description of domain name components using the background facts of *Kremen v. Cohen*⁷ to illustrate the type of dispute that arises with domain names. Part III traces the tort of conversion from its origins, through its expansion, to its current stagnant condition. The conversion doctrine and the Internet finally cross paths in Part IV in an analysis of the legal opinion generated in *Kremen*. In an attempt to plausibly expand the modern doctrine, despite the *Kremen* court's unwillingness to do so, Part V analogizes and distinguishes domain names from other intangible property in the case law. Finally, Part VI concludes that the holding in *Kremen* was incorrect because the doctrine of conversion must recognize domain names as property in order to protect the future of business on the Internet.

II. BACKGROUND DEVELOPMENT OF DOMAIN NAMES AND DISPUTES OVER THEM

A. What's in a Domain Name?

A domain name begins "as an Internet Protocol (IP) address"⁸ consisting of four sequences of numbers separated by periods.⁹ Because an IP address is typically complicated to remember, it is subsequently replaced by a domain name such as yahoo.com.¹⁰

Using yahoo.com as an example, this domain name can be broken down into three components. "Yahoo" would be the second-level domain

6. See Shannon Lafferty, *Fighting over Money and Sex (dot com)*, THE RECORDER, Jan. 31, 2001, News at 2, LEXIS, News & Business, News, News Group File, All.

7. 99 F. Supp. 2d at 1168.

8. Neil Batavia, Comment, *That Which We Call a Domain by Any Other Name Would Smell as Sweet: The Overbroad Protection of Trademark Law as It Applies to Domain Names on the Internet*, 53 S.C. L. REV. 461, 463 (2002); see also Kenton K. Yee, *Location.Location.Location: Internet Addresses as Evolving Property*, 6 S. CAL. INTERDISC. L.J. 201, 204-05 (1997).

9. See Batavia, *supra* note 8, at 463.

10. *Id.*

(SLD), “. ” would be the root, and “com” would be the top-level domain (TLD).¹¹ The Domain Name Service then organizes the components so that any computer user can retrieve any registered domain name.¹² Originally, in order to register it with an organization such as Network Solutions, Inc., the domain name only had to be previously unregistered and unique.¹³

Because the original requirements to register were lax, disputes pertaining to domain names ensued. Few potential registrants examined whether their name “would infringe any preexisting trademark” before racing to register it.¹⁴ The most infamous dispute developed when an individual registered the domain name MCDONALDS.COM.¹⁵ Obviously, McDonald’s Corp. felt this name was extremely valuable to its corporate development. However, in order to obtain the rights to the domain name, McDonald’s Corp. was forced to make a charitable contribution to the individual who registered it first.¹⁶

A similar dispute arose when a former employee of MTV Networks registered the domain name MTV.COM.¹⁷ The employee then created a website offering music news and information in a similar manner to MTV Networks services.¹⁸ Ultimately, MTV Networks recovered the domain name after a settlement agreement between the two parties.¹⁹

The simple registration process led to various domain name

11. *Id.*

12. *See id.* at 463–64. The Domain Name Service is a hierarchical retrieval system by which complex domain names are organized into a branching pattern of simpler components. Initially, there was no other respected and regularly utilized manner of organization. Network Solutions then places its registrants’ domain names in this system. *Id.* at 464–65.

13. *See id.* at 464–65. Network Solutions was the only registrar of domain names in the United States until approximately 1999. Any registrant seeking to register his domain name had to use the Network Solutions root server in order for his website to be viewable on Internet browsers. Thus, Network Solutions was the sole body responsible for governing the domain name process via rules and regulations. *Id.* at 465.

14. Bruce P. Keller, *Trademark and Unfair Competition Issues*, in PROTECTING YOUR INTELLECTUAL PROPERTY ASSETS 257, 309 (PLI Intell. Prop. Course, Handbook Series No. G-568, 1999).

15. *See id.*

16. *Id.*

17. *Id.* This dispute arose in the case of *MTV Networks v. Curry*, 867 F. Supp. 202, 203–04 (S.D.N.Y. 1994). Adam Curry, a former MTV employee, registered MTV.COM as a domain name. He developed the site at his own expense and under the pretense that MTV supported his development of the site. However, MTV later sued Curry, claiming that it did not agree that he could create the site using MTV’s name. Curry, on the other hand, alleged that MTV was merely using him to test the waters for its own future Internet project. *Id.*

18. *MTV Networks*, 867 F. Supp. 203–04.

19. Keller, *supra* note 14, at 309.

infringement problems. In response, Internic, the Internet Network Information Center, created the Domain Name Dispute Policy.²⁰ Under its policy the registration guidelines provided:

To register a domain name with Internic under this Policy, a potential registrant must: (i) select a suitable name not already registered by somebody else; (ii) arrange to have two operational computers—a main one and a backup—actively connected to the Internet to “host” or answer to the domain name; (iii) pay Internic an annual fee of \$50, the first two years (\$100) due at registration; and (iv) sign a Domain Name Dispute Policy agreement with Internic²¹

The annual fee described above varies depending on the commercial registration service one utilizes.²² For example, a low cost provider would charge a \$60 setup fee and \$30 monthly service charge, while a high cost provider would offer registration in all the industrialized countries for a charge of \$7,000.²³ In addition, any violation of the policy could lead to the deregistration of the violator’s domain name.²⁴ This deregistration would in turn mean that any new applicant could register the cancelled domain name as his own.

Despite this policy, the rise of both the Internet and e-commerce compelled individuals from around the world to register domain names.²⁵ Businessmen sought to take advantage of this untapped consumer resource. However, while the number of permutations of letters to form words in the English language is unimaginable, entrepreneurs only covet the most recognizable and generic words.²⁶ For example, the ease at which a consumer could track down a name such as dog.com in order to find dog information makes this domain name far more attractive than xzybn.com providing the same information.

Also, some of the methods employed to satisfy demand for a specific word only confused the situation further.²⁷ The distinction between dog.net

20. See Yee, *supra* note 8, at 206. The registrar for geographical TLDs is known as the Internet Information Center, or Internic. Lisa Katz Jones, *Trademark.com: Trademark Law in Cyberspace*, 37 ALTA. L. REV. 991, 995 (1999). In the United States, Network Solutions has a contract with the National Science Foundation to operate Internic. *Id.*

21. See Yee, *supra* note 8, at 206.

22. *Id.*

23. *Id.*

24. See Keller, *supra* note 14, at 311.

25. Yee, *supra* note 8, at 206.

26. See generally *id.* at 207–08 (listing examples that demonstrate the popularity of common words as domain names).

27. See Keller, *supra* note 14, at 319.

and dog.com would rarely come to the mind of the average computer user, let alone distinguish the two as different website entrances.²⁸ Some businesses were capable of compromise. *Wired Magazine* managed to convince *Women's Wire* to change its domain name from wire.net to wwire.net.²⁹ Some unwilling to compromise resorted to intentional theft of domain names by committing fraud.³⁰ The question soon arose—how would the legal system remedy these situations?

