

CHAPTER 4: DIGITAL INTANGIBLES

A. Domain Names

1. The Basics

KREMEN V. COHEN
337 F.3d 1024 (9th Cir. 2000)

Kozinski, Circuit Judge:^[*]

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

BACKGROUND

“Sex on the Internet?,” they all said. “*That’ll* never make any money.” But computer-geek-turned-entrepreneur Gary Kremen knew an opportunity when he saw it. The year was 1994; domain names were free for the asking, and it would be several years yet before Henry Blodget and hordes of eager NASDAQ day traders would turn the Internet into the Dutch tulip craze of our times. With a quick e-mail to the domain name registrar Network Solutions, Kremen became the proud owner of sex.com. He registered the name to his business, Online Classifieds, and listed himself as the contact.

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

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

Despite the letter's transparent claim that a company called “*Online Classifieds*” had no Internet connection, Network Solutions made no effort to contact Kremen. Instead, it accepted the letter at face value and transferred the domain name to

* [Ed: In 2009, Judge Kozinski was admonished by a judicial disciplinary panel for maintaining a publicly accessible server that included sexually explicit material. In 2017, he abruptly resigned after being accused of sexual misconduct by numerous women, including former law clerks.]

Cohen. When Kremen contacted Network Solutions some time later, he was told it was too late to undo the transfer. Cohen went on to turn sex.com into a lucrative online porn empire.

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

[Kremen was unable to collect the judgment from Cohen, who fled the jurisdiction and either hid or dissipated his assets.] Given his limited success with the bounty hunter approach, it should come as no surprise that Kremen seeks to hold someone else responsible for his losses. That someone is Network Solutions, the exclusive domain name registrar at the time of Cohen's antics. Kremen sued it for mishandling his domain name ...

BREACH OF CONTRACT

Kremen had no express contract with Network Solutions, but argues that his registration created an implied contract, which Network Solutions breached. A defendant is normally not liable for breach of contract, however, if he promised to do something for free. The party claiming breach must show that, in return for the promise, it conferred some benefit the other party was not already entitled to receive, or suffered some prejudice it was not already bound to endure. The adequacy of consideration doesn't matter, but it must be something of real value.

Kremen did not pay Network Solutions or exchange some other property in return for his domain name. Nor did his registration increase the amount of money Network Solutions received from the National Science Foundation; under the cooperative agreement, Network Solutions was paid on a fixed-fee basis. The cooperative agreement did contemplate that Network Solutions might one day charge fees. Kremen seizes on this fact and claims he conferred a benefit on Network Solutions by becoming a customer "at a time when it was eager to expand its customer base."

The problem with this theory is that Kremen was a nonpaying customer, so his status as a registrant was valuable only because of the possibility he might stick around if Network Solutions started charging fees. Kremen was under no obligation to do so. He was in the same position as one who promises to do something but reserves the right to change his mind. He might have become a paying customer or he might not; the choice was up to him once Network Solutions started charging fees. As many Internet investors found out the hard way, mere hope of profit is not consideration.

Kremen argues that he gave Network Solutions valuable marketing data by submitting his contact information when he registered the domain name. But there is no evidence that Network Solutions sought the data as part of its benefit of the bargain. It collected only information reasonably necessary to complete the registration process. Any marketing value it had was an incidental consequence of the process. This is not a case where a party's actions can only be explained as a gimmick to collect customer information; Network Solutions was giving away domain names because the National Science Foundation was paying it to do so. Knowledge of the recipient's identity is a nearly inevitable consequence of any gift.

Absent evidence it was actually something the donor bargained for, it is not consideration.

Kremen did not give consideration for his domain name, so he had no contract with Network Solutions.

BREACH OF THIRD-PARTY CONTRACT

We likewise reject Kremen's argument based on Network Solutions's cooperative agreement with the National Science Foundation. A party can enforce a third-party contract only if it reflects an express or implied intention of the parties to the contract to benefit the third party. The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended by the parties to benefit from the contract. When a contract is with a government entity, a more stringent test applies: Parties that benefit are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary. The contract must establish not only an intent to confer a benefit, but also an intention to grant the third party enforceable rights.

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

CONVERSION

Kremen's conversion claim is another matter. To establish that tort, a plaintiff must show "ownership or right to possession of property, wrongful disposition of the property right and damages." *G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Service, Inc.*, 958 F.2d 896, 906 (9th Cir. 1992). The preliminary question, then, is whether registrants have property rights in their domain names. Network Solutions all but concedes that they do. This is no surprise, given its positions in prior litigation. See *Network Solutions, Inc. v. Umbro Int'l, Inc.*, 259 Va. 759 (2000) ("Network Solutions acknowledged during oral argument before this Court that the right to use a domain name is a form of intangible personal property."); *Network Solutions, Inc. v. Clue Computing, Inc.*, 946 F. Supp. 858, 860 (D. Colo. 1996) (same). The district court agreed with the parties on this issue, as do we.

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

Finally, registrants have a legitimate claim to exclusivity. Registering a domain name is like staking a claim to a plot of land at the title office. It informs others

that the domain name is the registrant's and no one else's. Many registrants also invest substantial time and money to develop and promote websites that depend on their domain names. Ensuring that they reap the benefits of their investments reduces uncertainty and thus encourages investment in the first place, promoting the growth of the Internet overall.

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

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

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

We conclude that California does not follow the Restatement's strict merger requirement. Indeed, the leading California Supreme Court case rejects the tangibility requirement altogether. In *Payne v. Elliot*, 54 Cal. 339 (1880), the Court considered whether shares in a corporation (as opposed to the share certificates themselves) could be converted. It held that they could, reasoning: "The action no longer exists as it did at common law, but has been developed into a remedy for the conversion of *every species of personal property*." *Id.* at 341 (emphasis added). While *Payne's* outcome might be reconcilable with the Restatement, its rationale certainly is not: It recognized conversion of shares, not because they are customarily represented by share certificates, but because they are a species of personal property and, perforce, protected.⁷

Notwithstanding *Payne's* seemingly clear holding, the California Court of Appeal held in *Olschewski v. Hudson*, 87 Cal. App. 282 (1927), that a laundry route was not subject to conversion. ... Rather than follow binding California Supreme Court precedent, the court retheorized *Payne* and held that corporate stock could be converted only because it was "represented by" a tangible document. *Id.*; *see also Adkins v. Model Laundry Co.*, 92 Cal.App. 575, 583 (1928) (relying on

7. Intangible interests in *real* property, on the other hand, remain unprotected by conversion, presumably because trespass is an adequate remedy. Some California cases also preserve the traditional exception for indefinite sums of money.

Olschewski and holding that no property right inhered in “the intangible interest of an exclusive privilege to collect laundry”).

Were *Olschewski* the only relevant case on the books, there might be a plausible argument that California follows the Restatement. But in *Palm Springs-La Quinta Development Co. v. Kieberk Corp.*, 46 Cal.App.2d 234 (1941), the court of appeal allowed a conversion claim for intangible information in a customer list when some of the index cards on which the information was recorded were destroyed. The court allowed damages not just for the value of the cards, but for the value of the intangible information lost. Section 242(1) of the Restatement, however, allows recovery for intangibles only if they are merged in the converted document. Customer information is not merged in a document in any meaningful sense. A Rolodex is not like a stock certificate that actually represents a property interest; it is only a means of recording information.

Palm Springs and *Olschewski* are reconcilable on their facts—the former involved conversion of the document itself while the latter did not. But this distinction can't be squared with the Restatement. The plaintiff in *Palm Springs* recovered damages for the value of his intangibles. But if those intangibles were merged in the index cards for purposes of section 242(1), the plaintiffs in *Olschewski* and *Adkins* should have recovered under section 242(2)—laundry routes surely are customarily written down somewhere. “Merged” can't mean one thing in one section and something else in the other.

California courts ignored the Restatement again in *A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554 (1977), which applied the tort to a defendant who sold bootlegged copies of musical recordings. The court held broadly that “such misappropriation and sale of the intangible property of another without authority from the owner is conversion.” *Id.* at 570. It gave no hint that its holding depended on whether the owner's intellectual property rights were merged in some document. One might imagine physical things with which the intangible was associated—for example, the medium on which the song was recorded. But an intangible intellectual property right in a song is not merged in a phonograph record in the sense that the record represents the composer's intellectual property right. The record is not like a certificate of ownership; it is only a medium for one instantiation of the artistic work.[8] ...

In short, California does not follow the Restatement's strict requirement that some document must actually represent the owner's intangible property right. On the contrary, courts routinely apply the tort to intangibles without inquiring whether they are merged in a document and, while it's often possible to dream up some document the intangible is connected to in some fashion, it's seldom one that represents the owner's property interest. To the extent *Olschewski* endorses the strict merger rule, it is against the weight of authority. That rule cannot be squared with a jurisprudence that recognizes conversion of music recordings, radio shows, customer lists, regulatory filings, confidential information and even domain names.[9]

Were it necessary to settle the issue once and for all, we would toe the line of *Payne* and hold that conversion is “a remedy for the conversion of every species of personal property.” 54 Cal. at 341. But we need not do so to resolve this case. Assuming *arguendo* that California retains some vestigial merger requirement, it is clearly minimal, and at most requires only some connection to a document or tangible object—not representation of the owner's intangible interest in the strict Restatement sense.

Kremen's domain name falls easily within this class of property. He argues that the relevant document is the Domain Name System, or "DNS"—the distributed electronic database that associates domain names like *sex.com* with particular computers connected to the Internet. We agree that the DNS is a document (or perhaps more accurately a collection of documents). That it is stored in electronic form rather than on ink and paper is immaterial. It would be a curious jurisprudence that turned on the existence of a paper document rather than an electronic one. Torching a company's file room would then be conversion while hacking into its mainframe and deleting its data would not. That is not the law, at least not in California. ...

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

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

Even if Network Solutions were correct that there is no single record in the DNS architecture with which Kremen's intangible property right is associated, that is no impediment under California law. A share of stock, for example, may be evidenced by more than one document. *See Payne v. Elliot*, 54 Cal. 339, 342 (1880) ("The certificate is only evidence of the property; and it is not the only evidence, for a transfer on the books of the corporation, without the issuance of a certificate, vests title in the shareholder: the certificate is, therefore, but additional evidence of title. ..."); ...

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

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

The district court supported its contrary holding with several policy rationales, but none is sufficient grounds to depart from the common law rule. The court was reluctant to apply the tort of conversion because of its strict liability nature. This

concern rings somewhat hollow in this case because the district court effectively exempted Network Solutions from liability to Kremen altogether, whether or not it was negligent. Network Solutions made no effort to contact Kremen before giving away his domain name, despite receiving a facially suspect letter from a third party. A jury would be justified in finding it was unreasonably careless.

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

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

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

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

CONVERSION BY BAILEE

Kremen's complaint finally alleges a separate claim for "conversion by bailee." The district court granted summary judgment, holding that Network Solutions was not a bailee of Kremen's property.

We need not decide the issue because Kremen's "conversion by bailee" claim does not state a cause of action independent of his conversion claim. As we read California law, "conversion by bailee" is not a distinct tort, but merely the tort of conversion committed by one who is a bailee. Kremen's complaint does not allege any claim of bailee liability other than conversion. To prove "conversion by bailee," Kremen must establish all the elements of conversion but, having done so, he gains nothing by also showing that Network Solutions is a bailee.

NOTES

1. Some aspects of *Kremen* reflect the legal landscape of the mid-1990s, under which Network Solutions (now Verisign) was the exclusive registrar for the .com top-level-domain under a contract with the NSF and provided its services for free to users, without formal contracts. In the late 1990s, the Department of Commerce stood up ICANN, which now contracts with numerous registrars (e.g., GoDaddy, NameCheap, Tucows, Squarespace, and Register.com). These registrars charge fees to their users and typically require users to agree to a set of terms and conditions when they register a domain. How might these changes affect the result in *Kremen*?
2. Some courts have rejected *Kremen* and held that domain names are not property. For example, in *Xereas v. Heiss*, 933 F. Supp. 2d 1 (D.D.C. 2013), plaintiff Xereas registered domain names including riotactcomedy.com, and formed an LLC to operate the Riot Act Comedy Club with defendants Dawson and Heiss. In 2012, they purported to remove Xereas from his management role, and instructed the LLC's web designer to transfer the domain name from Xereas to the LLC. *Held*, the conversion claim against Dawson and Heiss failed because "Xereas does not allege that his property interests were merged in any tangible documents which were transferred to the defendants." However, his claims for unjust enrichment and breach of the contractual implied duty of good faith and fair dealing could go forward.
3. The duties owed by a bailee can generally be adjusted by contract, and domain names are no different. In *Size, Inc. v. Network Solutions, Inc.*, 255 F. Supp. 2d 568 (E.D. Va. 2003), Size registered size.com with Network Solutions and agreed to its standard service agreement, which provided:

13. LIMITATION OF LIABILITY. You agree that our liability, and your exclusive remedy, with respect to any Network Solutions' service(s) provided under this Agreement and/or for any breach of this Agreement is solely limited to the amount you paid for such service(s). Network Solutions and its contractors shall not be liable for any direct, indirect, incidental, special or consequential damages resulting from the use or inability to use any of the Network Solutions' services or for the cost of procurement of substitute services.

The domain name was later transferred to an unrelated third party under disputed circumstances. Size sued Network Solutions for conversion, negligence, and breach of contract, but the court enforced the limitation of liability clause to cap the damages at \$289. The court expressly declined to consider whether domain names are property—do you see why it made no difference here?

4. There are limits to how much contracts can do, however. In *Baidu, Inc. v. Register.com, Inc.*, 760 F. Supp. 2d 312 (S.D.N.Y. 2010), "an unauthorized individual falsely claiming to be an agent of Baidu" was able to convince Register to change the email address on file to antiwahabi2008@gmail.com and then to "re-route Internet traffic from Baidu's web site to an Iranian hacker group's site. Register had an extensive limitation of liability clause, but the court denied enforcement because the facts alleged by Baidu "would provide a sufficient basis for a jury to find that Register acted in a grossly negligent or reckless manner." Among other things, the intruder gave an incorrect re-

sponse to a security question and provided an incorrect two-factor-authentication security code.

CRS RECOVERY, INC. V. LAXTON
600 F.3d 1138 (9th Cir. 2010)

Hawkins, Circuit Judge:

I. BACKGROUND ...

A. Background Facts

On July 23, 1995, [Dale] Mayberry, a citizen of Virginia, registered the domain name *rl.com*. The registration was effected by a contract with domain name registrar Network Solutions, Inc., a Delaware corporation headquartered in Herndon, Virginia. Network Solutions is one of the largest domain name registrars in the world and for a \$100 fee registers a client's domain name with the Internet Corporation for Assigned Names and Numbers, commonly referred to as ICANN. Mayberry's registration of *rl.com* was renewable for \$50 per year. After the initial registration, Mayberry renewed the domain name periodically, last doing so on July 23, 2002, when he paid in advance for three years so that the registration would expire on July 24, 2005.

Mayberry's contract with Network Solutions identified the administrator of the website as Micro Access Technologies, Inc., a company owned by Mayberry. Specifically, Mayberry made MAT, through *mat.net* the administrative contact for both domain names, *mat.net* and *rl.com*. He thus exercised administrative control over both websites through the e-mail address *dale@mat.net*. In 2001 *mat.net* ceased operation. Mayberry failed to notify Network Solutions that *mat.net* was no longer operative.

The parties dispute the precise circumstances of Mayberry's loss of *mat.net* and, therefore, the loss of *rl.com*. [John] Laxton asserts that Mayberry let the registration expire by its terms, but Mayberry contends he attempted to renew the domain name. Laxton's expert claimed that Mayberry is "incorrect" in insisting the registration still belonged to Mayberry on December 19, 2003, and that Mayberry "abandoned *mat.net* by letting it expire on its own terms on October 2." At his deposition, Mayberry stated that he was still the registrant of *mat.net* on December 19, 2003, a claim Laxton vigorously contested both at the district court and on appeal. The district court concluded that "the circumstances surrounding the transfer of *mat.net* are not entirely clear."¹ ...

