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Federal Circuit Announces the End of the Adverse Inference Doctrine

BY: DAVID A. EINHORN AND HEIDI M. STRUSE

The Court of Appeals for the Federal Circuit (CAFC), in an *en banc* opinion on September 13, 2004, overruled its twenty-year old precedent that an adverse inference may be drawn when an accused infringer declines to obtain or produce a legal opinion (*Knorr-Bremse Systeme Fuer Nutzfahrzeuge GMBH v. Dana Corp.*, Fed. Cir., No. 01-1357,-1376, 02-1221, -1256, September 13, 2004 (2004 WL 2049342)).

The previous rule required a judge or jury to draw a negative inference where a defendant refused to produce legal opinions regarding the issues of infringement or non-infringement. This forced defendants to either disclose information otherwise protected by the attorney-client privilege or to suffer an adverse inference. This rule was overturned in a 10-1 opinion. In so ruling, the Federal Circuit stated that "[T]he inference that withheld opinions are adverse to the client's actions can distort the attorney-client relationship in derogation of the foundation of that relationship."

Appellee Knorr-Bremse owns a patent for air brakes for use in tractor trailers. Appellants Dana Corporation, Haldex Brake Products Corporation and Haldex Brake Products AB were found liable for infringement and willful infringement of this patent in the United States District Court for the Eastern District of Virginia. Dana had not sought an opinion of counsel regarding the patent issues and Haldex withheld an opinion of European and US counsel, asserting attorney-client privilege. Because no infringing products were sold, no damages were awarded. However, the court awarded partial attorney fees under 35 USC § 285 based on the finding of willful infringement. In doing so, the court relied on CAFC precedent (a line of cases beginning with *Underwater Devices, Inc. v. Morrision-Knudsen Co.* (717 F. 2d 1380 (Fed. Cir. 1983)) in inferring that the withheld opinion of counsel was unfavorable to the defendants. The CAFC decided sua sponte to hear this case en banc to revisit its precedent regarding the adverse inference doctrine.

Four questions were certified for appeal and amici briefing was requested for questions 1, 2 and 4. The questions were: 1) whether it is appropriate for the trier of fact to draw an adverse inference with respect to willful infringement when the attorney-client privilege and/or work product privilege is invoked by a defendant in an infringement suit; 2) whether it is appropriate to draw an adverse inference with respect to willful infringement when the defendant has not obtained legal advice; 3) what the consequences for the case under review should be if the court decides that the law should be changed and the adverse inference withdrawn as applied to the case under

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counselor's corner


David A. Einhorn

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review; and 4) if the existence of a substantial defense to infringement should be sufficient to defeat liability for willful infringement even if no legal advice has been secured.

The court answered the first and second questions in the negative, thus overruling its own precedent starting with the *Underwater Devices* opinion, where the court had stated that "a potential infringer…has an affirmative duty to exercise due care to determine whether or not he is infringing," which includes "the duty to seek and obtain competent legal advice from counsel before the initiation of any possible infringing activity." (*Underwater Devices* at 1389-90). In later cases, including *Kloster Speedsteel AB v. Crucible, Inc.* (793 F. 2d 1565 (Fed. Cir. 1983) and *Fromson v. Western Litho Plate & Supply Co.* (853 F. 2d 1568 (Fed. Cir. 1988), the Court further developed the adverse inference doctrine, or, "the general rule that 'a court must be free to infer that either no opinion was obtained, or, if an opinion were obtained, it was contrary to the infringer's desire to initiate or continue its use of the patentee's invention.'" (Knorr-Bremse at *3, citing *Fromson* at 1572-1573.).

With respect to the third question, the CAFC vacated the district court's finding of willful infringement and remanded for redetermination of the issue, holding that because "elimination of the adverse inference as drawn by the district court is a material change in the totality of the circumstances, a fresh weighing of the evidence is required to determine whether the defendants committed willful infringement." (*Knorr-Bremse* at *6). The fourth question was answered in the negative, with the Court finding that no per se rule should be adopted as the determination of willful infringement is made on consideration of the totality of the circumstances, or "whether a prudent person would have sound reason to believe that the patent was not infringed or unenforceable, and would be so held if litigated." (*Knorr-Bremse* at *7 citing *SRI Int'l., Inc. v. Advanced Tech. Labs., Inc.*, 127 F. 3d 1462, 1465 (Fed. Cir. 1997)).