*B. Everybody Wants "Sex:" The Dispute over the
Domain Name Sex.com*

On May 9, 1994, Gary Kremen, representing Online Classified, Inc., registered sex.com as a domain name for the first time.³¹ Network Solutions, Inc. granted the domain name to Kremen, as there was neither a prior nor conflicting registrant.³² Kremen's intent for this domain name was to link those interested to an informative website discussing "sexually transmitted disease education, underage pregnancy, and women's health."³³ However, before Kremen could create the website content, Stephen Cohen obtained the rights over the domain name and began constructing adult-themed businesses.³⁴

Realizing the possible value of sex.com, Cohen sent a forged letter to Network Solutions stating that Online Classified, Inc. was relinquishing sex.com and all rights therein.³⁵ The letter, however, was not signed by Cohen, but by Sharon Dimmick, the alleged president of Online Classified, Inc.³⁶ Assuming that both the signature and company letterhead on which the letter was written were authentic, Network Solutions made the domain name available once again for registration.³⁷ Cohen immediately used this opportunity to register the domain name under his own company.³⁸

28. *See id.*

29. *Id.*

30. *See generally* Kremen v. Cohen, 99 F. Supp. 2d 1168, 1170 (N.D. Cal. 2000) (discussing the alleged fraud Stephen Cohen committed when he forged the signature of a representative from Gary Kremen's company on a letter and sent it to Network Solutions).

31. *Id.* at 1170.

32. *See* Batavia, *supra* note 8, at 464–65. (discussing the process of registering a domain name with Network Solutions, Inc.).

33. Cohen v. Carreon, No. CV-00-235-ST, 2001 U.S. Dist. LEXIS 7746, at *2 (D. Or. Mar. 9, 2001).

34. *Id.* at *3–*4.

35. *Kremen*, 99 F. Supp. 2d at 1170.

36. *Id.*

37. *Id.*

38. *Id.*

Kremen subsequently received notice from Network Solutions that it had cancelled his registration.³⁹ After investigating the matter and concluding that Cohen's letter was a forgery, Kremen brought suit against multiple defendants, including Network Solutions and Stephen Cohen.⁴⁰ Specifically, Kremen alleged both "conspiracy to convert property and . . . conversion of bailee" against Network Solutions.⁴¹ Unfortunately for Kremen, Judge Ware dismissed both causes of action pursuant to Network Solutions' motion for summary judgment.⁴²

III. THE ORIGINS AND DEVELOPMENT OF THE TORT OF CONVERSION

A. The Historical Development of Conversion

The tort of conversion arose out the common law's writ of trover.⁴³ "Trover" is the French word for "finding."⁴⁴ Essentially, the courts created conversion to cover instances where trespass to chattels and detinue failed to compensate the plaintiff.⁴⁵ First, trespass to chattels was inapplicable to the finding of lost goods.⁴⁶ Thus, trespass required that the tortfeasor take the goods of another without consent.⁴⁷ Second, detinue was inappropriate for the situation of found goods.⁴⁸ Detinue required an agreement between the two parties, which created a bailment relationship.⁴⁹

As a result, individuals were now able to employ trover to recover their goods. Specifically, one was now able to argue that the tortfeasor found his lost good and refused to return it upon request.⁵⁰ The claimant only needed to prove that he had a superior title to the tortfeasor.⁵¹ Eventually, courts no longer limited the tort to instances of lost and found goods.⁵² Reaching its modern form of conversion, trover only required that

39. *Cohen*, 2001 U.S. Dist. LEXIS 7746, at *4.

40. *See Kremen*, 99 F. Supp. 2d at 1170.

41. *Id.* at 1170–71.

42. *Id.* at 1174–75.

43. RICHARD A. EPSTEIN, TORTS § 1.12.2 (1st ed. 1999).

44. *Id.*

45. *See id.* Trespass to chattels is the intentional dispossession of, use of, or intermeddling with the chattel of another. RESTATEMENT (SECOND) OF TORTS § 217 (1965).

46. *See EPSTEIN*, *supra* note 43.

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See EPSTEIN*, *supra* note 43.

the tortfeasor “treated someone else’s property as his own, regardless of how he came by it.”⁵³

B. The Modern Black Letter Law: Elements of Conversion

The *Restatement of Torts* defines conversion as “an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other full value of the chattel.”⁵⁴ Black’s Law Dictionary defines conversion as:

The act of changing from one form to another; the process of being exchanged . . . The wrongful possession or disposition of another’s property as if it were one’s own; an act or series of acts of willful interference, without lawful justification, with an item of property in a manner inconsistent with another’s right, whereby that other person is deprived of the use and possession of the property.⁵⁵

Inherent in this definition are individual elements: intent, act, and possession or ownership.⁵⁶

Conversion requires the intent to claim an ownership in the goods.⁵⁷ However, one committing the tort need neither have bad intentions nor intentions of taking property from another.⁵⁸ Rather, tort law classifies conversion as a strict liability tort.⁵⁹ Therefore, a tortfeasor’s good faith belief that he owns a piece of property is wholly irrelevant to the intent element of conversion.⁶⁰ Simply put, a tortfeasor intends to convert a piece of property if his possession or “claim of ownership is inconsistent with the original owner’s.”⁶¹ As such, intent often requires little more than a showing of the original owner’s possession or right of ownership and the act of depriving the owner of that right.⁶²

The act element of the tort must be “some affirmative claim of ownership . . . or some act inconsistent with [the original owner’s] title.”⁶³

53. *Id.*

54. EPSTEIN, *supra* note 43, § 1.12.1.

55. BLACK’S LAW DICTIONARY 144 (2d Pocket ed. 2001).

56. *See* EPSTEIN, *supra* note 43, § 1.12.1.

57. *Id.*

58. *Id.*

59. *Id.*

60. *See id.*

61. *Id.*

62. *See* Kremen v. Cohen, 99 F. Supp. 2d 1168, 1172 (N.D. Cal. 2000).

63. EPSTEIN, *supra* note 43, § 1.12.1.

Some courts refer to it as a wrongful act or a disposition of a property interest.⁶⁴ Either way, the act requirement ensures that one's negligent destruction of another's property will not result in conversion.⁶⁵ The tortfeasor must represent himself as would a reasonable owner or as a possessor of the property.⁶⁶

Finally, the original owner must prove that he had the right of ownership or possession over the property.⁶⁷ The owner or possessor can establish this element in a variety of ways.⁶⁸ For example, the owner could provide a receipt or deed as evidence. In addition, the mere location of the item on the alleged owner's property could suffice.⁶⁹ Furthermore, the owner must not have previously relinquished possession or ownership or consented to the tortfeasor's possession of the property.⁷⁰

One of the earliest actions for conversion best demonstrates the elements of the tort. In *Maye v. Yappen*, the California Supreme Court set forth the strict liability nature of conversion.⁷¹ There, the plaintiffs and defendants owned adjoining mines.⁷² The defendants crossed onto the plaintiffs' land and mined a portion of that land.⁷³

The defendants argued that they were not liable for mining the plaintiffs' gold because they neither maliciously nor intentionally committed the act.⁷⁴ According to the defendants, the plaintiffs allowed them to continue mining because they were nowhere near the dividing line.⁷⁵ Relying on the plaintiffs' statement, the defendants continued mining in good faith ignorance of the actual division.⁷⁶ However, a later survey by the defendants' surveyor revealed that the defendants had crossed the line.⁷⁷ The defendants asserted estoppel based on the plaintiffs' assurances of the property line.⁷⁸ The California Supreme Court rejected

64. *Kremen*, 99 F. Supp. 2d at 1172.