Despite these unresolved factual issues, we can establish the following from the record. On December 19, 2003, a new registration of *mat.net* was made by a man named Li Qiang. The registration was made on Beijing Sinonets Network & Telecom Co. Qiang's control of *mat.net* permitted him to designate his e-mail address as *dale@mat.net* and to receive e-mail at this address in place of Mayberry. Using this e-mail address, Qiang transferred ownership of the domain name *rl.com* to himself. Network Solutions accepted the transfer, acting in the belief that it was

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1. While the dissent argues that finding any abandonment on this record is impossible, abandonment is a question of intent to be determined upon all the facts and circumstances. It is possible that Laxton could prove that, given Mayberry's alleged abandonment of *mat.net*, his long delay in attempting to reestablish control over the website, and his demonstrated familiarity with registering and re-registering domain names, that Mayberry evidenced an intent to intentionally relinquish his rights in the property, i.e., abandon it. ...

being made by Mayberry, who in fact was unaware of Qiang's actions. Qiang later transferred the domain name to Barnali Kalita, a citizen of India. In May 2005, Kalita sold the name to Laxton, a citizen of California, for \$15,000. Prior to the purchase, Laxton contends he checked *rl.com* with the World Intellectual Property Organization to ensure there were no disputes involving the domain name. Determining there were none, Laxton consummated the purchase and assigned the name to Real Estate Loans, Inc., a California corporation he owns.

Mayberry, meanwhile, discovered that he had lost control of both domain names. ... Contact was made with Laxton, who, having just spent thousands of dollars successfully defending *rl.com* from a WIPO action brought by Ralph Lauren, declined to surrender his control over the domain name. This lawsuit followed. ...

II. ANALYSIS ...

C. California Conversion Law

Having decided California law applies, we turn to whether Mayberry should have prevailed on summary judgment. Like the choice-of-law analysis, we must accommodate facts arising from Internet transactions within traditional legal doctrines. We are faced with two parties, neither of which apparently knew anything they did was wrong until it was too late, and a third-party wrongdoer from whom it is unlikely anyone can ever collect judgment.

The parties do not dispute that a domain name is intangible property, subject to an action for conversion under California law. *Kremen*, 337 F.3d at 1030. Laxton argues, however, that his purchase of the domain name, done with no knowledge of its unsavory provenance, was not a wrongful act at all. Mayberry responds that Laxton's "innocence" is irrelevant since he continued to possess property over which he never did, or could have, possessed title.

1. *Innocent Purchaser Defense*

Under California law, conversion is generally described as the wrongful exercise of dominion over the personal property of another. The common law rule thus holds that so long as Laxton exercised conscious dominion and control over *rl.com*, he assumed the risk on the question of whether he is correct about the true title holder. Further, where a person entitled to possession demands it, the wrongful, unjustified withholding is actionable as conversion.

California does, however, recognize an innocent purchaser defense. As a general rule, an innocent purchaser for value and without actual or constructive notice that his or her vendor has secured the goods by a fraudulent purchase is not liable for conversion. The law distinguishes between a purchaser whose vendor obtained title by fraud and a purchaser whose vendor obtained title by theft, because an involuntary transfer results in a void title, whereas a voluntary transfer, even if fraudulent, renders the title merely voidable. Therefore, an innocent purchaser for value and without notice, actual or constructive, that his vendor had secured the goods by a fraudulent purchase, is not liable for conversion.

The district court found that Mayberry was "not lawfully dispossessed" of his right to *rl.com* "by Qiang's seizure of the domain name without Mayberry's authorization, and thus it was not possible for Defendants to acquire a right to the domain superior to Mayberry's by virtue of Laxton's purchase." Therefore, the court held, Laxton was "*prima facie* liable for conversion."

Laxton argues that Mayberry voluntarily parted with *rl.com* and, at most, the transfer to Qiang was obtained by fraud, leaving Laxton an innocent purchaser for

value. In support of this argument Laxton offered his declaration, in which he claimed that “there was nothing to suggest that this purchase was anything other than an honest transaction. Prior to the purchase, I checked the domain name with the World Intellectual Property Organization just to make sure that there were no disputes involved with the domain name and there were none.” He also offered an expert who explained inconsistencies in the evidence regarding the dates and circumstances surrounding Mayberry’s loss of *mat.net*. Laxton’s expert further explained that “CRS offers no explanation as to how Qiang might have transferred the registration away from Mayberry without his consent.”

The key determination was thus whether Mayberry lost control of *rl.com* as the result of theft or fraud. To be sure, if the title were voidable Mayberry could pursue a separate action against Qiang for the fraud, as could Laxton if the title were void. However, because of the likely inability of either party to collect a judgment against Qiang, the determination of the quality of the title is of paramount importance. In any case, the facts underlying a determination on this issue are contested. Laxton alleges facts that, if credited, support the conclusion that Mayberry voluntarily gave up control over *rl.com*, and Qiang exploited that carelessness to fraudulently obtain control of the site. Yet the district court begged the factual question in characterizing Qiang’s control of *rl.com* as a “seizure” when the circumstances of the transfer are unclear. We thus remand to the district court for further fact-finding to resolve Laxton’s claims that Mayberry lost *rl.com* due to fraud.

2. *Abandonment*

At the district court, Laxton also claimed Mayberry’s actions resulted in Mayberry’s abandonment of his right to possess *rl.com*. The district court rejected this argument, holding that “a defendant must show a clear, unequivocal, and decisive act’ demonstrating a waiver of the plaintiff’s property rights.” The district court concluded that Laxton “pointed to no such affirmative relinquishment of Mayberry’s right to exercise control over *rl.com*.”

While this court correctly states the standard of abandonment under California law, in *Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.*, a California appellate court upheld an abandonment defense to a conversion action where the plaintiff had discarded documents in an outdoor trash barrel, reasoning that “a thing is abandoned when the owner throws it away, or leaves it without custody, because he no longer wishes to account it as his property.” 95 Cal. App. 4th 1273, 116 Cal.Rptr.2d 370, 377 (2002). Laxton claims the facts are similar as Mayberry gave up *mat.net* to a public database—essentially a virtual trash bin—listing websites available to the public for registration.

The district court noted that it could “divine no intent to abandon *rl.com* from Mayberry’s failure to update his contact information with [Network Solutions] once he lost access to the email address, *dale@mat.net*. It is not clear when Mayberry first learned that he no longer could access his email, and only four days passed between *mat.net*’s transfer to Qiang and the theft of *rl.com*. In any event, Mayberry’s failure to change the contact information... cannot be interpreted as an affirmative abandonment of his rights to the domain.” We are not so sure.

The factual disputes regarding the loss of *mat.net* prevent disposing of this case on summary judgment. Laxton did allege an act that, he says, is unequivocal and indicates decisive intent to abandon *rl.com*: the abandonment of *mat.net*. Laxton claims Mayberry abandoned *mat.net*, letting its registration expire, and based on Mayberry’s extensive knowledge of the system for registering domain names, this was also an abandonment of *rl.com*. Mayberry disputed the facts underlying his

intent. The record, in the district court's words, is "not clear" on the facts surrounding Mayberry's loss of mat.net. These "not clear" facts are material as to Mayberry's intent regarding rl.com. *See Trevaskis v. Peard*, 111 Cal. 599 (1893) ("Abandonment, it is true, is a matter of intent; but that intent may be proved by the acts and conduct of a party, even against his express declarations to the contrary."). Further factual development is therefore necessary regarding the precise circumstances through which Mayberry lost control of mat.net and thus rl.com.

Finally, we note that the issue of "fraud" versus "theft," as well as the claim that Mayberry abandoned rl.com, both relate to the circumstances under which Mayberry lost control over rl.com. The issues heighten our concern that—accepting Laxton's account of the facts, as we must at summary judgment—the record shows Mayberry could have maintained his control over mat.net and rl.com with as little as a single e-mail and a few clicks on a webpage. Laxton, on the other hand, who claims he searched for pending disputes over rl.com, may not have been able to ascertain the not-yet-realized dispute with any amount of diligence. Further, though the record—again—is not perfectly clear, it appears that Mayberry had lost control over rl.com more than eighteen months before Laxton purchased the domain name, during which time Mayberry apparently took no action despite having previously demonstrated his knowledge of the need to change administrative contacts for his websites, as well as his proven ability to do so.

In short, we cannot decide the issue of whether Qiang obtained rl.com by "theft" on the "not entirely clear" record before us. Under the circumstances alleged by Laxton, it is unclear whether "theft" or "fraud" is the appropriate understanding of the method through which Mayberry lost control of mat.net and rl.com. *See People v. Moses*, 217 Cal. App. 3d 1245 (1990) (theft arises only if finder has requisite notice regarding owner's identity). Further, it is not entirely clear if Mayberry "lost" or "abandoned" the website. In so holding we do not determine one way or the other whether Mayberry abandoned rl.com. It may be that Mayberry's loss was indeed "theft," but this will be an issue for the district court to determine on remand with the benefit of further fact-finding. ...

Noonan, Circuit Judge, dissenting: ...

Undisputed facts established that Mayberry held the domain name rl.com registered through July 25, 2005. Undisputed facts established that Li Qiang transferred the domain name to himself before the registration to Mayberry had expired. No facts were presented to the court showing or even suggesting that Li Qiang had obtained the domain name by fraud rather than by theft.

The majority notes that Laxton checked the registry and found nothing suspicious. That fact establishes his innocence and good faith; it does not establish that Li Qiang had gotten hold of the domain name by fraud. Laxton was in the position of any innocent purchaser of stolen property. He had to return the property to the owner. ...

The majority draws from the record the possibility that Mayberry deliberately abandoned mat.net by leaving it to a "virtual trash bin" of available domain names. There is no evidence that Mayberry abandoned rl.com in this way. The majority guesses that the abandonment of mat.net might have been the abandonment of both domain names. Its guess is without foundation. It is as though Mayberry had thrown away a bank statement that had on it the numbers and codes necessary to access a bank account. He surely would have meant to abandon the statement. It could not be reasonably inferred that he meant to abandon the account itself.

NOTES AND QUESTIONS

1. This is a case about the good-faith purchase rule. What is Laxton's chain of title? What are the possibilities for the quality of title that Qiang, Kalita, and Laxton might have?
2. Applying standard principles is made more difficult here because there are two domain names involved, one of which plays a role in control of the other. On the facts as described here, would you say that Qiang acquired *mat.net* through abandonment, fraud, or theft? What about *rl.com*? Do you see why these analyses might have different answers?
3. If Mayberry wins, does Laxton have any way to recover his \$15,000? If Laxton wins, does Mayberry have any way to recover the value of the domain name?

BEST CARPET VALUES, INC. V. GOOGLE, LLC
90 F.4th 962 (2024)

Wallace, Circuit Judge:

Google, LLC (Google) appeals from the district court's denial of its motion to dismiss Plaintiffs' putative class action asserting California state-law claims arising from Google's placement of search results on copies of their websites. ...

I. ...

Google provides internet services and products, most famously the *google.com* search engine, the Android mobile operating system, and the web browser Google Chrome. Google integrates "Search App" into its Android mobile operating system. The Search App enables a user to conduct internet searches directly from the home screen of their Android phone without opening a web browser. During the class period, Search App typically appeared as a search bar at the top of the Android home screen.

When a user typed a website address into the browser, Search App (like most web browsers) connected to the server hosting the website and "obtained a copy of the requested website page from the host web server." Search App then "delivered the copy to the user by translating the website's codes and recreating the website page on the user's ... mobile device screen." If a user clicked a link on the page, the click was "transmitted back over the internet to the host web server, from which the hosted website could then transmit responsive information," such as a different website page. Plaintiffs explicitly alleged that "Google did not trespass on the source websites located on Plaintiffs' web servers."

Plaintiffs challenge the way Google displayed websites in Search App on Android phones from March 2018 to April 2020. During this period, Search App displayed the requested website page with a "frame" at the bottom of the page stating, for example, "VIEW 15 RELATED PAGES." The frame gave the user the option of clicking a button to expand the frame to display half-page banners advertising related websites, occupying up to eighty percent of the screen size and shadowing the remaining twenty percent. Alternatively, the user could scroll through the website to which they navigated as normal with the frame remaining in place at the bottom of the screen. The banners were not advertisements for which Google paid Plaintiffs, but instead results automatically generated by Google's algorithms and placed there without Plaintiffs' permission. Plaintiffs alleged that the "VIEW 15 RELATED PAGES" frame and (when expanded by the user) the half-page digests blocked important content on their websites. In the case of putative

class representative Best Carpet Values, Inc. (Best Carpet), the results at times displayed in the frame included links to websites owned by Best Carpet's direct competitors and negative news stories about Best Carpet's owner. Plaintiffs argue that by displaying the frame and half-page digests, Google "occupied valuable space" on the websites of class members that Google should have paid for because it "obtained all the benefits of advertising" from use of that space.

Plaintiffs filed a putative class action, asserting California state law claims for trespass to chattels, implied-in-law contract and unjust enrichment, and violation of California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq.* Google moved to dismiss the operative Complaint for failure to state a claim upon which relief could be granted. ...

III. ...

The district court certified for our interlocutory review four "novel and difficult" questions of law that it believed were potentially dispositive of the case. We conclude that the first and third questions are indeed dispositive, thus we do not address the second or fourth. ...

A.

As to the first question, "whether *Kremen* should be extended to protect as chattel the copies of websites displayed on a user's screen," we answer in the negative. ...

We agree with the district court that the "chattels" at issue here are the copies of Plaintiffs' websites. Plaintiffs alleged so in their Complaint: "Website owners likewise have property rights ... in the *copies of their websites* that appear on internet users' monitors and screens." ...

Plaintiffs do not allege a possessory interest in copies of their websites sufficient to give rise to a trespass to chattels claim. Under California law, trespass to chattels "lies where an intentional interference with the *possession* of personal property" causes injury. *Hamidi*, 30 Cal. 4th at 1350-51 (emphasis added). Plaintiffs assert only a conclusory allegation that they have "possessory interests" in the copies of their websites that are transmitted to a user's device upon a request from Search App. Nor should we. Under Plaintiffs' theory, they maintain a possessory interest in an intangible copy that (1) is created when a user visits a website via the Search App, (2) exists on the user's device, and (3) is deleted by the user when they leave the page. Plaintiffs' possessory interest is thus entirely dependent on actions taken by an individual user unassociated with Plaintiffs or their websites. A possessory interest does not lie under these circumstances.

Nor do Plaintiffs allege a cognizable property interest in the website copies that may serve as the basis for a trespass to chattels claim. The district court's analysis to the contrary misreads both the governing law and Plaintiffs' Complaint. The district court reasoned that "consistent with *Kremen* and subsequently issued cases ... a *website* can be the subject of a trespass to chattels claim." In *Kremen*, we held that the California law of conversion applied to an internet *domain name*, not the website itself or other intangible assets attendant to the website. And Plaintiffs' Complaint highlights that a website copy and its domain name are different concepts, explaining that "a website is a digital document built with software and housed on a computer called a 'web server,' which is owned or controlled in part by the website's owner" while a domain name is a unique identifier "which enables an internet user to find the web server on which the website resides." For these reasons, the website copies are the proper focus of the property-interest inquiry.

The district court similarly erred in concluding that Plaintiffs have a cognizable property interest in website copies. ...

Application of *Kremen*'s three-part test here leads to the conclusion that a cognizable property right does not exist in a website copy.

First, a website copy is not “capable of precise definition” because there is no single way to display a website copy. As Plaintiffs acknowledge in the Complaint, a web browser “obtains a copy of the requested website page and translates the website's codes to recreate the website page on the user's computer monitor or mobile device screen.” This translation of website code into a visual appearance necessarily varies across browsers and devices. Plaintiffs respond that the lack of a fixed display does not defeat their property interest. Although in *Kremen* we held that updating records in a document did not defeat a finding of a property interest, Plaintiffs’ argument elides the core inquiry of the “capable of precise definition” part. California law requires that the property interest be “well-defined” and “like staking a claim to a plot of land at the title office.” *Id.* at 1030. A website copy possesses neither of these qualities.⁵

Second, a website copy is not “capable of exclusive possession or control.” Plaintiffs have not alleged, nor could they allege, that they retain control over the copies of their websites that are generated and sent to users’ devices. Unlike a domain name, where the *registrant* “decides where on the Internet those who invoke that particular name—whether by typing it into their web browsers, by following a hyperlink, or by other means—are sent,” *id.*, once the website copy is generated and sent to the user's device, *users* have control over what to do with it—whether to click on a link on Plaintiffs’ sites, resize the page, navigate away from the page themselves, or click on one of the links provided in the results. ...

Third and finally, there is no “legitimate claim to exclusivity” over website copies. Plaintiffs themselves recognize that they do not control how their websites are displayed on different devices or web browsers. This lack of exclusivity renders website copies fundamentally different from other types of intangible property recognized as being subject to California state-law property claims. See *G.S. Rasmussen*, 958 F.2d at 903 (regulatory certificate); *Payne v. Elliot*, 54 Cal. 339, 342 (1880) (corporate stock); *Holistic Supplements*, 61 Cal. App. 5th at 553 (tax registration certificate); *Welco Elecs., Inc. v. Mora*, 223 Cal. App.4th 202, 211 (2014) (credit line from a credit card company); *Fremont Indem. Co. v. Fremont Gen. Corp.*, 148 Cal.App.4th 97, 125, 55 Cal.Rptr.3d 621 (2007) (business's net operating loss); *Golden v. State*, 133 Cal. App.2d 640, 643 (1955) (liquor license). Because Plaintiffs do not control how the copies of their websites are shown in different environments, they have no legitimate claim to exclusivity over those copies. ...