This decision immediately impacts the ability of clients to obtain candid opinions. Free from the potential dire consequences of the adverse inference doctrine, counsel may now provide their clients with honest assessment and evaluations of potential infringement problems. ■

Personal Jurisdiction Over Foreign Website Operators

By: David A. Einhorn and Kanishka Agarwala

When a suit is brought against a defendant, as a threshold matter, the court examines whether it has the power to command obedience from the defendant. If the court lacks this power, it will dismiss the suit without adjudication. The question of jurisdiction gets to be particularly troublesome when the court is situate in a country different from that of the defendant. However, recently, the United States District Court for the Eastern District of Virginia held that a U.S. court would have jurisdiction over a foreign defendant in a matter concerning use of a foreign web site and infringing domain name. *Graduate Management Admission Council v. Raju d/b/a,'GMATplus.com'*, 241 F.Supp.2d 589 (E.D.Vir. 2003). The Court applied Fed. R. Civ. P. Rule 4(k)(2), although the Plaintiff had not based jurisdiction on this rule, and held that the Court possessed jurisdiction over the Defendant.

The underlying facts are straightforward. Plaintiff, Graduate Management Admission Council ("GMAC"), a Virginia corporation located in Virginia develops, owns and conducts the Graduate Management Admission Test ("GMAT") used by several universities to assess the qualifications of applicants to business programs. The questions it creates are original copyrightable material and it has exclusive rights to copy, distribute, display, publish and prepare derivative works from this material. GMAC also owns the trademark "GMAT."

Defendant, Raju, registered the domain names <gmatplus.com> and <gmatplus.net> with VeriSign Global Registry Services, located in Herndon, Virginia. Raju operated a web site associated with these domain names from India and through this web site sold GMAT questions for test preparation purposes. According to GMAC, Raju sold and delivered infringing materials to persons located in Virginia on at least two occasions. Payment for the same was to be made via Western Union or MoneyGram and the proceeds transferred to India. The ordering page mentioned only the U.S. and Canada as countries from which orders could be placed.

The Magistrate Judge recommended a finding of no personal jurisdiction over Raju, which was contested by GMAC. The District Court began its determination of the issue by reiterating that the inquiry is a two-step process, viz. (i) a determination of whether the facts of the case fall within the reach of Virginia's "long-arm statute," and (ii) whether such exercise of personal jurisdiction is consistent with "traditional notions of fair play and substantial justice" under the Due Process clause.

Virginia's Long-Arm Statute provides for personal jurisdiction over a person "causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth." The court found that Raju caused injury to GMAC in Virginia by operating the web site and selling the infringing materials. Moreover, citing to precedent developed by courts in Virginia, soliciting business through a web site accessible by Virginians satisfies the remaining requirement of the long-arm statute, namely, "does or solicits business, or engages in any other persistent course of conduct" in Virginia. Thus, the court held, Raju's conduct as alleged by GMAC, clearly placed him within reach of the Virginia long-arm statute.

Due Process analysis: (A) Analyzing the facts under the more commonly used rule to find jurisdiction (Fed. R. Civ. P. Rule 4(k)(1)(A), the court applied the well established formulation of the U.S. Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) regarding personal jurisdiction and the adaptation thereof by the Fourth Circuit, namely, that the due process analysis "must take into account the modern reality of widespread Internet electronic communications." Thus, a State may, consistent with due process, exercise jurisdiction over a person outside the State when that person "(1) directs electronic activity into the State, (2) with the manifest intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person, within the State, a potential cause of action cognizable in the State's courts." *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002).

The court held that Raju's contacts with Virginia, when evaluated in light of the 3-part *ALS* test, did not lead to the conclusion that Virginia courts had personal jurisdiction over him because Raju did not direct electronic activity into the State with the "intent of engaging in business…within the State." However, there existed an alternate basis for personal jurisdiction over the defendant under Rule 4(k)(2). The court said that it would examine personal jurisdiction under this rule even though the plaintiff had not raised it in any of its pleadings. "Federal courts are entitled to apply the proper body of law, whether the parties name it or not." *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991).