65. See EPSTEIN, *supra* note 43, § 1.12.1.

66. See *id.*

67. See *Kremen*, 99 F. Supp. 2d at 1172.

68. See *id.*

69. See generally EPSTEIN, *supra* note 43, § 1.12.1 (discussing the facts of *Maye v. Yappen*, 23 Cal. 306 (1863), where trees on the owner's land were converted when a neighbor cut them down in good faith).

70. See *Kremen*, 99 F. Supp. 2d at 1172 (establishing the elements of conversion).

71. See *Maye*, 23 Cal. at 307-08.

72. *Id.* at 307.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Maye*, 23 Cal. at 308.

78. *Id.*

this argument.⁷⁹ It found instead that *both* parties were ignorant of the actual dividing line.⁸⁰ Due to these findings, the court determined that two of the jury instructions given at trial were erroneous.⁸¹ They were as follows:

If the jury believe from the evidence that the defendants were ignorant of the boundary lines between the plaintiffs and defendants, and in such ignorance, if they entered upon the ground of the plaintiffs in good faith, believing it to be their own, and were induced to do so by the acts and representations of plaintiffs themselves, then they will find for the defendants. . . . If the jury believe, from the testimony, that defendants entered upon plaintiffs' ground in good faith, believing it to be their own ground, and were misled into so doing by the acts or declarations of plaintiffs, then if the plaintiffs recover at all, they can only recover the net sums taken from plaintiffs' ground, over and above the expense of extracting it.⁸²

As a result, the court held that, even if the defendants' mining were accidental, they were still liable for conversion.⁸³ Additionally, the court required the defendants to pay the plaintiffs' damages equivalent to "the value of the gold-bearing earth at the time it was separated from the surrounding soil and became a chattel."⁸⁴

Because of the precise measurements of gold that the plaintiffs presented as evidence at trial, *Maye v. Yappen* was an easy case for the newly-developed doctrine of conversion.⁸⁵ The gold and soil were both tangible.⁸⁶ There existed a precise market value for both types of property.⁸⁷ However, how would the legal system apply this precedent to intangible property?

79. *Id.*

80. *Id.*

81. *Id.* at 312.

82. *Id.* at 309–10.

83. *See Maye*, 23 Cal. at 308.

84. *Id.* at 311.

85. *See id.*

86. *See id.* at 310.

87. *See id.* at 310–11.

C. *The Tort of Conversion as Applied to Intangible Property*

Historically, the tort of conversion did not include “wrongful interference with intangible personal property.”⁸⁸ However, with the ever-growing importance of and dependence on intangible property, such as stocks and bonds, the law began to recognize a cause of action for conversion of specific types of this property.⁸⁹ This modern recognition comes with an incredibly clear-cut limitation. In order for a court to entertain an argument for conversion, the intangible property must be “merged with, or reflected in, something tangible.”⁹⁰

Take for example a savings account.⁹¹ The account itself is intangible. It is comprised of nothing more than numbers. Nevertheless, because this account is memorialized in a bank passbook, it can be the subject of a claim for conversion.⁹² There is a tangible representation of the existence of the account in the black ink dollar figure on the passbook page.

The same, though, is not true for many other valuable pieces of intangible property. Thus far courts have been unwilling to allow an action for conversion to lie in regards to the “goodwill of a business, trade secrets, or a newspaper or laundry route.”⁹³ The judicial standard of a tangible representation of the intangible property seems unforgiving. Some argue that the reluctance of the courts to recognize that conversion can encompass other intangible property is inappropriate.⁹⁴ One author suggested that “where ideas are formulated with labor and inventive genius, as in the case of literary works or scientific researches, they are protected. Where they constitute instruments of fair and effective commercial competition, those who develop them may gather their fruits under the protection of the law.”⁹⁵ Nevertheless, no court had entertained a cause of action for conversion where the property at issue was a domain name. Despite the odds, the owner of a domain name would again battle for the expansion of the tort in *Kremen*.⁹⁶

88. 14 CAL. JUR. 3D *Conversion* § 12 (2002).

89. *See id.*

90. *Id.*

91. *Id.*

92. *See id.*

93. *Id.*

94. *See* RAYMOND T. NIMMER, INFORMATION LAW § 2:13 (2002).

95. *Id.*

96. *See Kremen*, 99 F. Supp. 2d at 1170.

IV. LEGAL TREATMENT OF *KREMEN V. COHEN*⁹⁷

Returning to the facts of *Kremen*, plaintiff Gary Kremen alleged multiple causes of action against defendant Network Solutions.⁹⁸ Conversion was one of these causes of action.⁹⁹ Claiming Network Solutions committed this tort, Kremen argued that as the registrar of the domain name “sex.com,” Network Solutions “wrongfully assigned the property rights to Sex.com to [co-defendant Stephen] Cohen.”¹⁰⁰ Network Solutions, on the other hand, defended against the claim arguing that “a domain name . . . is a form of intangible property that cannot be the basis of a conversion claim.”¹⁰¹ As such, Network Solutions moved for summary judgment on all six causes of action, including conversion.¹⁰²

The court began its analysis of conversion by setting forth its elements.¹⁰³ Under California law, Kremen, the plaintiff, was required to prove the following: first, that he had either ownership or right to possession of the property at the time of the alleged conversion; second, that Network Solutions’ conversion was by a wrongful act or disposition of property rights; and finally, damages.¹⁰⁴ Following a black letter legal introduction, the court discussed the manner by which California jurisprudence dealt with conversion.¹⁰⁵

The history of tort law reveals that conversion generally only applies to the wrongful act or disposition of property rights in tangible property.¹⁰⁶

97. *Kremen v. Cohen*, 99 F. Supp. 2d 1168 (N.D. Cal. 2000).

98. *Id.* at 1170–71.

99. *Id.* at 1171.

100. Roemer, *supra* note 2, at 4.

101. *Id.*

102. *Kremen*, 99 F. Supp. 2d at 1170. The six causes of action were breach of contract, breach of intended third-party beneficiary contract, breach of fiduciary duty, negligent misrepresentation, conspiracy to convert property, and conversion of bailee. *Id.* at 1170–71. The breach of contract cause of action failed because Kremen could not prove the existence of a contract. *Id.* at 1172. The breach of intended third-party beneficiary contract cause of action failed because Kremen did not tender sufficient evidence to create an issue of triable fact pertaining to third-party beneficiary status granted under the Cooperative Agreement. *Id.* The breach of fiduciary duty cause of action failed because the relationship between Network Solutions and Kremen was so remote that there was no fiduciary duty of trust and confidence. *Id.* at 1175. The negligent misrepresentation cause of action failed because Kremen did not offer any evidence of a misrepresentation. *Id.* Finally, the conversion of bailee cause of action failed because the registration of domain names does not make Network Solutions a bailee. *Kremen*, 99 F. Supp. At 1175.