We hold that there is no cognizable property interest in website copies that may serve as the basis for a trespass to chattels claim under California law.

NOTES AND QUESTIONS

1. As *Best Carpet Values* shows, even courts that have accepted *Kremen* have put limits on it. Does *Best Carpet Values* draw the line in the right place? Was there a way the plaintiffs could have described the “property” at issue that would have been more successful?

5. Plaintiffs claim a particular interest in the portion of the screen (in their words, “advertising space”) that is occupied by the Search App's leaderboard. But whether that space even exists and how it is displayed rely on how the website's codes are translated as well as the user's choices.

2. Trademark Law

UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY

[ICANN requires in its contracts with registrars for many top-level domains that this policy be included in all contracts with registrants. It creates a mandatory arbitration system for control of the domain based on certain trademark grounds.]

... 4. **MANDATORY ADMINISTRATIVE PROCEEDING.** – This Paragraph sets forth the type of disputes for which you are required to submit to a mandatory administrative proceeding. These proceedings will be conducted before one of the administrative-dispute-resolution service providers listed at www.icann.org/udrp/approved-providers.htm (each, a “Provider”).

a. **APPLICABLE DISPUTES.** – You are required to submit to a mandatory administrative proceeding in the event that a third party (a “complainant”) asserts to the applicable Provider, in compliance with the Rules of Procedure, that

- (i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and
- (ii) you have no rights or legitimate interests in respect of the domain name; and
- (iii) your domain name has been registered and is being used in bad faith.

In the administrative proceeding, the complainant must prove that each of these three elements are present.

b. **EVIDENCE OF REGISTRATION AND USE IN BAD FAITH.** – For the purposes of Paragraph 4(a)(iii), the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

- (i) circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or
- (ii) you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or
- (iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- (iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant’s mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location. ...

- i. **REMEDIES.** - The remedies available to a complainant pursuant to any proceeding before an Administrative Panel shall be limited to requiring the cancellation of your domain name or the transfer of your domain name registration to the complainant. ...
- k. **AVAILABILITY OF COURT PROCEEDINGS.** - The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If an Administrative Panel decides that your domain name registration should be canceled or transferred, we will wait ten (10) business days (as observed in the location of our principal office) after we are informed by the applicable Provider of the Administrative Panel's decision before implementing that decision. We will then implement the decision unless we have received from you during that ten (10) business day period official documentation (such as a copy of a complaint, file-stamped by the clerk of the court) that you have commenced a lawsuit against the complainant in ... If we receive such documentation within the ten (10) business day period, we will not implement the Administrative Panel's decision, and we will take no further action, until we receive (i) evidence satisfactory to us of a resolution between the parties; (ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name.

TRAVELERS INDEMNITY CO. V. TRAVELLERS.COM

No. 10-cv-448 (LO/JFA) (E.D. Va. Nov. 28, 2011)

O'Grady, District Judge: ...

IV. UNDISPUTED FACTS

1. Plaintiff is a leading provider of property and casualty insurance and surety products and risk management services and products to a wide variety of businesses, government units, associations, and individuals. ...
2. For more than 140 years, Travelers and its affiliated entities and/or predecessors have continuously used the TRAVELERS name and mark in various forms (collectively, the "TRAVELERS Mark") to identify and distinguish Travelers and its products and services. Travelers first used the TRAVELERS Mark for its insurance products and services and/or risk management services in 1865. Travelers has registered the TRAVELERS Mark at the United States Patent and Trademark Office ("USPTO") under Reg. No. 1,611,053 for a variety of insurance-related products and services.
3. Since 1996, Travelers has owned and operated a website at the domain name TRAVELERS.COM, which prominently displays the TRAVELERS Mark and offers information regarding Travelers and its insurance, surety, and risk management products and services offered under the mark. ...
9. Mr. Rajani is the owner and registrant of the TRAVELLERS.COM domain name. In April 2009, Travelers became aware of the TRAVELLERS.COM domain name and website and the display of pay-per-click advertisements for insurance products and services on that website. At that time, the

TRAVELLERS.COM website displayed “Travellers.com” prominently on its website, touted itself as a “gateway to sites on the Internet for insurance,” and provided insurance-related advertisements and links to third-party websites, including direct and indirect competitors of Travelers.

10. In May 2009, Travelers, through its attorneys, sent a demand letter to Mr. Rajani, as the registrant of TRAVELLERS.COM, regarding the unlawful nature of the TRAVELLERS.COM website. Travelers’ letter expressly advised Mr. Rajani of Travelers’ rights in the TRAVELERS Mark, including its federal trademark registration for the mark (a copy of which was attached to the letter). Travelers also made clear that Mr. Rajani’s activities constituted cybersquatting, among other things. In response, Mr. Rajani admitted that he was the sole owner of the TRAVELLERS.COM domain name, but denied that he had engaged in any wrongdoing.
11. More than two years later, despite Travelers’ objections and the filing of this lawsuit, The TRAVELLERS.COM website continues to prominently display “travellers.com” and insurance-related, paid-placement ads and links to commercial websites. For example, the TRAVELLERS.COM website contains advertising links for major competitors such as GEICO, Progressive, Allstate, and Nationwide. These companies offer insurance products and services that are identical, directly competitive, or closely related to those sold or provided by Travelers in connection with the TRAVELERS Mark.
12. Mr. Rajani registered TRAVELLERS.COM for the purpose of conducting commercial activity. Increasing website traffic for the TRAVELLERS.COM domain was a necessary component of Mr. Rajani’s business use of TRAVELLERS.COM. The website accessed under domain name TRAVELLERS.COM displays a website advertising a pay-per click advertising program. As Mr. Rajani noted in one of his earlier filings, the purpose of the ads and links on his domain in 2008 was to divert users who navigate to the TRAVELLERS.COM website to third-party websites (which include websites offering competing products and services). It is undisputed that TRAVELLERS.COM is currently participating in a program operated by Sedo, an advertising company, which pays Mr. Rajani each time a user clicks on an advertisement listed on the TRAVELLERS.COM web page. ...

V. COUNT I-15 U.S.C. § 1125(D)

The Anticybersquatting Consumer Protection Act of 1999, Pub. L. 106-113, §§ 3001-02 (1999) (current version at 15 U.S.C. § 1125(d) (2006)), amended the Lanham Act to permit the owner of a protected mark to pursue an action against the owner of a domain name that violated the owner’s rights in the mark. The ACPA was “carefully and narrowly tailored ... to extend only to cases where the plaintiff can demonstrate that the defendant registered, trafficked in, or used the offending domain name with bad-faith intent to profit from the goodwill of a mark belonging to someone else.” S. Rep. No. 106-140, at 12 (1999). A plaintiff can pursue an in rem action under the ACPA against a domain name that violates any right of the owner of a mark registered in the Patent and Trademark Office, or is protected under paragraph (a) or (c) of § 1125, so long as the owner of the mark cannot obtain in personam jurisdiction over a person who—with bad faith intent to profit—registers, traffics in, or uses a domain name that is identical or confusingly similar to the plaintiff’s mark. 15 U.S.C. §§ 1125(d)(1), (2)(A)(i).

A. In rem jurisdiction

The Court must initially determine whether the Plaintiff is entitled to recover against Defendant TRAVELLERS.COM under the ACPA's in rem provisions. 15 U.S.C. § 1125(d)(2)(A). The Court evaluates whether the use of the TRAVELLERS.COM domain name “violates any right of the owner of a mark registered in the Patent and Trademark Office,” or is protected under § 1125(a) or (c). 15 U.S.C. § 1125(d)(2)(A)(i). The Court finds that the TRAVELERS mark is protected under § 1125(a), and need not evaluate whether it is protected under § 1125(c).

Plaintiff has produced undisputed evidence of its ownership of a federally registered trademark in the TRAVELERS mark. The federal trademark registration offered by Plaintiff is prima facie evidence of the mark's validity, and no party offers contrary evidence. 15 U.S.C. § 1057(b). Plaintiff has also shown that Mr. Rajani used the TRAVELLERS.COM domain name for the activities alleged in the Complaint, and that he did so “in commerce.” The record contains several admissions by Mr. Rajani that he registered TRAVELLERS.COM. Mr. Rajani admitted squarely in his answer that he had used TRAVELLERS.COM in commerce. Mr. Rajani conceded that his purpose and expectation was that he would profit from the use of TRAVELLERS.COM to generate traffic to his website. He said, essentially, that he registered TRAVELLERS.COM for his commercial and business activities, and that he used TRAVELLERS.COM to generate traffic to his website as a necessary component of his business. Mr. Rajani therefore used TRAVELLERS.COM in commerce in connection with the sale, offering for sale, and advertising of insurance services. *See Lamparello v. Falwell*, 420 F.3d 309, 313 (4th Cir. 2005).

The next question is whether the use of TRAVELLERS.COM in this fashion was “likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person[.]” 15 U.S.C. § 1125(a)(1)(A). The Fourth Circuit uses a multi-factor test to evaluate claims of confusion under § 1125(a)(1)(A). The key factors are: (1) the strength or distinctiveness of the mark; (2) the similarity of the two marks; (3) the similarity of the goods/services the marks identify; (4) the similarity of the facilities the two parties use in their businesses; (5) the similarity of the advertising used by the two parties; (6) the defendant's intent; and (7) actual confusion resulting from the use of the mark. *See Lamparello*, 420 F.3d at 314-15. These factors are non-exclusive, and not all are relevant or equally emphasized in each case.

As Plaintiff argues, the first three factors weigh heavily in its favor. Under factor 1, the strength of the mark, the TRAVELERS mark is very strong because it is federally registered, and has been used in the marketplace for many years. As to factor 2, the TRAVELERS mark and the TRAVELLERS.COM domain name are quite similar. “Travellers” and “travelers” sound identical when pronounced in the English language and the two words differ only by a single letter. The TRAVELLERS.COM domain name is based on a misspelling of a word which, in American usage, is correctly spelled “travelers.” As for factor 3, the similarity of the services, the insurance services signified by the TRAVELERS Mark are the same type as those advertised on the TRAVELLERS.COM website. The advertised products and services were identical, directly competitive, or closely related to those sold by Plaintiff in connection with the TRAVELERS mark. Moreover, it is undisputed that this is why Mr. Rajani chose the TRAVELLERS.COM domain name—it was

similar enough to the TRAVELERS Mark that it would generate traffic to his website that could be diverted for profit. These facts justify a finding that factor 6, which inquires about the defendant's intent, weighs in favor of likely confusion.

Factors 4 and 5, too, suggest a likelihood of confusion. Both Travelers and Mr. Rajani promote insurance-related advertising on their websites. As such, they use similar website facilities for their businesses (factor 4) and use similar advertising on those websites (factor 5). The Court holds that the undisputed evidence supports the conclusion that the use of the TRAVELLERS.COM mark is likely to result in confusion violating § 1125(a).

Because TRAVELLERS.COM violates Plaintiffs rights under § 1125(a) and Plaintiff is unable to obtain in personam jurisdiction over a person who would have been a civil defendant under § 1125(d)(1), the Court concludes that the in rem requirements of § 1125(d)(2) have been satisfied.

B. Cybersquatting

Having established that the Court may grant relief in rem against TRAVELLERS.COM, the Court next evaluates whether Plaintiff has shown that liability attaches to TRAVELLERS.COM under the substantive provisions of § 1125(d)(1). To demonstrate entitlement to summary judgment, Plaintiff must produce undisputed facts showing that Mr. Rajani: (1) had a bad faith intent to profit from TRAVELLERS.COM; and (2) registered, trafficked in, or used TRAVELLERS.COM in a prohibited manner. 15 U.S.C. § 1125(a)(1)(A).

1. *Bad Faith Intent to Profit*

First, Plaintiff must show that Mr. Rajani had bad faith intent to profit from TRAVELLERS.COM. In determining whether a person has a bad faith intent, the Court considers a non-exhaustive list of nine statutory factors. 15 U.S.C. § 1125(d)(1)(B)(i). The Court may take into account other factors which, taken together, comprise the totality of the circumstances.

The first two statutory factors, whether Mr. Rajani had trademark or intellectual property rights in TRAVELLERS.COM or used TRAVELLERS.COM as a legal name, weigh in favor of a finding of bad faith. *See* 15 U.S.C. §§ 1125(d)(1)(B)(i)(I) & (II). Mr. Rajani has offered no evidence indicating that he has recognizable trademark or other legitimate intellectual property rights in TRAVELLERS.COM, or that the domain name is used to identify a legal person. He asserted in his answer that he had a first-come, first-served right to the domain name, and that his 12-year usage of TRAVELLERS.COM conferred upon him protectable rights in the use of the domain name. Mr. Rajani's invocation of the rule of capture would pose a different issue at common law, of course, *see Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805) (ownership of wild animal acquired by bringing the animal within certain control), but it is immaterial to the question of bad faith under the ACPA.

The third, fourth, and fifth statutory factors relate to bona fide uses of TRAVELLERS.COM. 15 U.S.C. §§ 1125(d)(1)(B)(i)(III)-(V). Mr. Rajani registered and used TRAVELLERS.COM many years before this action was brought. Had the use of the site been legitimate, however, it would have tended not to pose a danger of confusion. Mr. Rajani has presented no evidence contradicting the Plaintiffs evidence that he offered services or goods targeting Plaintiffs potential customers and attempted to divert them to competitors for his own purposes. Indeed, Mr. Rajani admitted in his Answer that he registered and used TRAVELLERS.COM both for commercial purposes and to further his business's operations. Rajani Answer at

197. It is apparent that TRAVELLERS.COM would have the affirmative effect of harming Plaintiffs goodwill by diverting customers to a page containing advertisements by Plaintiffs competitors. Moreover, the confusion resulting from the close resemblance of TRAVELLERS.COM and Plaintiffs Mark indicate that the diversionary effect was not accidental, but rather the natural and probable result of registering a misspelling of the TRAVELERS Mark.

The ninth statutory factor, the strength of the TRAVELERS mark, is the obvious reason for Plaintiffs long-running commercial use of the TRAVELLERS.COM domain name. TRAVELERS is a public, widely-known mark, and is registered in the federal trademark database. 15 U.S.C. § 1125(d)(1)(B)(i)(IX). The Court therefore concludes that Plaintiff has bad faith intent to profit from the use of TRAVELERS through commercial use of TRAVELLERS.COM.

2. Prohibited Use of TRAVELLERS.COM

Second, Plaintiff must show that Mr. Rajani registered, trafficked in, or used TRAVELLERS.COM in a manner prohibited by the ACPA. 15 U.S.C. § 1125(a)(1)(A). Specifically, Plaintiff must show that: (a) TRAVELERS was distinctive at the time of registration and TRAVELLERS.COM is identical or confusingly similar to TRAVELERS; or (b) TRAVELERS was famous at the time of registration and TRAVELLERS.COM is identical or confusingly similar to or dilutive of TRAVELERS. 15 U.S.C. § 1125(a)(1)(A)(ii). TRAVELERS is a famous mark because the uncontradicted facts demonstrate that it has, for decades, been widely recognized by the general consuming public as an indicator that the users of the mark were associated with the Plaintiff. *See* 15 U.S.C. § 1125(c)(2)(A). As explained in Section V.A *supra*, TRAVELLERS.COM was and is confusingly similar to TRAVELERS. Consequently, the Court finds that TRAVELLERS.COM is being used in violation of the ACPA and is subject to forfeiture under § 1125(d)(2)(D).

3. Other Network Resources

STERN V. ISLAMIC REPUBLIC OF IRAN

73 F. Supp. 3d 46 (D.D.C. 2014)

Lamberth, District Judge:

Plaintiffs hold a set of substantial money judgments against defendants Islamic Republic of Iran, Democratic People's Republic of Korea, and Syrian Arab Republic arising out of claims brought under the Foreign Sovereign Immunities Act. Pursuant to those judgments, plaintiffs seek to attach the defendants' property allegedly in the possession of the Internet Corporation for Assigned Names and Numbers. ICANN has moved to quash the writs of attachment served on it. ...

I. BACKGROUND

A. The Internet and the Domain Name System

Any device connected to the Internet is identified by a unique Internet Protocol address, consisting of a series of numbers separated by periods. Because IP addresses in their bare form are unmemorable, the Domain Name System was created to allow people to more easily remember and find places on the Internet. Under this system, IP addresses are given alphanumeric identifiers called domain names. A domain name consists of a top level domain and second level domains within that TLD. The TLD is the series of characters that are to the right of the last period in a domain name. For example, ".gov" is the TLD for the domain name assigned to this Court. A second level domain is the series of characters to the left of

the last period in a domain name. *Id.* For example, **google** is the second level domain in **google.com**. Second level domains are subdivisions of TLDs and are registered within the TLDs.