(B) "Rule 4(k)(2) was added in 1993 to deal with a gap in federal personal jurisdiction law in situations where a defendant does not reside in the United States, and lacks contacts with a single state sufficient to justify personal jurisdiction, but has enough contacts with the United States as a whole to satisfy the due process requirements." *GMAC* at 597. "[It] responds to the Supreme Court's suggestion that the rules be extended to cover persons who do not reside in the United States, and have ample contacts with the nation as a whole, but whose contacts are so scattered among states that none of them would have jurisdiction." The rule provides for personal jurisdiction over any defendant if "(i) exercise of jurisdiction is consistent with the Constitution and laws of the United States, (ii) the claim arises under federal law, and (iii) the defendant is not subject to the jurisdiction of the courts of general jurisdiction of any state." *GMAC* at 597.

The significant difference between the minimum con-tacts due process analysis conducted under Rule 4(k) (1)(A) and 4(k)(2) is that under the latter enquiry, the relevant forum is the United States as a whole and not a particular State. Therefore, the question to be asked under the latter rule is whether the defendant has contacts with the United States. The court adapted the *ALS* test for determining jurisdiction based on electronic activities for the purpose of the national contacts analysis. Thus the plaintiff would have to show that: (i) Raju directed his electronic activity into the United States, (ii) he did so with the manifest intent of engaging in business or other interactions within the United States, and (iii) his activity created a potential cause of action in a person within the United States that is cognizable in the United States' courts.

The court found that all three elements of the adapted *ALS* test had been satisfied. The record indicated that Raju had directed his activity at the United States market and had targeted customers therein. The web site itself was "designed to attract or serve a United States audience." The ordering information was also specifically directed to customers in the United States and the prices were stated in dollars. The materials were advertised on the web site as allowing test takers in the United Sates to score as well as their counterparts from Asia. These facts showed that Raju had directed his activity into the United States. The second prong of the *ALS* test was also satisfied because Raju was in the business of selling the GMAT materials for a price. The third element was met because GMAC's causes of action were based on federal law, which was cognizable in federal courts.

Although Fed. R. Civ. P. Rule 4(k)(2) has been in the statute book for several years now, this provision has been used infrequently by plaintiffs confronted by web merchants. This case assumes importance because it casts light upon a potent method of obtaining *in personam* jurisdiction over a foreign web merchant. Its importance is increased by the fact that the Virginia court applied the alternate rule even in the absence of specific pleading directed towards it. Since most matters concerned with infringing Internet activity originating in foreign countries will be brought in Virginia, this decision should prove very helpful to plaintiffs seeking to protect their intellectual property. ■

Savin Iran—It Ran So Far Away
The International Reach of *In Rem* Actions In Cyberspace

BY: DAVID A. EINHORN AND DANIEL J. HEALY

Anderson Kill's IP Group recently successfully obtained for its client, Savin Corporation ("Savin") the transfer of the domain name <savincorp.com> from an Iranian entity by filing a complaint against the domain name itself under the in rem provisions of the Anti-Cybersquatting Consumer Protection Act (the "ACPA"). The domain name incorporated Savin's exact trademark and was used in connection with a .com Web site. The Iranian registrant of <savincorp.com> did not appear to conduct sufficient business within any U.S. state to enable Savin to obtain personal jurisdiction over the foreign entity. However, the domain name was registered with Network Solutions, Inc. in Virginia, which resulted in there being jurisdiction in the Eastern District of Virginia over the domain name itself.

The complaint by Savin Corporation against <savincorp.com> alleged that the defendant domain name violated the ACPA because it infringed upon Savin's mark by incorporating the exact trademark placed next to a generic term ("corp"). Additionally, the complaint alleged that the defendant domain name violated the ACPA because it diluted Savin's mark.

The U.S. District Court for the Eastern District of Virginia required formal compliance with the service and publication requirements set forth in the ACPA, which provides statutory jurisdiction over all domain names registered with U.S. registrars. Anderson Kill served the complaint by email and by hard copy to the domain name registrant and also published a notice of the filed action in the Washington Post newspaper. It had also attempted to have the same notice printed in an Iranian newspaper in Farsi. The major Iranian newspapers refused to print the notice, however, citing the adverse political climate between the U.S. and Iran, leaving Anderson Kill to submit to Court only the evidence of its efforts with the Iranian press. Since the domain name registrant had responded to the service of the complaint by email indicating that it had actual notice of the action, the Court was satisfied by these service and publication efforts and quickly resolved the merits of the case.