103. *Id.* at 1172.

104. *Id.*

105. *See id.* at 1172–73.

106. *Id.* at 1172.

However, the *Kremen* court did note that, in limited circumstances, California jurisprudence had expanded the tort to include intangible property.¹⁰⁷ Specifically, any intangible property alleged to be converted must have been “*represented by documents*, such as a [sic] bonds, notes, bills of exchange, stock certificates, and warehouse receipts.”¹⁰⁸ However, California courts have declined to consider “[i]ntangible property such as ‘goodwill of business, trade secrets, a newspaper route, or a laundry list of customers. . . .’”¹⁰⁹

Having laid the groundwork for its analysis, the court entertained Network Solutions’ argument that a domain name is insufficient intangible property to be the basis for a conversion claim.¹¹⁰ Judge Ware followed current California law precisely: he wasted no time deciding that there was “simply no evidence establishing that a domain name, including sex.com, [was] ‘merged in or identified with’ a document or other tangible object.”¹¹¹ Falling outside previous acceptable intangible property like bonds and notes, the domain would not suffice as property to sustain an action for conversion.¹¹²

Ware examined two cases in deciding that the domain name was insufficient intangible property.¹¹³ First, he examined *Lockheed Martin Corp. v. Network Solutions, Inc.*¹¹⁴ In that case, Lockheed Martin sued Network Solutions for trademark infringement of the service mark “Skunk Works.”¹¹⁵ “Skunk Works” was Lockheed Martin’s aircraft design and construction laboratory.¹¹⁶ Lockheed Martin argued that Network Solutions allowed others to register variations of the phrase “Skunk Works,” such as skunkworks.net and theskunkworks.com.¹¹⁷ Lockheed Martin claimed that these third-party domain names both diluted and infringed its domain name.¹¹⁸ However, Network Solutions was not found liable.¹¹⁹ The Ninth Circuit reached this holding by determining that Network Solutions did not provide a product, but instead provided a

107. *Id.* at 1172–73.

108. *Kremen*, 99 F. Supp. 2d at 1172.

109. *Id.* (quoting 5 WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 613 (9th ed. 1988)).

110. *Id.* at 1173.

111. *Id.*

112. *See id.*

113. *Id.* at 1173 n.2.

114. 194 F.3d 980 (9th Cir. 1999).

115. *Id.* at 980.

116. *Id.* at 982.

117. *Id.* at 983.

118. *Id.*

119. *Id.* at 987.

service.¹²⁰ The *Kremen* court distinguished the “sex.com” dispute based on this holding.¹²¹ *Lockheed Martin* was inapplicable because it was concerned with Network Solutions’ “role, rather than the proper classification of a domain name.”¹²²

Second, Ware addressed the case of *Network Solutions, Inc. v. Umbro International, Inc.*¹²³ That matter was a garnishment proceeding in which a creditor sought to garnish multiple domain names from a debtor.¹²⁴ However, the Virginia Supreme Court held in the debtor’s favor because domain names were not garnishable.¹²⁵ The Virginia Supreme Court reached this holding because the right to use a given domain name “is inextricably bound to the domain name services that [Network Solutions] provides.”¹²⁶

Despite the holding of *Umbro International*, the *Kremen* court clearly felt the two cases could be distinguished.¹²⁷ Judge Ware felt that the specifics of a garnishment proceeding were far different from a conversion action.¹²⁸ In addition, the domain names in *Umbro International* were registered pursuant to a contract with Network Solutions, unlike the domain names at issue in *Kremen*.¹²⁹ Furthermore, Ware agreed with the dissent in *Umbro International*, which stated that “the right to use domain names ‘exists separate and apart from [Network Solutions]’ various services that make the domain names operational Internet addresses.”¹³⁰

After discussing case law relied on by both parties, Ware addressed three policy concerns regarding his reluctance to expand the tort of conversion to encompass Internet domain names.¹³¹ First, tort law characterizes conversion as a strict liability tort.¹³² As a strict liability tort, the alleged tortfeasor’s intent and knowledge are irrelevant for finding liability.¹³³ Strict liability was far too severe in the Court’s opinion.¹³⁴ If

120. *Lockheed Martin*, 194 F.3d at 984–85.

121. *Kremen*, 99 F. Supp. 2d at 1173 n.2.

122. *Id.*

123. *See id.*; 529 S.E.2d 80 (Va. 2000).

124. *Umbro Int'l*, 529 S.E.2d at 80.

125. *Id.* at 86.

126. *Id.*

127. *See Kremen*, 99 F. Supp. 2d at 1173 n.2.

128. *See id.*

129. *Id.*

130. *Id.*

131. *See id.* at 1173.

132. *Id.*

133. *Kremen*, 99 F. Supp. 2d at 1173.

134. *See id.* at 1174.

conversion covered domain names, Network Solutions and all other domain name registrars would be vulnerable to suit “every time a third party fraudulently obtained the transfer of a domain name.”¹³⁵ Ware believed that the repercussions of such prospective liability would be a multitude of regulations and fee increases.¹³⁶ In addition, these repercussions might impede the entire process of domain name registration.¹³⁷

Second, Ware felt that expansion of the law of conversion would result in a “slippery slope.”¹³⁸ In other words, Ware did not want to remove the entire concept of tangibility from the requirements of conversion.¹³⁹ He would rather force plaintiffs like *Kremen* to seek alternative remedies to protect their domain names.¹⁴⁰ However, the opinion did not mention any of these remedies until its final policy concern.¹⁴¹

Finally, the court further discussed the notion that other remedies were better fashioned for the domain name dispute.¹⁴² However, the court did not specify these remedies, leaving those matters for future consideration by Congress.¹⁴³ Following the court’s discussion of this policy concern, the court granted summary judgment in favor of Network Solutions for the conversion cause of action.¹⁴⁴

V. DIFFERENT “SEX” POSITIONS: EXPANDING THE TORT OF CONVERSION BASED ON AMERICAN INTELLECTUAL PROPERTY JURISPRUDENCE

A. The Intangible Bundle of Rights for Intangible Property

The *Kremen* court’s reasoning in considering the expansion of the tort of conversion was faulty. The initial step in expanding the tort of conversion to encompass domain names is determining that a domain name is property. Property was originally—and still is sometimes narrowly—

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *See Kremen*, 99 F. Supp. 2d at 1174.

140. *See id.* (quoting W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 15 (5th ed. 1984)).