Country code TLDs ("ccTLDs") are a particular type of TLD which carry a two letter code identifying a relationship to a particular country. ICANN, *ICP-1: Internet Domain Name System Structure and Delegation (ccTLD Administration and Delegation)* (1999), available at <https://www.icann.org/resources/pages/delegation-2012-02-25-en>. The ccTLDs are operated by "managers" for that country. *Id.* Managers' duties include "assignment of domain names, delegation of subdomains and operation of nameservers." *Id.*

Information about the names and locations of the various TLDs on the Internet is stored on the "root zone file," which is the authoritative listing of this information on the Internet. The root can be analogized to a phone book for the Internet.

With the foregoing foundational concepts in mind, the basic roadmap for what occurs between the moment a user types a domain name into an Internet browser and the moment the corresponding webpage appears on the user's screen can be described. The D.C. Circuit has succinctly done so as follows:

When ordered to translate an unknown domain name into an Internet Protocol number, a computer will ask its Internet Service Provider's server if it knows the domain name and corresponding Internet Protocol number. If that server lacks the information, it will pass the query to a 'root server,' also called a 'root zone' file, the authoritative and highest level of the domain name system database. The root zone file directs the query to the proper top-level domain zone file, which contains the domain names in a given domain and their corresponding Internet Protocol numbers.

Thomas v. Network Solutions, Inc., 176 F.3d 500, 503-04 (D.C. Cir. 1999). Thus, the Internet Domain Name System operates as something of a pyramid. The root zone file, at the top of the pyramid, contains information on the TLDs within the system and the location of the registries for those TLDs. Registries of the TLDs, in turn, contain IP address information on domain names logged within that TLD, which ultimately leads a computer (and its user) to the final Internet destination looked for.

B. ICANN's Role

ICANN is a non-profit corporation that performs the Internet Assigned Numbers Authority ("IANA") functions under a contract with the United States government. Of relevance to these proceedings, these IANA functions include managing the process of delegation and redelegation of TLDs (including ccTLDs). This means that ICANN is responsible for recommending the entities that shall perform the functions of a ccTLD manager and for recommending corresponding changes to the root zone file. The delegation or redelegation process is designed to assign or re-assign a ccTLD to a manager, with such a change being implemented by a change to the root zone to indicate the TLD and its related manager. *Delegating or redelegating a country-code top-level domain (ccTLD)*, IANA, <http://www.iana.org/help/ccTld-delegation> (last visited Nov. 6, 2014). ...

II. LEGAL STANDARD AND DISCUSSION

A. Applicable Law

Federal Rule of Civil Procedure 69(a)(1) provides that the "procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—

must accord with the procedure of the state where the court is located.” Fed. R. Civ. P. 69(a)(1). Furthermore, under the FSIA, local law on attachment and execution controls any dispute. The District of Columbia Code states that an “attachment may be levied upon the judgment debtor’s goods, chattels, and credits.” D.C. CODE § 16-544. This includes property in the possession of a third person. *Id.* § 16-507.

B. Country Code Top Level Domains Are Not Subject to Attachment in the District of Columbia

There is little authority on the question of whether Internet domain names may be attached in satisfaction of a judgment. Indeed, no reported decision of any American court appears to have decided the specific issue of whether a ccTLD may be attached. The Virginia Supreme Court’s discussion of these issues in *Network Solutions, Inc. v. Umbro Int’l, Inc.*, 259 Va. 759 (2000) is helpful in illuminating the questions presented. There, the court held that a domain name could not be garnished by a judgment creditor under the relevant Virginia statute because it was “inextricably bound” to the domain name services provided by the registry operator. *Id.* at 86. The court elaborated: “Whatever contractual rights the judgment debtor has in the domain names at issue in this appeal, those rights do not exist separate and apart from [the registry] services that make the domain names operational Internet addresses.” *Id.* The court further observed that allowing garnishment of a registry’s services as part of garnishing a right to a domain name would mean that “practically any service would be garnishable.” *Id.* at 86-87.

The Court finds this reasoning persuasive as applied to District of Columbia attachment law as well. The ccTLDs exist only as they are made operational by the ccTLD managers that administer the registries of second level domain names within them and by the parties that cause the ccTLDs to be listed on the root zone file. A ccTLD, like a domain name, cannot be conceptualized apart from the services provided by these parties. The Court cannot order plaintiffs’ insertion into this arrangement. *Cf. United States ex rel. Global Bldg. Supply, Inc. v. Harkins Builders, Inc.*, 45 F.3d 830, 833 (4th Cir. 1995) (holding that “where the property is in the form of a contract right, the judgment creditor does not ‘step into the shoes’ of the judgment debtor and become a party to the contract, but merely has the right to hold the garnishee liable for the value of that contract right”).

While interpretations of the D.C. Code are sparse, they tend to support this understanding of ccTLDs. The District of Columbia Court of Appeals has held that “money payable upon a contingency or condition is not subject to garnishment until the contingency has happened or the condition has been fulfilled.” *Cummings Gen. Tire Co. v. Volpe Constr. Co.*, 230 A.2d 712, 713 (D.C. 1967). Thus, payments under a contract that are conditioned upon completion of the work contracted for are not subject to garnishment because the “existence and amount” of the debt is “contingent and uncertain.” *Id.* While this suit does not squarely fit within the rule articulated by the court in *Cummings General Tire*, that rule does illuminate the fact that courts may not, through garnishment proceedings, insert a judgment creditor into an ongoing contractual arrangement that necessarily requires continued work or services to have value. Here, the ccTLDs only have value because they are operated by ccTLD managers and because they are connected to

computers around the world through the root zone.² D.C. law does not allow their attachment.

WEINSTEIN V. ISLAMIC REPUBLIC OF IRAN

831 F.3d 470 (D.C. Cir. 2016)

Henderson, Circuit Judge: ...

We affirm the district court but on alternative grounds. ...

To this point we have assumed *arguendo* that D.C. law does not impede the plaintiffs' pursuit of the defendant sovereigns' ccTLDs. ... Ordinarily, remand would be in order to allow the plaintiffs to continue discovery in an effort to establish whether the ccTLDs can properly be considered "property of" the defendants under the FSIA. Many critical issues remain disputed.²⁵

We assume without deciding that the ccTLDs the plaintiffs seek constitute "property" under the FSIA and, further, that the defendant sovereigns have some attachable ownership interest in them. Nonetheless, pursuant to the terrorist activity exception, the court has the "authority" to "prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment"—i.e., we are expressly authorized to protect the interests of ICANN and other entities. Because of the enormous third-party interests at stake—and because there is no way to execute on the plaintiffs' judgments without impairing those interests—we cannot permit attachment.

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2. The Court notes that judicial decisions have construed domain names to be a form of intangible property. *See, e.g., Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir.2003). But the conclusion that ccTLDs may not be attached in satisfaction of a judgment under District of Columbia law does not mean that they cannot be property. It simply means that they are not attachable property within this statutory scheme. Indeed, in *Network Solutions*, the Virginia Supreme Court nodded to this precise point in stating that it was not "essential to the outcome of this case to decide whether the circuit court correctly characterized a domain name as a 'form of intellectual property.'" *Network Solutions, Inc.*, 529 S.E.2d at 86.
 25. For example, ICANN contends that the defendants do not own the .ir, .kp and .sy ccTLDs and that ICANN is therefore powerless to effect an attachment thereof. [But] the plaintiffs submitted a declaration regarding their counsel's discussion with an "internet infrastructure management and domain name systems operations and development expert" suggesting that ICANN had in the past "changed and redirected who runs certain ccTLDs ... in conjunction with the 'monetization' of the ccTLDs by their respective governments, including instances where the governments transferred control away from academic communities to government approved third parties that acquired contractual property rights to exploit the ccTLD and generate revenue." There is also record evidence regarding the nation of Tuvalu's monetization of its .tv ccTLD by sale or lease of its ccTLD management rights to a private company for millions of dollars. On the other hand, ICANN contends that ccTLDs are not property at all because they are "not an interest capable of precise definition, because [they are] always in flux," and that "there is, in fact, no established market within which ccTLDs are purchased and sold." They also argue that no one has the requisite control over ccTLDs in order to establish ownership and that, in any event, "authoritative Internet protocol standards declare that concerns about rights and ownership of domains are inappropriate." Finally, the United States as *amicus* argues that the internet governance community "explicitly rejects efforts to assert property rights in [ccTLDs]."

The plaintiffs demand, in effect, that ICANN delegate management of the .ir ccTLD so that they can “sell or license the operation of the ccTLD to a third party.” As explained, the power to operate a ccTLD includes the power to register (or remove) domain names from that registry. Thus, an entity seeking a .ir domain name will have to register through the plaintiffs or their designee—a process in which the ccTLD manager can extract a fee. The plaintiffs’ plan plainly impairs the interests of “persons who are not liable in the action giving rise to the judgment” in myriad ways. 18 U.S.C. § 1610(g).

First, requiring ICANN to delegate .ir to the plaintiffs would bypass ICANN’s process for ccTLD delegation, which includes ensuring that the incoming manager has technical competence and a commitment to serving the Iranian Internet community’s interests. The plaintiffs and, more importantly, their prospective designee may not possess that technical competence or commitment. Granted, the plaintiffs are “aware that the ... court can—and should—protect the interests of third parties” and they “welcome the opportunity to work together with the district court and ICANN to ensure a smooth transition.” But even if the plaintiffs are able to show adequate competence and commitment, the act of forced delegation itself impairs ICANN’s interest in protecting the stability and interoperability of the DNS.

Recall that a change in the root zone file will only affect the routing of a search for .ir. But a change in the root zone file does not also transfer the information stored on the ccTLD server.²⁹ To ensure that any delegation occurs seamlessly, ICANN requires that the incoming manager provide a plan to preserve the stability of the ccTLD, which plan explains how existing registrants will be affected. According to ICANN, the current ccTLD managers in the defendant countries will not voluntarily transfer information regarding their registrants and, because the relevant servers are located abroad, we are powerless to so require them. If ICANN is required to direct an end-user looking for .ir web pages to the plaintiffs’ server but the plaintiffs are unable to direct them to the requested SLD, the Internet’s stability and interoperability are undermined.³⁰

The impairment does not end there. As the plaintiffs recognize, ICANN occupies its position only because “the global community *allows it* to play that role.” Appellants’ Br. at 34 (emphasis added). “[T]he operators of ... top level domains” can “form a competitor to ICANN and agree to refer all DNS traffic to a new root zone directory.” *Id.*; see also Br. for United States as Amicus Curiae at 13 (“As a

29. For example, assume there is now a web page with the domain name *example.ir*, meaning that the SLD *example* is registered within the .ir ccTLD. An end-user searching for *example.ir* reaches the web page by first querying the root servers for .ir and then the .ir server for the *example.ir* domain. The .ir server directs the end-user to *example.ir* because it knows the location of *example.ir* that is, *example.ir* is registered within it. But, we may also assume, this web page is not currently registered within the plaintiffs’ server which, post-delegation, would “host” the .ir ccTLD. Before the SLD is so registered, an end-user searching for *example.ir* is not able to reach the web page. Although it would remain accessible through the old .ir server (i.e., Iran’s server), the root servers, as a result of the delegation, would no longer direct queries there.

30. The plaintiffs do not allege that a particular ccTLD management has *ever* been transferred without the cooperation of the outgoing manager. *Cf.* Gebelin Decl. at 6, App’x at 54 (alleging Tuvalu transferred management of its ccTLD to monetize *its* interest).

technological matter, nothing prevents an entity outside the United States from publishing its own root zone file and persuading the operators of the Internet's name servers to treat that version as authoritative instead.”). This result, known as “splitting the root,” is widely viewed as a potentially disastrous development; indeed, some regard it as the beginning of “ultimate collapse of Internet stability”—a “doomsday scenario for the globally accessible” network and, thus, for ICANN. Harold Feld, *Structured to Fail: ICANN and the ‘Privatization’ Experiment*, in *WHO RULES THE NET?: INTERNET GOVERNANCE AND JURISDICTION* 351 (Cato Inst. 2003). Whether that description of a split root is accurate need not concern us; ICANN's interests, as a third party “not liable in the action giving rise to the judgment,” 18 U.S.C. § 1610(g)(3), are sufficient for us to protect them pursuant to section 1610(g)(3) of the FSIA.

But given that the ICANN-administered DNS is the beneficiary of substantial network effects, how could such a doomsday scenario arise? And why would forced delegation hasten its arrival? In light of the plaintiffs' recognition that ICANN's control “stems only from the fact that the global community allows it to play that role,” and considering that the delegation of the three defendant sovereigns' ccTLDs could likely antagonize the global community, *see* Br. for United States as Amicus Curiae at 13 (“It is not difficult to imagine that a court-ordered change to the authoritative root zone file at the behest of private plaintiffs would prompt members of the global Internet community to turn their backs on ICANN for good.”), we believe the doomsday scenario is not beyond imagining.*

For the foregoing reasons, the judgment of the district court is affirmed.

AMERICAN REGISTRY FOR INTERNET NUMBERS
NUMBER RESOURCE POLICY MANUAL
<https://www.arin.net/participate/policy/nrpm/>

... *6.4.1. Address Space Not to be Considered Property*

It is contrary to the goals of this document and is not in the interests of the Internet community as a whole for address space to be considered freehold property.

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33. As noted earlier, an end-user ISP ordinarily uses DNS protocols to ask the root servers for the location of one of the DNS's TLDs. But there is no technological barrier binding ISPs to the DNS. A sovereign has authority over ISPs operating in its country and can act unilaterally to redirect Internet traffic for end-users within its borders by requiring Internet service providers to use what amounts to that government's own DNS. For example, a foreign government can require that, when receiving a query for a particular TLD, an ISP operating within its borders not direct that query to a root server but rather to a different location altogether. If ICANN delegates management of .ir to the plaintiffs and the plaintiffs control where a query for .ir SLDs is directed, Iran has a powerful incentive to require its ISPs to bypass the root servers altogether and instead require ISPs to direct queries to the server that formerly hosted the .ir ccTLD. Under that circumstance, end-users in Iran and other parts of the world might access different web pages by querying identical domain names. And there is no reason to suppose that members of the global Internet community would not turn their backs on ICANN for good. For example, another sovereign whose citizens do business through web pages registered under the former .ir ccTLD might no longer permit their ISPs to search the root servers for .ir SLDs. Whether or not this possibility is a positive development for the Internet, it unquestionably impairs ICANN's interests in protecting the stability and interoperability of the DNS.

The policies in this document are based upon the understanding that globally-unique IPv6 unicast address space is allocated/assigned for use rather than owned.

8. TRANSFERS

8.1. Principles

Number resources are nontransferable and are not assignable to any other organization unless ARIN has expressly and in writing approved a request for transfer. ARIN is tasked with making prudent decisions on whether to approve the transfer of number resources.

It should be understood that number resources are not “sold” under ARIN administration. Rather, number resources are assigned to an organization for its exclusive use for the purpose stated in the request, provided the terms of the Registration Services Agreement continue to be met and the stated purpose for the number resources remains the same. Number resources are administered and assigned according to ARIN’s published policies.

Number resources are issued, based on justified need, to organizations, not to individuals representing those organizations. Thus, if a company goes out of business, regardless of the reason, the point of contact (POC) listed for the number resource does not have the authority to sell, transfer, assign, or give the number resource to any other person or organization. The POC must notify ARIN if a business fails so the assigned number resources can be returned to the available pool of number resources if a transfer is not requested and justified.

8.2. Mergers, Acquisitions, and Reorganizations

ARIN will consider requests for the transfer of number resources in the case of mergers, acquisitions, and reorganizations under the following conditions:

- The current registrant must not be involved in any dispute as to the status of the resources to be transferred.
- The new entity must sign an RSA covering all resources to be transferred.
- The resources to be transferred will be subject to ARIN policies.
- The minimum transfer size is the smaller of the original allocation size or the applicable minimum allocation size in current policy.
- The Internet number resources being transferred as part of a transfer under section 8.2 will not be subject to a needs-based assessment during the process of the transfer.

AND one or more of the following:

The recipient must provide evidence that it has acquired the assets that use the resources to be transferred from the current registrant.

OR

The recipient must show that it has acquired the entire entity which is the current registrant. ...

IPV4 NUMBERS PURCHASE AGREEMENT

between FullNet Communications Inc. (seller) and EBOX Inc. (buyer) (Aug. 7, 2018)
https://www.sec.gov/Archives/edgar/data/1092570/000114070518000215/fn_ex10z22.htm

IPV4 NUMBERS PURCHASE AGREEMENT

THIS PURCHASE AGREEMENT (“Agreement”) is made and entered into as of the date of last signature set forth below (“the Effective Date”), between:

FullNet Communications, Inc., an Oklahoma corporation, having its primary address at 201 Robert S. Kerr Avenue, Suite 210, Oklahoma City, OK 73102, USA (“Seller”),

and

EBOX Inc., a Canadian corporation, having its primary address at 1225 St-Charles Ouest, Bureau 1100, Longueuil, Quebec J4K 0B9, Canada (“Buyer”), ...

WHEREAS, Seller has previously been allocated, and is recognized by ARIN as the authorized registrant of the IPv4 Numbers, as defined below;

WHEREAS, Buyer desire to purchase from Seller, and Seller desires to sell to Buyer, the IPv4 Numbers that are allocated to and owned by, Seller on the terms, subject to the conditions and as more fully set forth in this Agreement.

NOW, THEREFORE, in consideration of the foregoing and the provisions set forth below, and subject to the terms and conditions set forth herein, the Parties agree as follows:

1. *DEFINITIONS.*

- a. “ARIN” means the American Registry for Internet Numbers.
- b. “Broker” means GetConnect IPv4 Brokers Inc., a Canadian corporation, having its primary address at 11 Brunel Court, Toronto, Ontario M5V 3Y3, Canada, acting as a broker (representing the Seller) for the sale and purchase of the IPv4 Numbers. ...
- d. “Closing” means the completion of the sale and transfer of the IPv4 Numbers pursuant to the conditions of this Agreement.
- e. “Escrow Agent” means escrow.com, an agent to provide escrow services from Internet Escrow Services, Inc., a California corporation (“IES”), as documented in Appendix One.
- f. “IPv4 Numbers” means the IPv4 address block 64.58.32.0/20, a total of 4,096 IPv4 addresses. ...

2. *PURCHASE OF IPV4 NUMBERS.*

- a. Subject to the provisions of this Agreement, Buyer agrees to purchase from Seller, and Seller agrees to arrange the transfer of, all of Seller’s rights, title and interest, to the IPv4 Numbers.
- b. The purchase price for the IPv4 Numbers shall be US\$ 16.75 per IPv4 address, for a total of exactly US\$ 68,608.00 (“Purchase Amount”) payable as set forth herein.

3. *PAYMENT PROCEDURE.*

- a. Buyer, Seller and Broker will use Escrow Agent for this transaction. Broker will pay the escrow fees. Broker will create a transaction account on escrow.com.
- b. Buyer shall deliver the Purchase Amount to Broker’s escrow.com transaction account within two (2) Business Days of the Effective Date. The date the Purchase Amount is delivered to escrow.com is known as the “Deposit Date”.
- c. Beginning on the Transfer Date, as defined in Clause 4(f), the IPv4 Numbers will be in the inspection period. Buyer will have no more than one (1) Business Day to:
 - i. Accept the IPv4 Numbers. Buyer then agrees to immediately release the Purchase Amount as set forth in this Agreement.

- ii. Reject the IPv4 Numbers. Buyer has ten (10) days to return the IPv4 Numbers to the Seller as per the terms in Appendix One. Buyer must pay the escrow fee.
 - iii. Do nothing. When the inspection period expires payment is released to Broker and Seller, with escrow fees deducted by Escrow Agent.
- d. All brokerage fees payable to Broker will be the responsibility of the Seller.

4. ARIN 8.3 TRANSFER PROCEDURE.

- a. Buyer is currently a member of ARIN (Org-ID: QUEBE-50) and Seller is recognized by ARIN as the authorized registrant of the IPv4 Numbers (Org-ID: FNET).
- b. Within two (2) Business Days of the Deposit Date Seller shall submit a transfer request via ARIN Online, using the information shown in Appendix Two.
- c. Buyer shall submit a request to receive the transfer via ARIN Online, using the ARIN ticket number provided upon completion of Clause 4 (b).
- d. The Parties shall respond to requests for information from ARIN in a timely manner and are each responsible for paying any fees assessed to them by ARIN.
- e. ARIN will complete the transfer of the IPv4 Numbers to the Buyer and update the Whois.
- f. Together Clauses 4 (a) to (e) are known as the “Transfer Process” and, when complete, the ARIN 8.3 transfer will be final, and the date completed will be known as the “Transfer Date”.
- g. In the event ARIN does not approve the transfer for reasons attributable to the Buyer, the Buyer will use the Reject the IP’s feature of escrow.com, and the Broker will Accept the Return. The Buyer will therefore get the Purchase Amount back, less the escrow fee.
- h. In the event that, after the Effective Date, any policies or procedures of ARIN are amended such that it is no longer possible for the Parties to adhere to the ARIN 8.3 Transfer Procedure set out in Clause 4, the Parties shall negotiate in good faith to agree on the minimum modification necessary to give effect to the intent of this Agreement.
- i. In the event ARIN does not actually transfer the IPv4 Numbers within 45 calendar days of the Effective Date through no fault of either Party, the Parties agree that their obligations to sell and purchase the IPv4 Numbers shall be null and void and neither Party will have any continuing obligations under this Agreement.

5. CLOSING.

- a. Closing shall be deemed to occur (and all of Seller’s right, title and interest to the IPv4 Numbers shall transfer fully) upon the receipt by the Seller of the portion of the Purchase Amount to which it is entitled.
- b. After the Transfer Date, and with Clause 5 (a) complete, the Seller shall provide Buyer an Invoice as set out in Appendix Three, marked PAID. The date of Closing shall be known as the “Closing Date”.

Question	West Headnote	Case Opinion
Does originality for copyright purposes mean that the work was independently created and has some minimal degree of creativity?	Originality, for copyright purposes, means that the work was independently created and has some minimal degree of creativity.	Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.

- c. After Closing, Seller shall promptly take all reasonable efforts to complete any documentation as may be requested or required by the Buyer to effect or memorialize the transfer of the IPv4 Numbers.
- d. Except for claims arising due to a breach of this Agreement, Seller shall not be liable or responsible for any liabilities or obligations of any kind or nature whatsoever arising out of, under, or related to the IPv4 Numbers from and after the Closing.

6. REPRESENTATIONS AND WARRANTIES.

- a. Each Party represents and warrants that the execution of this Agreement and performance of its duties and obligations do not and will not violate any agreement to which it is a party or by which it is otherwise bound.
- b. Seller shall transfer the IPv4 Numbers to Buyer free and clear of any liens and claims. There is no suit, action or other proceeding threatened or pending before any court or governmental or regulatory authority which seeks to restrain or prohibit or to obtain damages or other relief in connection with the IPv4 Numbers. Seller further represents and warrants that the IPv4 Numbers is not currently leased or in use by any party, and that it has full power to transfer the IPv4 Numbers without delay.
- c. As of the Effective Date, there is no known ARIN condition on the IPv4 Numbers that would prevent it from being transferred to the Buyer.
- d. Except as otherwise provided herein, Buyer agrees that it is purchasing, and shall take possession of, the IPv4 Numbers in "AS IS" condition, and acknowledges that it has previously been given the opportunity to and has conducted such investigations and inspections of the IPv4 Numbers as it has deemed necessary and appropriate for the purposes of this Agreement.
- e. Except as expressly stated in this agreement, Seller does not make any express or implied representations, statements, warranties, or conditions of any kind or nature whatsoever concerning the IPv4 Numbers, including (without limiting the generality of the foregoing) any warranties regarding the condition and/or quality of any or all of the purchased assets. Any and all implied warranties of merchantability or fitness for a particular purpose are disclaimed. ...

IN WITNESS WHEREOF, this Agreement has been executed by the Parties through their duly authorized representatives, as of the Effective Date.

B. Accounts and Handles

JLM COUTURE, INC. V. GUTMAN

91 F.4th 91 (2d Cir. 2024)

Park, Circuit Judge:

Fashion designer and social-media influencer Hayley Paige Gutman challenges a preliminary injunction and contempt order entered against her in litigation with her former employer, JLM Couture, Inc. The district court issued a preliminary injunction awarding JLM sole control of two social-media accounts—an Instagram Account and a Pinterest Account (together, the “Disputed Accounts”) ...

I. BACKGROUND ...

1. *Employment History*

In July 2011, Hayley Paige Gutman signed an employment agreement with JLM (the “Contract”). Gutman agreed to design a line of bridal wear in exchange for a salary plus “additional compensation” tied to the sales of the products she designed. The contract included provisions to protect JLM’s investment in Gutman’s name and brand association. Thus, among other terms, Gutman: (1) agreed not to use her name (or any derivatives of her name) in commerce once JLM registered a trademark thereof; (2) agreed that various categories of creative material she produced would be JLM’s property; and (3) agreed to certain noncompete, nonsolicit, and nondisclosure restrictions. The Contract allowed JLM to fire Gutman at any time, with or without cause, but included no provision for Gutman to terminate the arrangement. ...

In 2019, the parties attempted to negotiate amendments to the Contract but were unable to reach agreement. That November, Gutman changed the passwords to the Disputed Accounts and refused to give JLM access. Although the accounts had been used to post content advertising JLM’s products, Gutman informed JLM that she would “not be posting any JLM related business.” JLM then filed this lawsuit. Relevant here, JLM alleged that Gutman had breached the Contract and that she was liable for conversion and trespass to chattels for taking control of the Disputed Accounts.

2. *The Disputed Accounts*

Gutman created the Pinterest Account on November 3, 2011 and the Instagram Account on or about April 6, 2012. For both, she used the handle @misshayleypaige, a derivative of her name that she had used for other social-media profiles not in dispute, including several that were created before her employment with JLM. The Disputed Accounts were created using Gutman’s name, personal cell phone number, and a personal email account that she also used for work purposes. She created her own passwords.

JLM did not direct Gutman to open the accounts. Gutman says she created them at the suggestion of a friend. JLM argues that she must have created them to advertise for the company, as the Contract required her to “perform such other duties and services commensurate with her position... as may be assigned to her by an officer of the Company, including ... assisting with advertising programs.”

Although the district court did not find that Gutman created the Disputed Accounts for JLM, it did find that “the Instagram Account was utilized to showcase JLM’s products almost immediately after its creation.” It also found credible the

testimony of JLM's CEO that the creation of the Instagram Account was "timed to coincide with the week of the Fall 2012 New York bridal market." The district court further noted that JLM products were featured in several of Gutman's early posts to the Instagram Account.

Gutman's earliest posts include pictures of wedding dresses, as well as pictures of the New York City skyline, chairs, dogs, a wine bottle, and what appears to be a beach vacation.

Over time, however, the Disputed Accounts came to serve as critical advertising platforms for JLM's products. In addition to posts depicting bridal gowns, the Disputed Accounts provided information about JLM's promotional events, and Gutman used Instagram's messaging function to respond to sales inquiries. Promotional posts were interspersed with more personal content, in a strategy that JLM referred to as the "personal glimpse." Other JLM employees came to assist in managing the Disputed Accounts and responding to customer messages and, by 2019, at least two other employees had access to the Instagram Account. ...

II. DISCUSSION ...

Gutman next argues that the district court erred by modifying its preliminary injunction to give JLM exclusive control over the Disputed Accounts. We agree. ...

To resolve the issue, the district court identified six factors "at the core of a proper social media account ownership inquiry."³ Based on these factors, the district court ruled that "JLM has established [a] clear likelihood of success in demonstrating that it owns the Instagram Account and Pinterest Account or (to the extent Ms. Gutman or the relevant platforms may hold title to the Accounts) has a right to use and control the Accounts vastly superior to any such right of Ms. Gutman."

The district court expressly declined to consider whether Gutman owned the Disputed Accounts when they were created. It stated that such an approach would be "overly simplistic, and the dynamics of social media warrant a much fuller examination of how the accounts were held out to the public, the purposes for which the accounts were used, and the methods by which the accounts were managed."

We conclude that this approach was error. The law has long accommodated new technologies within existing legal frameworks. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 33-40 (2001) (holding that the use of thermal imaging technology can constitute a search under the Fourth Amendment); *Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 292-93 (2007) (treating electronic records as property equivalent to physical records for the purposes of conversion). We see no reason to depart from this traditional approach here. Determining the ownership of social-media accounts is indeed a relatively novel exercise, but that novelty does not warrant a new six-factor test.

The Disputed Accounts should be treated in the first instance like any other form of property. This includes determining the original owner. *See Pierson v. Post*, 3 Cai. 175 (N.Y. 1805) (determining original owner of a fox); *Lightfoot v. Davis*,

3. They are: "(1) whether the account handle reflects the business or entity name; (2) how the account describes itself; (3) whether the account was promoted on the entity's advertisements or publicity materials; (4) whether the account includes links to other internet platforms of the entity; (5) the purpose for which the account was used, including whether it was tied to promotional or mission-oriented activities of the entity; and (6) whether employees or members of the entity had access to the account and participated in its management."

198 N.Y. 261, 265, 91 N.E. 582 (1910) (discussing the principle of title by first possession); *see also* Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73, 73 (1985). When Gutman created the Disputed Accounts, any associated property rights belonged to *someone*. And if she created them using her personal information and for her personal use, then those rights belonged to her, no matter how the Disputed Accounts may have been used later.⁵ *See* 2 William Blackstone, *Commentaries* *389.

If the district court concludes that Gutman owned the Disputed Accounts at creation, it will then need to consider whether JLM subsequently took ownership by operation of the Contract.⁶ Traditional principles of property law guide this analysis. Thus, the fact that Gutman transferred some or all of her rights in particular content posted on the Disputed Accounts does not by itself support an inference that she transferred ownership of the Disputed Accounts themselves.⁷ Nor should it ordinarily matter to the question of ownership whether an account owner permits others to assist in managing the account, or whether one or the other party holds itself out as owning it. *See, e.g., Meisels v. Meisels*, 630 F. Supp. 3d 400, 411 (E.D.N.Y. 2022) (management of rental property not probative of ownership); *Porter v. Wertz*, 53 N.Y.2d 696, 698 (1981) (permitting suit for recovery of a painting purchased from a middleman who lacked authority to sell the painting). Determining ownership by reference to such principles would promote transfer by

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5. In evaluating the initial ownership of the Disputed Accounts, we note that Gutman's use of the @misshayleypaige username does not support a presumption that she created the account for business purposes. First, Gutman had licensed her name and its derivatives to JLM for use only in trade or commerce. She was entitled to continue using her name for noncommercial purposes, including personal social-media accounts. Second, even if Gutman created the Disputed Accounts for commercial purposes, it remains possible that she did so on her own behalf and in violation of the Contract.
 6. It appears that ownership of the Disputed Accounts may depend at least in part on the terms of service governing their creation and use. *See, e.g., Eagle v. Morgan*, No. 11-cv-4303, 2013 WL 943350, at *11 (E.D. Pa. 2013) (discussing LinkedIn's User Agreement). The district court may thus consider on remand what rights are inherent in "ownership" of the Disputed Accounts and whether they include the right to transfer or assign those accounts.
 7. Rights in the Disputed Accounts and rights in content posted on them—including ancillary content like direct messages, captions, profile pictures, and the like—need not be intertwined. *See, e.g., Agence Fr. Presse v. Morel*, 934 F. Supp. 2d 547, 562-63 (S.D.N.Y. 2013) (discussing Twitter's terms of service providing that "users retain their rights to the content they post"); *Sinclair v. Ziff Davis, LLC*, 454 F. Supp. 3d 342, 345 (S.D.N.Y. 2020) (discussing Instagram's terms of service providing that the user grants to Instagram "a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license" to the content they post).

surprise and complicate contractual arrangements under which an account owner might agree to advertise another's goods on his or her platform.⁸

Moreover, the district court erred by concluding that JLM is likely to succeed in demonstrating ownership of the Disputed Accounts under Paragraph 11 of the Contract. That paragraph provides that all “designs, drawings, notes, patterns, sketches, prototypes, samples, improvements to existing works, and any other works conceived of or developed by [Gutman] in connection with her employment with the Company involving bridal clothing, bridal accessories and related bridal or wedding items,” are works for hire and the exclusive property of JLM.

The district court ruled that the Disputed Accounts themselves qualify as “any other works” conceived of or developed by Gutman in connection with her employment. It thus concluded that Gutman likely assigned them to JLM in the Contract. But the ordinary meaning of general terms at the end of a list must be interpreted to embrace only objects similar in nature to those objects enumerated by the preceding specific words. Otherwise, giving general terms an all-encompassing meaning would render specifically enumerated terms surplusage.