141. *See id.*

142. *See id.*

143. *See id.*

144. *See id.*

conceptualized as a “fixed, tangible object.”¹⁴⁵ The common law developed the notion of property as a “bundle of rights.”¹⁴⁶ This notion suggests that a domain name could be considered property “because a holder [of the domain name in question] has the right to use it, exclude others from using it, and transfer it to another entity.”¹⁴⁷ Thus, the rights a holder has in a domain name equate with the rights a business has in an advertising sign.¹⁴⁸

The use, sale, and transfer of domain names already occur in practice.¹⁴⁹ Use, which is the backbone of this Comment, is the “application . . . employment [or enjoyment] of something.”¹⁵⁰ Regarding transfer, Network Solutions specifically “requires the domain name holder to complete a Registrant Name Change Agreement.”¹⁵¹ Finally, although no domain name has officially been sold yet, many are currently being advertised for sale by registrants.¹⁵²

Although the *Kremen* court was unwilling to adopt this view, precedent suggested that domain names are property as well. The matter of *Umbro International* espoused this very conclusion.¹⁵³ There, Umbro International argued that the domain name is a form of property because Network Solutions provides a registrant with “. . . the exclusive right to use a unique domain name for a specified period of time.”¹⁵⁴ Network Solutions, on the other hand, contended that a registrant is only entitled to the exclusive right to use the domain name as a translation of the Internet Provider (IP) address for Internet surfers.¹⁵⁵ Network Solutions characterized the right as contractual; therefore, a domain name was not property.¹⁵⁶ Unfortunately, Judge Kinser had a better memory than Network Solutions. He reminded them that they had conceded during oral argument “that the right to use a domain name is a form of intangible personal property.”¹⁵⁷ Ultimately, the court did determine that the

145. A. Mechele Dickerson, *From Jeans to Genes: The Evolving Nature of Property of the Estate*, 15 BANKR. DEV. J. 285, 304 (1998).

146. *Id.*

147. *Id.*

148. *Id.*

149. *See, e.g., id.* at 303.

150. BLACK'S LAW DICTIONARY 1540 (7th ed. 1999).

151. Dickerson, *supra* note 145, at 303.

152. *Id.* at 306.

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

154. *Id.*

155. *See id.* at 85.

156. *See id.*

157. *Id.* at 86.

registrant's right was more related to a contractual service.¹⁵⁸ However, this determination was strictly contingent upon the court's interpretation of the requirements of a specific Virginia garnishment law (not conversion).¹⁵⁹ This specificity avoided characterizing domain names as a type of property, and diminished Network Solutions' concession pertaining to such.¹⁶⁰

B. Conversion of Intellectual Property Precedent

Exploration of precedent dealing with the conversion of intellectual property further exemplifies why the *Kremen* court wrongly decided not to expand the tort of conversion to encompass domain names. The Nebraska Court of Appeals in the case of *Mundy v. Decker* first recognized that these cases involved "an old remedy, conversion, and a new factual situation possible only in the computer era."¹⁶¹ In *Mundy*, a former secretary deleted the entire contents of her employer's Word Perfect directory contained on an office computer hard drive.¹⁶² The secretary intentionally destroyed the files on her last day of work before she was fired.¹⁶³ The Nebraska Court of Appeals reversed and remanded the trial court's verdict, believing that the employer had stated a claim for conversion.¹⁶⁴

The facts of *Mundy*, which are strikingly similar to the facts of *Kremen*, clearly support the extension of conversion to domain names. In *Mundy*, the secretary destroyed the Word Perfect version of her employer's documents.¹⁶⁵ Although the documents had been saved onto floppy disks as well as produced as multiple hard copies, the Nebraska Court of Appeals recognized the essential efficiency that the Word Perfect form provided.¹⁶⁶ Like a domain name, a Word Perfect form of a document allows quick and easy retrieval of information stored on the computer.¹⁶⁷ The Nebraska Court of Appeals stated that the existence of tangible forms of the documents was "meaningless on the question of whether there had been a conversion of the directory's files."¹⁶⁸ The only concern was that the

158. *See id.*

159. *See Umbro Int'l*, 529 S.E.2d at 86.

160. *See id.* at 88.

161. *Mundy v. Decker*, No. A-97-882, 1999 Neb. App. LEXIS 3, at *1 (Neb. Ct. App. Jan. 5, 1999).

162. *Id.* at *10.

163. *Id.* at *3.

164. *Id.* at *18.

165. *Id.* at *3.

166. *Id.* at *2-*4.

167. *Mundy*, 1999 Neb. App. LEXIS 3, at *2-*3.

168. *Id.* at *14.

secretary altered the employer's property, just as Cohen did to Kremen's property, thus, exercising "dominion over it."¹⁶⁹

One California court expressed greater concern for the intangible property of information than it did for the tangible property that housed it in *Ananda Church of Self-Realization v. Massachusetts Bay Insurance Co.*¹⁷⁰ There, the defendant removed "documents from the trash can of the claimant's attorney" that pertained to suits in which the plaintiff was involved, seeking indemnification from the defendants.¹⁷¹ Subsequently, the plaintiff brought an action for conversion.¹⁷² The court denied the conversion claim because "[b]y placing [the documents] into the garbage, the owner renounces the key incidents of ownership—title, possession, and the right to control."¹⁷³

Separately, the court examined a specific property damage provision of the insurance policy that Massachusetts Bay Insurance Co. provided to the Ananda Church of Self-Realization.¹⁷⁴ This provision led the court to find that the loss of the documents did not satisfy the policy's requirements to hold the defendant liable for conversion.¹⁷⁵ Of particular interest, the court stated that the true value of the property was the ability to exploit the information within the documents.¹⁷⁶ Thus, the tangibility requirement of conversion hinged on the specific insurance policy term, not the specific characteristics of the documents or the information contained within them.¹⁷⁷

The alleged conversion of a telephone number is probably most similar to that of a domain name. A court considered this very situation in the case of *Rotstein v. Cable & Wireless, Inc.*¹⁷⁸ There, the defendant company provided the plaintiff consumer with telephone numbers for his own personal and business uses.¹⁷⁹ Subsequently, the plaintiff began working at a job where his employer agreed to pay the plaintiff's business-related phone bills that were sent directly to the defendant.¹⁸⁰ Unfortunately, shortly after a year at his new job, the plaintiff's services

169. *Id.* at *10.

170. 116 Cal. Rptr. 2d 370 (Cal. Ct. App. 2002).

171. *Id.* at 372.

172. *See id.* at 370.

173. *Id.* at 376.

174. *See id.* at 377–78.

175. *See id.* at 378.

176. *See Ananda*, 116 Cal. Rptr. 2d at 378.

177. *Id.*

178. No. G027549, 2002 WL 691458, at *1 (Cal. Ct. App. Apr. 24, 2002) (unpublished).

179. *Id.*

180. *Id.*

were no longer required.¹⁸¹

Although the plaintiff no longer worked at the job location, the defendant continued to direct the plaintiff's calls to the company's corporate offices.¹⁸² The defendant persisted in this conduct despite the plaintiff's request that the defendant route the calls to the plaintiff's home.¹⁸³ The defendant asserted that the company "was its customer, not the [plaintiff]."¹⁸⁴

The plaintiff brought suit alleging several causes of action, including conversion of the telephone number.¹⁸⁵ The defendant demurred, and the court sustained the defendant's motion.¹⁸⁶ The plaintiff appealed; however, the appellate court rejected the plaintiff's arguments, holding that the facts did not support an action for conversion.¹⁸⁷

In reaching this holding, the court relied on the fact that "[a] telephone number itself is not tangible property."¹⁸⁸ The court did consider that various tangible items, such as a bill, might raise the issue of intangible property merging into tangible property.¹⁸⁹ However, this consideration was not sufficient to satisfy the requirements of conversion.¹⁹⁰ While tangible documents did reflect the phone number, these documents did "not represent an intangible property interest of value."¹⁹¹ In other words, theft of these documents did not cause the owner to lose his phone number.¹⁹²

The court also stated that any missed telephone calls were not a proper basis for liability based on conversion.¹⁹³ The key to reaching this conclusion was that the court could not calculate or approximate a value for these calls.¹⁹⁴

Rotstein does not place an obstacle in Gary Kremen's quest to expand conversion law. The initial similarity between the two cases arises because a domain name is a means of connecting to a location, just like a telephone number. In addition, Kremen obtained his domain name via both

181. *Id.*

182. *Id.*

183. *Id.*

184. *Rotstein*, 2002 WL 691458, at *1.

185. *See id.*

186. *See id.* at *2.

187. *See id.* at *2, *5.

188. *Id.* at *6.

189. *Id.*

190. *See Rotstein*, 2002 WL 691458, at *6.

191. *Id.*

192. *See id.*

193. *Id.*

194. *See id.*

“electronic and registered mail to Network Solutions, Inc. . . .”¹⁹⁵ Thus, there was a tangible representation of his intangible intellectual property, like the telephone number in *Rotstein*.¹⁹⁶ Unlike the tangible representation in *Rotstein*, the theft of Kremen’s registered or electronic mail would rob him of “an intangible property interest of value.”¹⁹⁷ The theft would prevent the domain name registration from occurring. In addition, the thief would hold the name in his hands, as well as the opportunity to register it. Furthermore, people could still contact Rotstein even without using a phone number. They could send him a letter or simply speak to him in person. Kremen, on the other hand, lost the only method for people to reach his business. People had no means of accessing Kremen’s website via their internet browsers.

Arguably, this scenario for the plaintiff in *Rotstein* presents the same result of inaccessibility to one’s business by different means employed by Stephen Cohen. Essentially, Cohen’s fraudulent letter of Kremen’s relinquishment of the domain name destroyed the property interest Kremen originally created by registering the name. Since Kremen had yet to develop the content of his proposed website, these registration documents may have been the only representation of the valuable commodity of “sex.com.”

Another significant difference between *Rotstein* and *Kremen* is that Kremen’s commodity could be valued,¹⁹⁸ unlike the telephone number in *Rotstein*.¹⁹⁹ As such, Kremen may avoid the concern the *Rotstein* court raised about telephone numbers being an improper basis for liability in considering the expansion of the tort of conversion.²⁰⁰ Furthermore, a domain name owner cannot regain the value of his property simply upon its return, unlike a telephone number. Stephen Cohen’s creation of an adult content site attaches both a stigma and reputation to the site. Few web surfers previously looking for Kremen’s health conscious site would ever return. The majority of hits would most likely be previous viewers of Cohen’s site returning for more. Therefore, a domain name satisfies all the points set forth in *Rotstein* in favor of expanding conversion, while steering clear from the issues that kept the *Rotstein* court from doing such.

195. Cohen v. Carreon, No. CV-00-235-ST, 2001 U.S. Dist. LEXIS 7746, at *2 (D. Or. Mar. 9, 2001).

196. See *Rotstein*, 2002 WL 691458, at *6.

197. *Id.*

198. Xuan-Thao N. Nguyen, *Cyberproperty and Judicial Dissonance: The Trouble with Domain Name Classification*, GEO. MASON L. REV. 183, 184 (2001) (citation omitted).

199. *Rotstein*, 2002 WL 691458, at *6.

200. See *id.* at *5–*6

C. Addressing the Policy Concerns of Kremen

The *Kremen* court cited, without developing, expanding, or responding to, the precise policy arguments previously raised in *Moore v. Regents of the University of California*.²⁰¹ There, plaintiff John Moore similarly brought a cause of action for conversion against The Regents of the University of California, as well as several other defendants.²⁰² However, intellectual property was not at issue. Instead, Moore claimed that the defendants converted his own cells and the rights to them.²⁰³

Moore suffered from hairy-cell leukemia and, as a result, sought treatment at the University of California Medical Center at Los Angeles.²⁰⁴ The doctors at the facility, also named defendants, first diagnosed Moore based on samples of “blood, bone marrow aspirate, and other bodily substances”²⁰⁵ Simultaneously, the doctors were considering the vast economic gains in certain specific types of blood and blood characteristics.²⁰⁶

During Moore’s treatment, one doctor determined that he should extract Moore’s spleen.²⁰⁷ The doctor convinced Moore that this operation was essential to the preservation of Moore’s health.²⁰⁸ As a result, Moore consented to the operation.²⁰⁹

Following the operation, one of the doctors excised pieces of the spleen in the interest of research, rather than Moore’s diagnosis and treatment.²¹⁰ The doctors never brought this to the attention of Moore.²¹¹

Moore’s supposed treatment continued at the medical facility.²¹² The same doctors sampled more blood, sperm, and other bodily substances under the guise of treatment, while continuing to seek a profitable patent.²¹³ Subsequently, the doctors created a patentable cell line based on the research of Moore and his cells.²¹⁴ Experts in the field valued the cell line

201. 793 P.2d 479 (Cal. 1990).

202. *Id.* at 480.

203. *Id.* at 487.

204. *Id.* at 480.

205. *Id.* at 481.

206. *Id.* at 481.

207. *Moore*, 793 P.2d at 481.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Moore*, 793 P.2d at 481–82.

214. *Id.*

at an estimated \$3.01 billion dollars.²¹⁵ In fact, the doctors profitted from an agreement with Genetics Institute for the “exclusive access to the materials and research performed on the cell line and products derived from it.”²¹⁶

Moore argued that the doctors committed conversion because he owned his cells and the right to decide how a doctor would use them.²¹⁷ In addition, Moore did not consent to the doctors’ research; the doctors never informed Moore of their intent.²¹⁸ Moore alleged that he had an interest in the profitable developments from his cells.²¹⁹

The court, however, failed to agree with Moore.²²⁰ Like the *Kremen* court, the court in *Moore* was hesitant to expand the tort of conversion.²²¹ Similarly, the *Moore* court raised the same concern as the *Kremen* court, that expanding the tort would impose an affirmative duty upon those wishing to use the property to determine whether an owner consensually relinquished his property rights.²²² Additionally, the *Moore* court, like that in *Kremen*, expressed that its hesitance correlated with the complexity of the involved policies—topics possibly more suitable for legislative determination.²²³

While the decision in *Moore* ultimately rested on entirely different property issues and statutes, the court set forth the identical policy concerns that the *Kremen* court relied on years later.²²⁴ However, unlike the opinion in *Kremen*, the *Moore* opinion addressed these policy concerns in a dissent by Justice Broussard.²²⁵ While Justice Broussard spoke directly to the issue of human tissues and cells,²²⁶ the principles he developed are applicable to domain names as well.