Here, the specific terms—“designs, drawings, notes, patterns, sketches, prototypes, samples, [and] improvements to existing works”—are all closely related. They describe steps in the process of fashion design and capture much (if not all) of the creative output that Gutman might produce in her role as a designer. Moreover, the enumerated terms are all items that JLM might conceivably sell to the public and appear to be presumptively copyrightable. The Disputed Accounts by contrast share none of these core attributes, despite featuring content that does, such as sketches and drawings of wedding dresses. It would thus be inconsistent with ordinary principles of contract interpretation to conclude that Paragraph 11 of the Contract assigned the Disputed Accounts to JLM.

To summarize: the analysis of social-media-account ownership begins where other property-ownership analyses usually begin—by determining the account's original owner. The next step is to determine whether ownership ever transferred to another party. If a claimant is not the original owner and cannot locate their claim in a chain of valid transfers, they do not own the account.

We thus remand to the district court to analyze ownership of the Disputed Accounts under the framework discussed above. ...

NOTES

1. How should the district court resolve this case on remand?
2. There is a useful distinction between an *account* (the ability to log in to a service) and a *handle* (a name such as @misshayleypaige). Make sure you see how these are different. They are often created and transferred together, but not always. Could it make sense, in an appropriate case, to split ownership of them?

8. To the extent that the district court held that JLM has a superior right to use and control the Disputed Accounts, it erred by relying on its six-factor ownership test. If the district court concludes on remand that Gutman owns the Disputed Accounts, it could still find that JLM has a superior right of possession. But that conclusion would depend on identifying the nature and source of any superior possessory interest. *See, e.g.*, Restatement (Second) of Torts § 225 (discussing persons entitled to immediate possession); *cf. Guiffrida v. Storico Dev., LLC*, 60 A.D.3d 1286, 876 (4th Dep't 2009) (holding that tenants could sue for conversion because they had an immediate superior contractual right to possession).

3. Some courts have rejected the application of conversion to intangibles like domain names and accounts. *See, e.g., Pan 4 America, LLC v. Tino & Tita Food Truck, LLC*, No. DLB-21-401 (D. Md. Mar. 3, 2022) (holding that a Facebook page fails the Restatement’s merged-in-a-document test).

C. Virtual Property

JLM Couture distinguishes the accounts from the “content” posted to them. Make sure you see how there are (at least) three different reasons that an account’s “contents” could be important:

- One is that they could be creative works subject to *copyright* or other IP rights, like photographs uploaded to an Instagram account. This is probably the sense in which the *JLM Couture* court uses the word. As we will see in the Information chapter, ownership of the account generally does *not* carry with it ownership of the copyright in material posted to it.
- A second reason to care about an account’s contents is gaining *access* to them. If your Gmail account were closed without warning, you would probably be quite upset to lose access to your email archive—even though the copyright in the emails would be held by the people who wrote them and sent them to you. We will discuss this dimension of rights to information in the Information chapter, as well.
- A third way in which an account’s contents can matter is when it has certain powers or resources that are useful when using the service the account is associated with. Examples include Fortnite skins, Reddit gold, and Spotify premium status. We will call these *virtual property*. This section is devoted to them.

As a reminder, *all* of these types of “contents” are distinct from control over the account itself and from control over a handle associated with an account. Ownership of an account might come with any of them, or it might not.

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(as of December 2024)

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(as of July 2024)

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... 3. ACCOUNT TRANSFER / CHARACTER TRANSFER

You are not permitted to transfer your Account to another person. ... You may transfer a character from your Account to another account, either belonging to you or another person. This transfer option is available from the EVE Online Account Management web site <http://secure.eveonline.com/account> and is subject to fees and the following limitations: You may not offer to transfer characters except your own, or act as a “broker” or intermediary (for compensation or otherwise) for anyone wishing to transfer or obtain characters. The transferee will obtain all rights to your character in a single transaction, and you will retain absolutely no control or rights over the characters, items or attributes of that character. You may not transfer any characters whose attributes are, in whole or in part, developed, or which own items, objects or currency obtained or acquired, in violation of the EULA.

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6. CONDUCT ...

B. Selling Items and Objects

You may not transfer, sell or auction, or buy or accept any offer to transfer, sell or auction (or offer to do any of the foregoing), any content appearing within the Game environment, including without limitation characters, character attributes, items, currency, and objects, other than via a permitted Character Transfer as described in section 3 above. You may not encourage or induce any other person to participate in such a prohibited transaction. You may not use, transfer or assign any game assets for games of chance operated by third parties. The buying, selling or auctioning (or any attempt at doing so) of characters, character attributes, items, currency, or objects, whether through online auctions, newsgroups, postings on message boards or any other means is prohibited by the EULA and a violation of CCP's proprietary rights in the Game.

10. PROPRIETARY RIGHTS ...

B. Rights to Certain Content

You have no interest in the value of your time spent playing the Game, for example, by the building up of the experience level of your character and the items your character accumulates during your time playing the Game. Your Account, and all attributes of your Account, including all corporations, actions, groups, titles and characters, and all objects, currency and items acquired, developed or delivered by or to characters as a result of play through your Accounts, are the sole and exclusive property of CCP, including any and all copyrights and intellectual property rights in or to any and all of the same, all of which are hereby expressly reserved.

NOTES

1. EVE Online has a policy against what is sometimes called “real money trading.” Note that the game allows players to freely transfer in-game items. It also has “markets” on its in-game space stations, where players can put in buy and sell orders for their in-game items. If a buyer and seller agree to a sale, the item is automatically taken from the seller's account and given to the buyer, and the corresponding sum in InterStellar Credits (ISK), the in-game currency, is transferred from buyer to seller. Given all this, what transactions does section 6 prohibit, and why?

R. V LAKEMAN

Court of Appeal (England and Wales)
[2026] EWCA Crim 4

Lord Justice Popplewell:

INTRODUCTION

1. The issue in this case is whether “gold pieces” as a form of wealth in a video game constitute property within the meaning of s. 4 of the Theft Act 1968.

THE GAME

2. The game in question is Old School Runescape, which is a role-playing game developed and published by Jagex Ltd. It is played online by a large number of players worldwide, typically in excess of 100,000 at any one time. Each player has an account protected by a username and password of their own choosing. In the game they have an avatar which interacts with other players' avatars and non-player avatars, such as humans, vampires, goblins and giants, in a fictional realm with multiple kingdoms. There are various

forms of the game, but in its essential conception a player needs to build up in-game wealth in order to improve their avatar's capabilities and access additional levels in the form of available quests. The in-game wealth can be achieved in several different ways. Players can accumulate wealth in the form of tokens which are, or can be converted into, gold pieces, by performing in-game tasks (e.g. woodcutting or mining). This can be a time consuming process in building up the in-game resources necessary to achieve a desired skill or level or the ability to perform a particular task. Players can also transfer gold pieces between each other within the rules of the game by two methods. There is an anonymous "grand exchange" by which gold pieces may be transferred in exchange for consumables or other items of value in the game, such as a cloak or amulet which strengthens the player's avatar. They may also be transferred by a direct player to player transfer provided the players are within close proximity within the game. A player may also buy from Jagex a bond (at the time costing £6) which is redeemable for 14 days of game-time membership. Such bonds can be, and often are, transferred on the grand exchange in exchange for gold pieces (a bond currently being worth about 13 million gold pieces). In this way, and only in this way, the game rules allow a player to use fiat currency to generate gold pieces in the game. The number of gold pieces generated by a bond might take some 15 hours to earn by completing in-game tasks.

3. The rules of the game do not entitle the players to cash in their in-game wealth with Jagex for fiat currency; and they expressly forbid any sale outside the game. Nevertheless gold pieces have a real world value because they are regularly bought and sold outside the game, despite this prohibition. Typically the vendor and purchaser will negotiate the terms of a sale off-line, either through one of a large number of third party websites dedicated to trading in-game wealth of this kind or on a platform such as Discord, a chat platform communications network used by gamers. The gold pieces are then transferred from the vendor to the purchaser in-game by player to player transfer, with the vendor being paid off-line by a fiat currency or cryptocurrency transfer. At the time of the alleged offences an offline purchase would cost the purchaser about £2.70 for the same number of gold pieces as would be generated by a £6 bond purchased from Jagex.

The software

4. Gold pieces exist in a virtual world. In the real world they are visual and functional manifestations of software comprising coded digital data. Each allocation of gold pieces to an individual player's account exists in a digital ledger held on Jagex's servers in the form of such coded data. It is instantiated, that is to say that what appears functionally in a player's account as a particular volume of gold pieces is a product of a set of coded data which attributes them to that particular player.
5. Jagex uses two types of source code in the game. One is written in Jagex's proprietary source code called Runescript developed by Jagex's software engineers. The copyright in such code belongs to Jagex and restrictions on its use are contained in an End User Licence Agreement and Terms and Conditions (as to which see below). This code governs the commands in the game. The other source code is written in JavaScript, the well-known and widely

used programming code. Jagex uses JavaScript to create what it calls its ‘game engine’ which carries out the command instructions written in Rune-script. It appears from the End User Licence Agreement that Jagex also uses various other forms of software licensed from third parties. A player’s holding of a quantity of gold pieces on the digital ledger on Jagex’s servers comprises code in which Jagex holds no copyright. At one stage the prosecution contended, amongst other things, that Jagex had a copyright interest which was relevant property falling within s. 4 of the Theft Act. However in argument before us, Ms Kenyon expressly confirmed that it was not contended by the prosecution that Jagex had a proprietary copyright interest in the instantiated data which reflected a quantity of gold pieces in a particular player’s account.

THE CONTRACTUAL AND LICENCING FRAMEWORK ...

9. We have set out the material terms of [the Jagex (1) Terms and Conditions; (2) Rules of Conduct of Runescape; and (3) End User Licence Agreement] in the Appendix to this judgment, because they are lengthy. If contractual, the following were the most relevant terms agreed between Jagex and each player of the game.
 - (1) The player was granted a non-exclusive licence to use the software which was revocable by Jagex at any time (EULA para 1.1, T&Cs clause 7);
 - (2) The licence conferred no title or ownership to the software or to the Jagex Products, and it was agreed that the player had no ownership, title or other property interest in any Jagex Product (T&Cs clause 7 and clause 8(1) and (3)). Jagex Product is defined in T&Cs clause 2 to be the game as a whole, rather than any particular features such as virtual currency, including gold pieces. The para 2 definitions draw a distinction between Jagex Products and Virtual Currencies, the latter being something which can be purchased in a Jagex Product. It appears to us that these provisions do not amount to a contractual agreement that the player has no property interest in the gold pieces if such property interest would otherwise exist at law.
 - (3) Virtual currency does not have an inherent or real world monetary value or reflect any stored monetary value (T&Cs clause 14(6) and (7)). It can only be redeemed in the game (T&Cs clause 14(4)) and sale or gifting of gold pieces in the real world is forbidden and not recognised by Jagex (T&Cs clauses 8(4), 14(7)). Any attempt at real world trading is a serious breach of a player’s agreement with Jagex (the Rules). Jagex will not redeem or provide real world money for virtual currency (T&Cs clause 14(7)), even where it is lost as a result of the player being subject to in game scamming or withdrawal of the Jagex Product (T&Cs clause 15(1)).
 - (4) All intellectual property rights in any game content including virtual currency are the property of Jagex or its licensors (T&Cs clause 8(2)). Although that refers to “intellectual property *or other* rights” it appears to us, from the heading and content of the clause as a whole (see 8(1)), that it is directed to intellectual property rights or similar rights, rather than to proprietary rights generally which might otherwise ex-

ist in a virtual currency. The status and treatment of virtual currencies is addressed specifically under clause 14.

- (5) Virtual currency is not the game player's "own private property" but is "a measurement of the extent of [their] licence in a Jagex Product" (T&Cs clause 14(6)). The latter phrase is problematical because the number of gold pieces do not in any meaningful sense *measure the extent* of the player's licence in the game; they are merely one feature of the content of the game. It appears to us that this term is at best ambivalent as to whether as a matter of contract the currency as intangible property (if such it be) is property of the game player.
- (6) Jagex can at any time cap, restrict access to, or delete virtual currency or anything acquired by means of virtual currency (T&Cs clause 12(2), 14(9)), or decide to end the currency in part or in whole (T&Cs clause 14(11)). ...

THE CASE AGAINST THE RESPONDENT

11. The Respondent worked for Jagex as a content developer. He had no role in the management of player accounts and was not authorised to access players' accounts. Access to players' accounts is afforded to an account recovery team within Jagex, typically for the purpose of requests for resetting of passwords. The case against the Respondent is that by hacking and/or using credentials of members of the account recovery team he obtained access to 68 accounts in which players had accumulated very substantial in-game wealth; and then stripped those accounts of hundreds of billions of gold pieces and transferred them to purchasers to whom he sold them off-line, receiving in return Bitcoin and fiat currency. Jagex has identified the number of gold pieces stripped from players' accounts as about 705 billion with a real world trading value of £543,123.
12. The Respondent faces a five count indictment. Count 2 charges theft contrary to s. 1(1) of the Theft Act 1968, the particulars being that "between the 17th day of March 2018 and the 29th day of July 2028 he stole a quantity of gold pieces from the online game Old School Runescape to an approximate value of £543,123 belonging to Jagex Ltd."
13. Section 1(1) of the Theft Act provides that "A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly." ... Section 4 is headed "Property" and contains a definition of property for the purposes of s. 1(1). Section 4(1) provides:

"Property" includes money and all other property, real or personal, including things in action and other intangible property.
14. Subsections 4(2) to (4) go on to exclude from the definition of property certain specific things in certain circumstances, namely land, wild mushrooms flowers and foliage, and untamed wild creatures.
15. Section 5 defines what is meant in s. 1(1) by property "belonging to another". It provides:

Property shall be regarded as belonging to any person having possession or control of it, or having any proprietary right or

interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).

16. Count 1 charges securing unauthorised access to computer material with intent to commit an offence, contrary to section 2(1)(a) of the Computer Misuse Act 1990. The particulars identified that it was “with intent to commit an offence to which section 2 of the Computer Misuse Act 1990 applies, namely the theft of ‘in game wealth’ (gold pieces) from Old School Runescape accounts”. This covered the conduct alleged against the Respondent in gaining access to the 68 customer accounts.
17. Counts 3 to 5 charge money laundering offences. Count 3 charges an offence contrary to s. 327(1)(c) of the Proceeds of Crime Act 2002 (‘POCA’) by converting the gold pieces into Bitcoin as the proceeds of crime. Count 4 charges an offence of possessing the Bitcoin as proceeds of crime contrary to s. 329(1) of POCA. Count 5 charges an offence of converting the Bitcoin to fiat currency as the proceeds of crime. In each case the crime of which these were alleged to be the proceeds is not particularised in the indictment but it was clearly intended to be the theft referred to in counts 1 and 2, as Ms Gaunt confirmed.

THE PROCEDURAL HISTORY GIVING RISE TO THE APPEAL

18. The defence made an application to dismiss the charges on the grounds that the gold pieces were not property within the meaning of s. 4 of the Theft Act.” ...
19. The Judge ruled in favour of the defence. His reasoning can be summarised as follows. The starting point was the definition of property in s. 4 of the Theft Act. The leading authority on the definition of property is *National Provincial Bank v Ainsworth* [1965] AC 1175 in which Lord Wilberforce said at p.1247G-1248B: “Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.” The gold pieces fulfilled each of those four criteria. However it was key to whether something can be property that it should also (i) have the characteristics of rivalrousness; and (ii) not amount to “pure information”. Rivalrousness is a term popularised in mid 20th century economics which was adopted as a relevant criterion for whether digital assets should be treated as property by the Law Commission in its Report on Digital Assets published in June 2023 (“the LC Report”) and its Supplementary Report published in July 2024 (“the LC Supplementary Report”). The term has been taken up in subsequent cases, notably by the Court of Appeal in *Tulip Trading Ltd v Bitcoin Association BSV & others* [2023] EWCA Civ 83 [2023] 4 WLR 16. The Law Commission defined a thing as rivalrous “if the use or consumption of the thing by a person, or of a specific group of persons, necessarily prejudices the use or consumption of that thing by one or more other persons.”
20. The Judge held that that gold pieces were not rivalrous and were more akin to pure information. The critical reasoning on rivalrousness was ... :

Gold pieces within Runescape are not sufficiently rivalrous to be classed as intangible property. One gold piece is the same as any other, and their supply is infinite. The fact that existing players have wealth does not preclude new players from joining

the game and getting more wealth, without taking it from existing players. This means, in my judgment, that even if the Crown is able to prove every single factual assertion that forms the basis of its case, the offences currently charged are not made out in law and I would not be prepared to leave them to a jury.

21. The critical reasoning on “pure information” ... was that unlike a real world currency the supply of gold pieces is in effect infinite. ...