First, Broussard attacked the majority’s position that the expansion of the tort of conversion would cause a chilling effect on medical research.²²⁷ The *Kremen* court similarly opined that if the tort of conversion were expanded to include conversion of a domain name, the threat of litigation

215. *Id.* at 482.

216. *Id.*

217. *Id.* at 487.

218. *Id.*

219. *Moore*, 793 P.2d at 487.

220. *Id.* at 497.

221. *Id.* at 487.

222. *Id.* at 487 & n.16

223. *Id.* at 488; *Kremen*, 99 F. Supp. 2d at 1173 .

224. *See Moore*, 793 P.2d at 488–93. *See discussion supra* Part IV.

225. *Moore*, 793 P.2d at 504–06 (Broussard, J. concurring and dissenting).

226. *Id.*

227. *Id.* at 504.

would slow the entire process of registration to a grinding pace.²²⁸ Domain name registrants would have to locate acceptable domain names and spend increasing amounts of money and time, like the researchers, just to comply with regulations and find an original domain name.²²⁹

Broussard dismantled this first policy argument, stating that granting summary judgment against a plaintiff who alleges conversion is unjustified treatment of direct interference or misappropriation with the “right to control the use” of his property.²³⁰ According to Broussard, the argument is valid only towards those who obtain materials from a proper cell bank.²³¹

Similarly, the *Kremen* court failed to distinguish between those that obtain their domain name through appropriate registration rather than inappropriate interference.

As a result, an alternative remedy may not always be available to a given plaintiff.²³² In *Moore*, the alternative remedy of breach of fiduciary duty would not necessarily give the plaintiff a remedy in all situations.²³³ For example, that remedy would only be available against the first party to have access to the materials.²³⁴ However, if a subsequent party then stole the materials from the first party, the original owner and donee to the first party would be left without a breach of fiduciary duty cause of action.²³⁵ Thus, the original owner would need a conversion cause of action or he would be left without any remedy.²³⁶

The analysis in *Kremen* possesses similar flaws. Here the alternative to conversion, as a cause of action, would be trademark infringement.²³⁷ However, trademark law does not necessarily protect the rights to a domain name.²³⁸ The United States Patent and Trademark Office sets the scope of trademark protections.²³⁹ According to the United States Patent and Trademark Office, “a domain name cannot be registered as a trademark if it functions as ‘merely an informational indication of the domain name

228. See *Kremen*, 99 F. Supp. 2d at 1174.

229. *Id.*

230. *Moore*, 793 P.2d at 504 (Broussard, J., concurring and dissenting).

231. *Id.*

232. See *id.*

233. See *id.*

234. See *id.*

235. See *id.*

236. See *Moore*, 793 P.2d at 504 (Broussard, J., concurring and dissenting).

237. See Eric G. Begun, *Even Courts Aren't Sure: Domain Name: Property? Contract?*, N.J. LAW., Sept. 10, 2001, at 7.

238. See *id.*

239. See *id.*

address used to access a website.”²⁴⁰ This guideline would leave the domain names of greatest potential worth without trademark rights.²⁴¹ This vulnerability results because generic terms are the most valuable commodities, as domain names, on the Internet.²⁴² For example, websites that contain generic terms, like sex.com, are the easiest to remember for the Internet user, and, thus, are highly coveted.²⁴³ Unfortunately, the United States Patent and Trademark Office refuses to allow potential registrants of these generic names to register them as trademarks.²⁴⁴ Therefore, a future plaintiff who suffers interference with his domain name (and his rights) will be without access to a trademark infringement cause of action.

Broussard further argued that the policy, which involves the fear of chilling the activities of researchers, is unrealistic.²⁴⁵ In Broussard’s eyes, researchers can alleviate their fears simply by going to authorized cell repositories.²⁴⁶ These repositories only house materials that are removed subject to patient consent.²⁴⁷ Thus, an action for conversion will not lie against researchers using the repositories’ services.²⁴⁸

The regulations likely to come as a result of the expansion of conversion to include domain names would lead to an identical result of greater scrutinizing of domain name registration through a different route. Faced with the fear of conversion liability, registration organizations like Network Solutions would take greater care when officiating the registration process. This increased care would translate to an increase in properly registered domain names. In addition, increased care would provide for increased proper domain name relinquishment. If a new registrant sought a specific name, a more organized system would make sure that the name had no prior owners. To acquire this certainty, the previous owner should be contacted to confirm he relinquished a previously registered name—a gross oversight by Network Solutions in *Kremen*. Network Solutions is the party with the greatest resources to take on the task of organizing and overseeing the domain names. The expansion of the conversion doctrine would not only place the burden of such tasks upon the proper party, but also motivate Network Solutions with enough incentive to carry the burden.

240. *Id.*

241. *Id.*

242. *Id.*

243. See Begun, *supra* note 237, at 7.

244. See *id.*

245. Moore, 793 P.2d at 504 (Broussard, J., concurring and dissenting).

246. *Id.* at 504–05.

247. *Id.* at 504.

248. *Id.*

Broussard's second point of contention was that, although some parties may face liability for conversion, they will still have sufficient reasons to continue conducting research.²⁴⁹ Specifically, the prospect of financial rewards for innovative research will prompt scientists to continue their experiments and tests.²⁵⁰ Further, since the real value is in the scientists' work product, not the patient's bodily substances, a patient will only have access to diminished and limited damages.²⁵¹ This result follows from the tort law principle that "a 'subsequent innocent converter' does not forfeit the proceeds of his own creative efforts, but rather 'is entitled to the benefit of any work or labor that he has expended on the [property]'"²⁵²

Broussard's criticism is even more compelling when applied to the facts of *Kremen*. Because the website was valued at an estimated \$100 million, it is unlikely that potential registrants will be deterred.²⁵³ However, a domain name is analogous to the undeveloped bodily substances of a patient.²⁵⁴ As such, a court cannot approximate the value of the domain name until the website has content.²⁵⁵ For example, the \$100 million approximation in *Kremen* followed as a result of the 25,000,000 hits a day that the X-rated website operated by Cohen received.²⁵⁶ Therefore, had Cohen committed the alleged conversion in good-faith, *Kremen* would not have been entitled to the full \$100 million. Instead, Cohen would have kept the returns from his creation. Following this reasoning, only those who willfully convert a domain name will lose their profits in order to deter others from the same culpable conduct.