FRAMING THE ISSUE

23. Four preliminary questions arise as to how the issue on this appeal is to be framed. First, are we concerned with “a chose in action” or “other intangible property”, or both? Secondly, whose putative property are we concerned with; in particular is it that of the game player or Jagex or both? Thirdly, and relatedly, are we concerned with gold pieces as a visual and functional thing in the virtual world of the game, or with the coded data which gives rise to that visual and functional manifestation, or both? Fourthly, to what extent are we concerned with the nature or definitions of property in the law generally?

(1) “Chose in action” or “other intangible property”?

24. Ground 2 of the Grounds of Appeal criticises the Judge for addressing the issue only by reference to whether the gold pieces are “other intangible property” and failing to hold that they are a chose in action in “contract and/or tort” or “as copyrighted material”. This argument was advanced orally on behalf of the prosecution by Ms Kenyon. As we understood it, it was an argument that the player had a cause of action against Jagex. As to copyright, she expressly conceded that there was no copyright in the gold pieces, and in any event there can have been no such right in the players so as to give them a cause of action against Jagex rather than vice-versa. No argument was advanced supporting a cause of action in tort. The argument was put on the basis that there was an implied term of the EULA that a player had a right to access their account and to use and have exclusive control over the items in their account including the gold pieces. We cannot accept such an argument. No such implication is necessary for the purposes of the EULA, and indeed is contrary to the terms of the EULA which is expressed to be a revocable licence. In any event the term suggested would be wholly inconsistent with the T&Cs in the ways we have highlighted above, which give Jagex a discretion to cap, withdraw or delete gold pieces. If the gold pieces are to be characterised as property, they must be “other intangible property”.

(2) Whose “property”?

25. The submissions on behalf of the prosecution at times treated the gold pieces as the property of the players from whose accounts they were stripped, and at other times as the property of Jagex. ...
26. ... The particulars under count 2 are consistent with the gold pieces being the property of the game players because of the width of s. 5 which allows property to belong to more than one person. The gold pieces can potentially be property “belonging to” Jagex by reason of Jagex, in the words of s. 5, “having possession or control of” them, whilst at the same time potentially being property also belonging to the relevant game player as having a “proprietary right or interest” in them. ...

27. Conversely if the gold pieces are the property of Jagex, they could also belong to the game players who would be persons having control over them, in the words of section 5. It is the player who decides whether and how they will be used in the course of the game, and the fact that Jagex may also have a degree of control by being able to withdraw restrict or delete them does not prevent the player having sufficient control to come within section 5. ...

(3) Gold pieces or coded data?

29. Gold pieces exist in the game, which is a virtual world. In the real world they are the visual and functional manifestation of software comprising coded digital data, which in relation to any set of gold pieces in a game player's account take physical form through the mechanisms by which software manipulates hardware, by electrical or magnetic impulses, pixels and so on. As Birss LJ commented in *Tulip Trading Ltd* at [72] in relation to Bitcoin:

... literally all there is, is software. A physical coin has properties which exist outside the minds of people and in that sense is tangible. Bitcoin is similar. It also has properties which exist outside the minds of individuals, but those properties only exist inside computers as a consequence of the Bitcoin software. There is nothing else.
30. We consider that the correct approach is to consider whether the gold pieces themselves constitute property, rather than whether the instantiated code which represents them is property. Physical existence is not a necessary ingredient of property, which includes *intangible* property; it also includes choses in action, which are a well-known example of property without any physical existence. Although the gold pieces exist in a virtual world they have a real world existence which manifests itself not only in their appearance and use on the screen but in real world trading. They are real functional things distinct from the code which creates them.
31. The data itself, as distinct from the asset it represents, is not rivalrous, in that the use of the code by Jagex or a player does not stop another person from using it: it may, in theory at least, be replicated on another computer without thereby representing anything of value to anyone. Its value qua data, if any, lies only in such protection as is afforded by the law of intellectual property. By contrast the thing which has value is the functional gold piece controlled by the game player. As we have observed, section 5 contemplates that property may belong to a number of people for the purposes of the Theft Act and that it may be property belonging to someone who merely has control of it.
32. The position is analogous to that which applies to cryptocurrencies, which are widely regarded as capable of constituting property (as to which see below), and for which the relevant criteria are applied to the functional concept of the cryptocurrency itself rather than to the software which creates it. Bitcoin, for example, consists of coded software which is entirely public and not the property of anyone: the code is public and is applied on a distributed ledger which itself is public. The only private element is the private key. There is no property interest in either the code or its manifestation on the blockchain. The thing which such code represents, however, namely Bitcoin as a currency, is recognised as being capable of amounting to intangible property.

33. The Law Commission explained the position in paras 2.28-2.30 of its Supplementary Report:
- 2.28 On one interpretation, all digital things are nothing more than strings of (alphanumeric) data, represented in code by a stored sequence of bytes. On this analysis, those digital things could be said to be nothing more than pure information. If this interpretation were adopted, there could be no property rights in any digital things at all.
- 2.29 However, crypto-tokens are more than just information. They comprise different components, rather than being purely a data structure. Professor Fox [in *Digital Assets as Transactional Power* 1 J. INT'L BANKING AND FIN. L. 3 (2022)] has suggested that a digital asset such as a crypto-token is:
- An ideational thing containing different components. It is more complex than the £1 coin since it lacks any tangible basis and its most significant properties are matters of digital functionality rather than legal attribution. Like the coin, however, it comprises more than one component. It is grounded in, but not confined to, the technical features of its own digital design. Its outward manifestation is a string of data generated by transactions between participants on a distributed ledger system. But to see the asset as mere data would ignore its larger functionality, just as we would fail to appreciate the full economic or legal significance of a coin by treating it as a mere metal disc.
- 2.30 Even though each of the individual data elements of a crypto-token can be copied—in the sense that the information can be reproduced on an equivalent medium—the copier does not get the same discrete instance of a crypto-token. Instead, what the copier gets is data in a different system. Even an exact recreation of all the elements of a particular network would result in the creation of a materially identical, yet distinct, network, populated by materially identical but distinct, rivalrous crypto-tokens. One way of thinking about this is to make an analogy with banknotes. Every Bank of England banknote has a unique serial number, but knowing or copying that serial number will not duplicate the function or value of the banknote; that number is of no use except as an intrinsic element of the banknote in question. Similarly, taking the data that makes up a token on a distributed ledger will not replicate the token because the data has no function except as instantiated in the token on the network.”
34. Mr Eissa told us that when a gold piece is “transferred” within the game from player A to player B, the instantiated code allocating it to the account of player A is in fact deleted and replaced by instantiated code allocating it to player B. We do not consider that this makes any difference to the concept of “transfer” of gold pieces or to their potential status as property. As Birss LJ observed in *Tulip Trading* at [25] there is a similar change to the blockchain code in any “transfer” of Bitcoin which some would describe as the creation of new property, but that does not affect the treatment of Bitcoin as something which is transferrable or as constituting property. When gold pieces are transferred there is a visual and functional transfer. It is im-

material that this is effected by one piece of code being replaced by another on the Jagex servers. Once again, the intangible asset is the functional ideation and to be distinguished from the code which represents it.

35. The question is therefore whether a gold piece as a visual and functional thing is property, not whether the code which gives rise to its visual manifestation and functionality is property.

(4) The nature of ‘property’ generally and private law rights ...

37. ... [W]e are not concerned to define what property is, or how to determine it, for all areas of the law. A definition of property serves different purposes in different contexts. ...
38. It does not follow, therefore, that for a thing to constitute property for the purposes of a criminal offence it should necessarily do so for the purposes of private rights in civil law. Even within the criminal law, it is necessary to focus on the particular offence in question, because what amounts to property is not defined in the same way for all offences. We are only concerned with the definition in section 4 of the Theft Act, a definition for the purposes of offences under that Act in the criminal law. Other definitions apply in other areas of the criminal law. In the Criminal Damage Act 1971, for example, as originally enacted, property was defined as “property of a tangible nature, whether real or personal...”. The restriction of that offence to tangible property was narrower than the Theft Act definition, which might have caused difficulty in relation to damaging computers. However a broad approach to what constituted causing damage, namely impairing the value or usefulness of the tangible property, enabled the court to treat computer hacking as criminal damage to the magnetic particles on a disc despite the absence of any tangible damage to the disc (*R v Whitely* (1991) 93 Cr App R 25), a decision effectively reversed by a new s.10(5) introduced alongside the introduction of the offences now in the Computer Misuse Act 1990. ...
40. There is no conceptual difficulty in something constituting property within the meaning of the definition in s. 4 of the Theft Act but not constituting property over which there are enforceable private law rights. Whilst there are aspects of the law for which a divergence between the criminal and civil law is inherently undesirable (for example the meaning of dishonesty; see *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords Club)* [2017] UKSC 67 [2018] AC 391 at [57] and [63]), this is not one of them. ...
42. Another example of where the criminal law departs from the civil law in its treatment of property for the purposes of the Theft Act is afforded by the position in relation to illegally held drugs. It was confirmed in *R v Smith (Michael Andrew)* [2011] EWCA Crim 66 that illegally held Class A drugs are property within the meaning of the Theft Act and are capable of being stolen. A theft or robbery amongst rival drug gangs can be indicted as such, because the criminal law is concerned with the public order consequences of preventing such behaviour, notwithstanding that it would be contrary to public policy to recognise any property rights for the purposes of civil enforcement between drug dealers. ...
43. Moreover section 5 of the Act qualifies the nature of property which may be the subject matter of theft in that it must be property “belonging to another” in the sense there defined. Whilst some aspects of that definition undoubtedly depend upon the civil law as to proprietary interests in property, they

do not all do so. In particular property can belong to another when it is in the control of that other, and control need not connote any private law proprietary interest. The same is true of property in the possession of another. Possession and control in section 5 are factual concepts, and not qualified by or dependent upon any legal right to possess or control. They do not depend upon such possession or control being lawful as a matter of civil law. ...

46. It is for all these reasons that anything in the contractual documents between Jagex and the players, or in the civil law more generally, which would preclude the player having any enforceable private law personal property rights in the gold pieces, is not determinative as to whether they are property for the purposes of the definitions in the Theft Act. ...

THE CRIMINAL CONTEXT

48. The starting point is the language of section 4. It is an inclusive not exhaustive definition. It is in wide terms so as to be capable of applying to anything intangible provided it can properly be described as property. As s. 1(1) makes clear in terms, it is directed to criminalising something which someone “steals”. It is aimed at property in the sense of a thing which someone can steal. The expansive nature of the definition and the criminal context suggests as a starting point that property should be construed as capable of applying to any thing which can as a matter of normal use of language be described as capable of being stolen, unless there are good reasons why such a thing should be excepted.
49. However, not all things which can colloquially be described as capable of being stolen constitute property within the meaning of the Theft Act. Intellectual property is protected by the Copyright Designs and Patents Act 1988 (the ‘CDPA’) and is largely designated as a “property right” under s. 1 (copyright) or s. 213 (design right). The rights are protected by statutorily defined acts of infringement, and the criminality of such infringement of copyright, for example, is defined by offences created by s. 107 of the CDPA. We doubt whether such intellectual property is capable of being property which is stolen contrary to the Theft Act, although it is not necessary to express a concluded view on the question.
50. What is clear is that it is widely regarded as settled that “property” in section 4 of the Theft Act does not extend to “pure information”, including confidential information, on the basis of the decision in *Oxford v Moss* (1979) 68 Cr App R 182. In that case the defendant was a student who had stolen an examination paper prior to an exam, and returned it after he had read its contents. He was charged with theft. The magistrate dismissed the information on the grounds there had been no appropriation of “property”. The prosecution case was not that the exam paper itself was the relevant property, because there could not be shown an intention permanently to deprive the owner of it (although see (1979) CLR 119 for an ingenious argument that it could have been). Rather it was argued that the questions to be set (in which there was no copyright) constituted the relevant property as confidential information, relying on civil decisions affirming rights and remedies for infringement of trade and matrimonial secrets. The Divisional Court dismissed the appeal by way of case stated, giving brief *ex tempore* judgments which cast little light on the rationale for the decision.

51. The decision, which is not binding on this court, is the subject of an interesting discussion in Smith, Hogan and Ormerod's Criminal Law 17th edn at 18.3.2.7, which identifies a number of academic writings on the subject, as well as the fact that the Law Commission proposed legislating to criminalise non-consensual use or disclosure of another's trade secrets in 1997. In Taylor & O'Flóinn's article cited above, *Oxford v Moss* is explained on a number of bases: the information in the exam questions is not rivalrous; one person's knowledge of it does not diminish someone else's knowledge of it; information as such is inalienable and unassignable; a fact cannot be "unknown"; the question of who owns a piece of information may be nebulous; and there are concerns about the use of the criminal law or property law to regulate dissemination of information.
52. In our view the justification for the decision, and the principle it stands for, lies in the fact that what is meant by "pure information" is simply knowledge; and knowledge cannot qualify as property which can be stolen for two reasons. First, it exists simply in a person's head and independently of anything representing or recording it on any form of medium (although it may of course be so recorded, in which case the tangible medium is property and may be stolen, as the exam paper in *Oxford v Moss* would have been had there been an intention permanently to deprive). If a person knows what day of the week it is, that knowledge could not appositely be described as their property; and no more could their accumulated body of knowledge acquired over time, whether generally or in a specific field of skill or endeavour. ...
53. Secondly, knowledge is not something which can be stolen because the transfer of knowledge from A to B does not deprive A of that knowledge or A's ability to use it.
54. In *Attorney General of Hong Kong v Nai-Keung* [1987] 1 WLR 1339 the Privy Council was concerned with an appeal from Hong Kong in respect of a conviction for theft under the Theft Ordinance 1970, which was in materially identical terms to the Theft Act 1968, including its definition of property. The export of textiles from Hong Kong was prohibited except under licence, and The Department of Trade and Industry operated an export quota system in respect of such exports. Export quotas were registered with the department and were transferable for value on a temporary or permanent basis. The defendant was a director and minority shareholder in a company to whom such export quota licence had been granted. Without the knowledge of his co-director, who was the majority shareholder, the defendant sold a large quantity of the company's quotas permanently transferring them to a textile company which had as its proprietor the defendant's co-director in a recently incorporated textile exporting company. The defendant was charged with theft of the textile export quotas, the prosecution case being that that he had acted dishonestly by selling the quotas at a gross undervalue. ... [T]he Judicial Committee ... held that export quotas were capable of being stolen since, although not things in action, they did come within the words "other intangible property" in the definition of "property" in section 5(1) of the Theft Ordinance. Lord Bridge, giving the Opinion of the Board, said at 1342B-C:

... It would be strange indeed if something which is freely bought and sold and which may clearly be the subject of dishonest dealing which deprives the owner of the benefit it confers were not capable of being stolen. ...

55. We take two points of importance from this passage. The first is that the definition of property in s. 4 of the Theft Act is to be interpreted as having the widest ambit. The second is that the indicia of what constitutes property for these purposes were treated as being that the thing was something (1) which is freely bought and sold and (2) which may clearly be the subject of dishonest dealing which deprives the owner of the benefit it confers.
56. Gold pieces may clearly be the subject of dishonest dealing which deprives the game player of the benefit they confer. They are freely bought and sold, both within the rules of the game for other game items, and outside the rules of the game for real money or money's worth. Mr Eissa sought to distinguish the case on the basis that gold pieces were not "freely" bought and sold because the buying and selling of gold pieces outside the game was not permitted under the terms of the T&Cs and Rules. However, the fact that transfer is prohibited does not prevent a thing being property. Class A drugs cannot lawfully be bought or sold (with limited exceptions), but as Mr Eissa accepted, illegally held Class A drugs are property within the meaning of the Theft Act and are capable of being stolen. The same is true if the restriction on transfer is contractual, rather than criminal. If A hires out his car to B on terms that it is only for B's personal use, the car remains A's property. If B dishonestly sells the car he is guilty of theft irrespective of the contractual prohibition on sale. It is the intrinsic nature of a car which makes it something which is "freely" bought and sold in practice within the meaning of the first of the two indicia identified in *Nai-Keung* despite any contractual prohibition on sale. The same is true of gold pieces. ...

CASES AND MATERIALS IN THE CIVIL LAW

The Ainsworth criteria

68. Lord Wilberforce's four criteria in *Ainsworth* are often taken as the starting point for determination of whether something constitutes property for the purposes of private law rights. For convenience we set them out again: "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."
69. We agree with the Judge that gold pieces fulfil each of these criteria. They are clearly definable and identifiable by third parties. They are capable of assumption by third parties in that they are transferable within the game. Mr Eissa argued that they are incapable of being *legally* assigned because they are subject to the revocable licence issued by Jagex. However unless and until the licence is revoked, the player is free to transfer them within the rules of the game. They also have the necessary degree of permanence and stability. Mr Eissa argued that that this last criterion is not met because they can be withdrawn or destroyed at any time by Jagex or removed from a player's account. However that does not prevent them having *some* degree of permanence and stability. It is apparent that only a small degree of permanence or stability is required: a melting ice lolly or burning match will quali-

fy as property. The Bank of England may withdraw notes or coins as legal tender at any time, but that does not prevent them being property.

Rivalrousness

70. Mr Eissa argued that fulfilment of the *Ainsworth* criteria was not sufficient, and that in order for digital assets to be property they must be rivalrous; and that gold pieces are not.
71. The concept of rivalrousness has come to the fore in consideration of whether digital assets are property in the light of the emphasis placed on the concept by the LC Reports. ...
73. The LC Report recognised that there was a very wide variety of digital assets which might potentially be regarded as property. They included digital files, digital records, email accounts, domain names, in-game digital assets, digital carbon credits, crypto tokens and Non Fungible Tokens, with differing forms of digital technology and characteristics ((1.3]). The LC proposed that digital assets which are neither tangible assets nor choses in action should be recognised as a third form of 'property' to which personal property rights attached if they satisfy three criteria ([4.5]):
 - (1) they are composed of data represented in an electronic medium, including in the form of computer code, electronic, digital or analogue signals;
 - (2) they exist independently of persons and exist independently of the legal system; and
 - (3) they are rivalrous, that is if the use or consumption of the thing by one person, or a specific group of persons, necessarily prejudices the use or consumption of that thing by one or more other persons. ...
75. The gold pieces with which we are concerned fulfil the Law Commission criteria. They are not pure information within the *Oxford v Moss* principle. They have properties which exist outside the minds of individuals, notwithstanding that those properties exist as a consequence of the coded software inside computers. They are rivalrous because the use and consumption of them by the game player necessarily prejudices the use and consumption of them by others. If they are used and consumed in the game by player A they cease to exist and cannot be used by anyone else. If they are transferred to player B they are not available to anyone other than player B. The use of usernames and passwords is designed to ensure the exclusivity of this use and consumption.
76. Mr Eissa objects that Jagex have both the practical ability and contractual right to alter the holding by player A or player B of their gold pieces, either by action taken directly against the player or by changing the rules of the game. Jagex control the game code and so can rewrite the code to destroy the player's holding. However that possibility does not stop the gold pieces being rivalrous at a time before it occurs. It is the use or consumption of the property which must be rivalrous, not the mere possession of it. The mere fact that whilst a thing is unused and unconsumed it may be removed from someone does not affect whether the quality of the thing is rivalrous before that time. A coin or banknote is property notwithstanding the ability of the Bank of England to recall it as legal tender. If A hires their car to B under a contract terminable at will, the car remains rivalrous in the hands of B for so

long as the hire contract continues: the use of it by B precludes the use of it by others. The fact that B's possession may be brought to an end by A at any time does not prevent the car having the characteristic of rivalrousness. The same is true if the right is one to consume or destroy the property rather than remove it. If A lends B a candle on terms that B is free to light and burn it but that A retains the right to light and burn it at any time to the extent B has not done so, the candle remains a rivalrous piece of property in B's hands: the burning of it by B or A precludes (pro tanto) the burning of it by anyone else. ...

77. We differ from the Judge in his reasoning for reaching the contrary conclusion on rivalrousness. The two reasons which the Judge gave in [25] of his ruling do not, with respect, bear analysis. The first was that "one gold piece is like any other, and their supply is infinite". This does not, however, distinguish them from many other forms of rivalrous property. One paper clip from a given manufacturer is like any other; and the manufacture and supply of them infinite, in the sense that is not capped at any finite number. Yet each paper clip constitutes property. The same is equally true of gold pieces. Mr Eissa submitted that digital assets needed to have a quality of "uniqueness" in order to qualify as property, but it is difficult to understand why this should be so. As he accepted, such a requirement does not apply to tangible property, which may be identical to other items of tangible property, as the paper clip example illustrates. In each case, whether paper clip or gold piece, the control which one person exercises precludes its use or consumption by another notwithstanding that that person, or another, may acquire further identical property with no finite limit. The Judge's second reason was that "[t]he fact that existing players have wealth does not preclude new players from joining the game and getting more wealth without taking it from existing players". However this too is no answer to the rivalrousness of the in-game wealth which a particular player already has at any given time. It focuses only on different assets which may thereafter be acquired. ...

POLICY ARGUMENTS

82. Each side resorted to arguments of policy to support their case. The prosecution suggested that failure to treat gold pieces as property would undermine the UK's status as a global hub for cryptoasset technology. We see no force in this suggestion. Of greater weight is the argument that there would be a general public expectation that the criminal law would penalise the stealing of items of commercial and monetary value, whether or not held in digital form. ...
83. Mr Eissa further argued that if the gold pieces were property, Jagex ought to have complied with a number of statutory regulatory regimes, including in particular Financial Conduct Authority regulation of activities and anti-money laundering provisions. We do not consider that this advances the argument. Whether something is property for the purposes of the Theft Act will not determine its treatment in the different regulatory environment; and if it be the case that the activities of Jagex ought to be regulated by the FCA, that is a matter for the FCA.

CONCLUSIONS

84. It is time to draw the threads together. ... Section 4 uses words of the widest ambit in "other intangible property" ... and they should not be constrained

to any greater extent than principle or policy requires. They are apt to catch any thing which can as a matter of normal use of language be described as capable of being stolen, unless there are good reasons why such a thing should be excepted. Such exceptions include the pure information principle, as we have explained it; (quite possibly) the different treatment of intellectual property; and exceptions in respect of particular *sui generis* assets in certain circumstances, such as those excepted in s4 of the Act and corpses and body parts, for social and historical reasons.

85. Gold pieces in Runescape fulfil these criteria. They are properly described as something which can be stolen as a matter of normal use of language. They do not fall within any of the established exceptions. They are not “pure knowledge”: functionally they exist as identifiable assets distinct from the code which gives rise to them and outside the minds of people. There is no good policy reason for excepting them from the category of property which can be stolen. On the contrary, they are assets which have an ascertainable monetary value and which may be traded for that value both in the game and outside the game. Within the rules of the game they represent money’s worth as the product of purchase of a bond. Outside the game they are regularly traded for money’s worth. They are capable of being subject to dishonest dealing which deprives their possessor of their use and value. It would be surprising and unsatisfactory if such dishonest dealing did not amount to the offence of theft.
86. Moreover, they fulfil each of the *Ainsworth* criteria and the Law Commission definition of rivalrousness, although we emphasise again that we are not saying that fulfilment of all those private law criteria is necessary in this criminal context.
87. Accordingly we ... allow the appeal. ... [G]old pieces within the Old School Runescape game are property which can be the subject of the offence of theft.

NOTES AND QUESTIONS

1. The court is at pains to say that its holding that gold pieces in Old School Runescape are “property” for purposes of the Theft Act does not necessarily mean that they are property for civil purposes. But are they? Suppose that Greg and Dan are avid Old School Runescape players. Greg learns Dan’s password, logs into Dan’s account, and transfers 100,000,000 gold pieces to his own account. Has Greg committed conversion? What, if anything, will the legal system do to return them to Dan? What, if anything, will Jagex do?
2. What does Jagex want here? Do you think it is satisfied or dissatisfied with the reasoning and holding in *Lakeman*? Could or should it redraft its terms of service?
3. Could Jagex have taken action (either on its own or in court) against Lakeman? What if he had been a player who hacked other players’ accounts, rather than an employee?
4. What should happen to the players who bought the gold pieces from Lakeman? Are they protected by the good-faith purchase principle? Can Jagex confiscate the gold pieces or close their accounts?
5. Would this opinion have been shorter and simpler if Jagex allowed real-money trading for in-game assets? What can Jagex do if it knows or suspects

that players are engaged in real-money trading? What can it do if it identifies third-party websites that help buyers and sellers for real-money trading find each other?

6. What happens if Jagex decides to shut down Old School Runescape? Must it reimburse players for their gold pieces? What if it decides to eliminate gold pieces from the game entirely and move to a barter-based in-game economy? Does it matter whether players can purchase gold pieces directly from Jagex for dollars or pounds? And if so, does it matter how Jagex describes this as a “purchase” or a “license” of gold pieces?

KATER V. CHURCHILL DOWNS, INC.

886 F.3d 784 (9th Cir. 2018)

M. Smith, Circuit Judge:

In this appeal, we consider whether the virtual game platform “Big Fish Casino” constitutes illegal gambling under Washington law. Defendant-Appellee Churchill Downs, the game’s owner and operator, has made millions of dollars off of Big Fish Casino. However, despite collecting millions in revenue, Churchill Downs, like Captain Renault in *Casablanca*, purports to be shocked—shocked!—to find that Big Fish Casino could constitute illegal gambling. We are not. We therefore reverse the district court and hold that because Big Fish Casino’s virtual chips are a “thing of value,” Big Fish Casino constitutes illegal gambling under Washington law.

FACTUAL AND PROCEDURAL BACKGROUND

Big Fish Casino is a game platform that functions as a virtual casino, within which users can play various electronic casino games, such as blackjack, poker, and slots. Users can download the Big Fish Casino app free of charge, and first-time users receive a set of free chips. They then can play the games for free using the chips that come with the app, and may purchase additional chips to extend gameplay. Users also earn more chips as a reward for winning the games. If a user runs out of chips, he or she must purchase more chips to continue playing. A user can purchase more virtual chips for prices ranging from \$1.99 to nearly \$250.

Big Fish Casino’s Terms of Use, which users must accept before playing any games, state that virtual chips have no monetary value and cannot be exchanged “for cash or any other tangible value.” But Big Fish Casino does contain a mechanism for transferring chips between users, which can be utilized to “cash out” winnings: Once a user sells her chips on a secondary “black market” outside Big Fish Casino, she can use the app’s internal mechanism to transfer them to a purchaser. Plaintiff-Appellant Kater alleges that Churchill Downs profits from such transfers because it charges a transaction fee, priced in virtual gold, for all transfers. In other words, Kater alleges that Churchill Downs “facilitates the process” of players cashing out their winnings.

Kater began playing Big Fish Casino in 2013, eventually buying, and then losing, over \$1,000 worth of chips. In 2015, Kater brought this purported class action against Churchill Downs, alleging: (1) violations of Washington’s Recovery of Money Lost at Gambling Act (RMLGA), WASH. REV. CODE § 4.24.070; (2) violations of the Washington Consumer Protection Act, WASH. REV. CODE § 19.86.010; and (3) unjust enrichment. The district court dismissed this case with prejudice, holding that because the virtual chips are not a “thing of value,” Big Fish Casino is not illegal gambling for purposes of the RMLGA. ...

ANALYSIS

Pursuant to the RMLGA:

All persons losing money or anything of value at or on any illegal gambling games shall have a cause of action to recover from the dealer or player winning, or from the proprietor for whose benefit such game was played or dealt, or such money or things of value won, the amount of the money or the value of the thing so lost.

WASH. REV. CODE § 4.24.070. “Gambling” is defined as the “[1] staking or risking something of value [2] upon the outcome of a contest of chance or a future contingent event not under the person’s control or influence, [3] upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome.” *Id.* § 9.46.0237; *see State ex rel. Evans v. Bhd. of Friends*, 247 P.2d 787, 797 (1952) (“[A]ll forms of gambling involve prize, chance, and consideration ...”). All online or virtual gambling is illegal in Washington. *See Rouso v. State*, 239 P.3d 1084, 1086 (2010).

I. Big Fish Casino’s Virtual Chips Are a “Thing of Value” Under Washington Law

The parties dispute whether Big Fish Casino’s virtual chips are a “thing of value” pursuant to Washington’s definition of gambling. Pursuant to Washington law, a “thing of value” is:

[A]ny money or property, any token, object or article exchangeable for money or property, or any form of credit or promise, directly or indirectly, contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

WASH. REV. CODE § 9.46.0285. Kater’s primary argument is that the virtual chips are a “thing of value” because they are a “form of credit ... involving extension of... entertainment or a privilege of playing [Big Fish Casino] without charge.” *Id.*

We agree. The virtual chips, as alleged in the complaint, permit a user to play the casino games inside the virtual Big Fish Casino. They are a credit that allows a user to place another wager or re-spin a slot machine. Without virtual chips, a user is unable to play Big Fish Casino’s various games. Thus, if a user runs out of virtual chips and wants to continue playing Big Fish Casino, she must buy more chips to have “the privilege of playing the game.” *Id.* Likewise, if a user wins chips, the user wins the privilege of playing Big Fish Casino without charge. In sum, these virtual chips extend the privilege of playing Big Fish Casino.

Churchill Downs contends that the virtual chips do not extend gameplay, but only enhance it, and therefore are not things of value. This argument fails because, as alleged in the complaint, a user needs these virtual chips in order to play the various games that are included within Big Fish Casino. Churchill Downs argues that this does not matter, because users receive free chips throughout gameplay, such that extending gameplay costs them nothing. But because Churchill Downs’ allegation is not included in the complaint, we do not further address this contention. ...

Notably, the only Washington court to analyze section 9.46.0285 supports our conclusion. In *Bullseye Distributing LLC v. State Gambling Commission*, the Washington Court of Appeals held that an electronic vending machine designed to emulate a video slot machine was a gambling device. 110 P.3d 1162, 1163, 1167 (2005). To use the machine, players utilized play points that they obtained by purchase, by redeeming a once-a-day promotional voucher, or by winning a game on

the machine. *Id.* at 1163-64. In reviewing an administrative law judge’s decision, the court concluded that the game’s play points were “things of value” because “they extend[ed] the privilege of playing the game without charge,” even though they “lack[ed] pecuniary value on their own.” *Id.* at 1166. Because the play points were a “thing of value,” the machine fell within the definition of a gambling device, and therefore was subject to Gambling Commission regulation. *Id.* at 1167.

Contrary to Churchill Downs’ assertion, nothing in *Bullseye* conditioned the court’s determination that the play points were “thing[s] of value” on a user’s ability to redeem those points for money or merchandise. Instead, *Bullseye*’s reasoning was plain—“these points fall within the definition of ‘thing of value’ because they extend the privilege of playing the game without charge.” *Id.* at 1166. Based on the reasoning in *Bullseye*, we conclude that Big Fish Casino’s virtual chips also fall within section 9.46.0285’s definition of a “thing of value.”² ...

Nor are we persuaded by the reasoning of other federal courts that have held that certain “free to play” games are not illegal gambling. Each case Churchill Downs cites for this proposition involves the analysis of different state statutes, state definitions, and games. See *Mason v. Mach. Zone, Inc.*, 851 F.3d 315 (4th Cir. 2017) (applying Maryland law); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016) (applying Illinois law); *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871 (N.D. Ill. 2016) (applying California law). Our conclusion here turns on Washington statutory law, particularly its broad definition of “thing of value,” so these out of state cases are unpersuasive.

Because the virtual chips are a “thing of value,” we conclude that Big Fish Casino falls within Washington’s definition of an illegal gambling game. See WASH. REV. CODE § 9.46.0237. ...

NOTES AND QUESTIONS

1. As *Kater* notes, the traditional elements of illegal *lottery* or *gambling* are “prize, chance, and consideration.” A legal *sweepstakes* typically avoids this definition by omitting consideration: this is why the fine print for many promotional contests allows players to enter for free by mailing in an entry form or filling one out online. A legal *contest* avoids the definition by omitting chance: the winner of a chess tournament with a cash prize is determined by skill at chess, not by random luck. And many online games, like Big Fish Casino, try to avoid the definition by omitting the prize.
2. As *Kater* also illustrates, state gambling laws vary widely, both in terms of how they define gambling and gambling devices, and also in terms of what safe harbors they provide for legal or regulated gaming. Compare *Mason v. Mach. Zone, Inc.*, 851 F.3d 315 (4th Cir. 2017), where the analogous Maryland statute protected only “[a] person who loses money at a [prohibited] gaming device.” Do you see how that is different, and narrower, than the Washington statute at issue in *Kater*?

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2. *Kater* makes a second argument, which we reject. She argues that the chips are a “thing of value” because users can sell them for money on the “black market.” However, Big Fish Casino’s Terms of Use prohibit the transfer or sale of virtual chips. As a result, the sale of virtual chips for cash on a secondary market violates the Terms of Use. The virtual chips cannot constitute a “thing of value” based on this prohibited use. See *Mason v. Mach. Zone, Inc.*, 851 F.3d 315, 320 n.3 (4th Cir. 2017).

3. This lawsuit subsequently settled; the total fund for payments to class members was \$155 million.
4. Do the EFTA and Regulation E apply to Big Fish Casino chips? FanDuel balances? Robux? Old School Runescape gold pieces?