Justice Mosk's dissent in *Moore* rounds out the critique of the policy arguments. First, Mosk criticized the argument that any decision about expanding the tort of conversion should be left in the proper hands of the Legislature.²⁵⁷ He pointed out that the common law created the tort of conversion.²⁵⁸ Mosk also reminded the majority that one of the greatest aspects of the common law is its ability to adapt to changing societal demands.²⁵⁹ Tort precedent contains numerous examples of such change

249. *Id.* at 505.

250. *Id.*

251. *Moore*, 793 P.2d at 505 (Broussard, J., concurring and dissenting).

252. *Id.* (quoting 1 HARPER ET. AL., THE LAW OF TORTS § 234, at 234 (2d ed. 1986)).

253. See *Sex.com Site Awarded*, *supra* note 4.

254. See *Begun*, *supra* note 237, at 7.

255. See *Sex.com Awarded*, *supra* note 4.

256. See *id.*

257. *Moore*, 793 P.2d at 507 (Mosk, J., dissenting).

258. See *id.*

259. *Id.*

and expansion.²⁶⁰

Kremen and domain names in general could not be any better indicators of changing societal demands. The Internet continues to grow and attract both entrepreneurs and consumers. Many people flock to cyber dressing rooms, bookstores, and libraries in search of products and information instead of the tangible storefronts so coveted by the judicial system. The common law can, and should, follow the people to protect their venturing into new avenues, even super-highways. It must provide the incentive for proper business and economic growth, as well as consumer interest, while deterring those eager to employ culpable conduct for their own gain.

*D. Even Ninth Circuit and Supreme Court Judges
Want "Sex"—Sex.com, That Is*

The United States Court of Appeals for the Ninth Circuit attempted to address the challenging and important questions that Judge Ware left unanswered. The Ninth Circuit heard Gary Kremen's appeal.²⁶¹ However, the Ninth Circuit posed only questions, not answers, in its decision to order the matter certified to the Supreme Court of California.²⁶² The questions offered up to the Supreme Court of California were as follows:

Is an Internet domain name within the scope of property subject to the tort of conversion? (a) For the tort of conversion to apply to intangible property, is it necessary that the intangible property be merged with a document or other tangible medium? (b) If the answer to Question (a) is "yes," does the tort of conversion apply to an Internet domain name, or, more specifically, is an Internet domain name merged with a document or other tangible medium?²⁶³

The Ninth Circuit chose to certify the question because of the value that an answer could have on both precedent and public policy.²⁶⁴ California has yet to answer these questions under its state conversion laws.²⁶⁵ Further, the Internet is the means by which all members of varying social and economic classes may access the world in order to exercise their First Amendment rights. With the ever-growing number of domain names

260. *See id.*

261. *Kremen v. Cohen*, 314 F.3d 1127 (9th Cir. 2003).

262. *See id.* at 1129.

263. *Id.* at 1130.

264. *See id.* at 1132–36.

265. *Id.*

and the importance of the Internet as a means of communication and business,²⁶⁶ those questions can wait no longer to be answered. While Judge Kozinski did correctly point out in his dissent that certifying the question will tax the California Supreme Court's already sparse resources of time and money,²⁶⁷ Kozinski incorrectly believes that "[c]yberspace will not implode if the supreme court confronts the majority's questions at some point in the future"²⁶⁸ Carefully making the "lawyerly" choice to use the word implosion does make the result seem unlikely; however, the results of exponential increases in culpable conduct, such as that engaged in by Cohen, as well as exponential increases in suits to remedy this conduct, hardly seem to spare administrative costs or Internet development. In essence, the choice would subsidize Network Solutions by allowing it to expend absolutely no resources to better its registration system. Network Solutions must be held accountable in order for it to recognize its responsibility to protect all domain name registrants. Network Solutions has yet to take on this role, as evidenced by its decision to tell Cohen to contact Kremen, rather than contacting Kremen itself, thus creating the entire problem.²⁶⁹ In addition, Kremen should hardly be expected to be left to seek recourse from Cohen, a virtual fugitive from justice.

Kozinski does state that the Ninth Circuit can answer these questions, which would still leave the Supreme Court of California with the option to overrule.²⁷⁰ Nevertheless, that point seems to undermine Kozinski's judicial resource argument. Essentially, two different courts would then exhaust their resources while handling the same question. Furthermore, the delay created by Kozinski's dual resource expenditure could also lead to more litigation by other parties. The time has come for the judicial system to embrace the same technology consumers and businessmen have utilized for years.

266. *Id.*

267. *See Kremen*, 314 F.3d at 1136.

268. *Id.*

269. *See id.* at 1137 n.2.

270. *See generally id.* at 1142-45 (discussing the alternatives to certifying the question for Supreme Court hearing).

VI. CONCLUSION

The *Kremen* court improperly decided to preserve the common law limitations on the types of property protected by conversion law. The established elements of the tort of conversion do not reflect the seemingly never-ending advancements in technology in recent years. The *Rotstein* court best explained this idea when it stated, “[a]s society became technologically more advanced, the value of intangible property rights became apparent and consequently subject to theft.”²⁷¹

The current limits on tort protection do not address the concerns of either entrepreneurs or consumers. First, the limitations are incompatible with the modern entrepreneur’s aggressive investment in the Internet. Large corporations and mom-and-pop stores alike seek daily to expand their clientele by making their businesses and products accessible on the Internet. Without the legal protection of conversion, “[e]ven if [an entrepreneur] is successful in regaining control of the domain name, there is nothing to prevent another person from hijacking the site using the same procedure.”²⁷² Second, unrecognized conversions of domain names potentially hurt consumers as well.²⁷³ Consumers have shown a strong interest in e-business.²⁷⁴ However, the only way to satisfy their interest is via domain names.²⁷⁵ One cannot physically drive to these cyberstores on the Information Super Highway.²⁷⁶

The California Supreme Court now has the opportunity to provide registration organizations with the incentive to run an efficient and secure registration process. Similarly, expanding the protections afforded to potential registrants will provide them with incentive to delve into the Internet. Finally, the expansion will provide individuals like Stephen Cohen with sufficient disincentive to engage in domain name theft and fraudulent conduct. These are the desired results, as it is the wrongdoers like Cohen who should suffer. Furthermore, parties like Network Solutions, Inc., who sit in the best position to stop these incidents from occurring, must be held accountable so that they take advantage of their

271. *Rotstein v. Cable & Wireless, Inc.*, No. G027549, 2002 WL 691458, at *5 (Cal. Ct. App. Apr. 24, 2002).

272. *NSI Wins Another One*, 5 CYBERSPACE LAW. 27, July/Aug. 2000, LEXIS, News & Business, News, News Group File, All.

273. *Id.*

274. *Id.*

275. See generally *Yee*, *supra* note 8, at 206–07 (recognizing that although domain names have the potential to make or break a business, competition for domain names is cutthroat).

276. See generally *id.* at 203 (comparing domain names to real estate addresses).

position. As such, the California Supreme Court must expand the tort of conversion to include domain names within the protections afforded to other forms of intangible property.

*Eric Kohm**

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