The defendant domain name defaulted in the case, permitting the magistrate judge to enter issue a report and recommendation in plaintiff's favor based on the complaint. The magistrate found that the registrant of the defendant domain name failed to make an appearance pursuant to Rule 55 of the Federal Rules of Civil Procedure. While the registrant had sent letters to the Court and to Anderson Kill, the Magistrate did not consider these actions to constitute formal appearance.

Based on the well-plead facts of the complaint, the Magistrate recommended transfer of the domain name. The allegations of the complaint and the documents attached to the complaint supporting those allegations, set forth that the trademark owner was entitled to transfer of the defendant domain name because that domain name infringed and diluted the SAVIN trademark. The Court found for the plaintiff on all counts, pointing to the Web site at the defendant domain name and other documents attached to the complaint as evidence of unauthorized use in commerce of the SAVIN mark.

The registrant of the domain name then contested the magistrate's recommendation. The District Court Judge reviewed these submissions and after a *de novo* review, adopted the magistrate's recommendations. Because the Court reviewed the case *de novo* after it was contested, the district court judge's decision was not based on default and carries the weight of precedent.

The Court upheld the magistrate's finding that the registrant's use of the domain name, including its use with a Web site that featured Savin's mark used alone and in connection with related goods and services all contributed to its finding of like-

highlights

Federal Circuit Limits Patentability of Printed Matter

By: Heidi M. Struse

The Court of Appeals for the Federal Circuit (CAFC) in a May 13, 2004 precedential opinion held that a set of instructions describing a patentable method, when added to a prior art kit, would not make that kit a patentable invention. (In re Ngai, 03-1524 (Fed. Cir. May 13, 2004) (Per Curiam); 2004 U.S. App. LEXIS 9381.

Petitioners Ngai and Lin filed a patent application for a new method for amplifying and normalizing ribonucleic acid (RNA). Claim 19 of the application was drawn to a kit that included printed instructions for performing the method. This claim was rejected by the patent examiner. The Board of Patent Appeals and Interferences at the U.S. Patent and Trademark Office affirmed this rejection, which was then appealed by Ngai and Lin to the CAFC. Petitioners admitted the kit was known in the art, but argued that the addition of new printed matter rendered this product patentable, relying on the decision in In re Gulack,703 F.2d 1381 (Fed. Cir. 1983). In that case, the CAFC had found that a band which had digits printed on it at regularly spaced intervals was patentable, where the numbers printed on the band had a functional relation to the band. In other words, where the printed matter related to the underlying object, there existed a "new and unobvious functional relationship" (Gulack at 1386), which rendered the resulting product patentable. However, in the Ngai case, the language of Gulack was applied by the CAFC to deny patentability, as Gulack also states that "where the printed matter is not functionally related to the substrate, the printed matter will not distinguish the invention from the prior art in terms of patentability." (Gulack at 1387.) Because in Ngai the kit did not depend on the instructions, nor the instructions on the kit, this attempt to link a product to a method by means of adding an instruction sheet was held not to be patentable.

This decision was first handed down on March 8, 2004 in a non-precedential opinion and then made precedential at the request of the US Patent and Trademark Office.

lihood of confusion. The Court additionally held that use of the domain name in a Web site diluted Savin's mark. The Court found that Savin's mark is famous and distinctive, based on the evidence attached to the complaint of long use, national advertising, widespread public recognition and the volume of sales under the mark. The Iranian company's use of the SAVIN mark on the Web diluted the source identifying quality of our client's mark because it did not distinguish the registrant from Savin. Based on these findings of dilution and likelihood of confusion, the Court ruled that the defendant domain name should be transferred to the plaintiff.

The *in rem* provisions of the ACPA, unlike the other provisions of that statute, do not require an additional showing by the plaintiff of bad faith. They only may be used where jurisdiction is not otherwise available, e.g., over a foreign domain registrant. The provisions are often used against foreign cybersquatters because relief against the offending domain name can often be obtained quickly and cost effectively. ■

America Online, Inc. v. aol.org: Current Trends in Enforcement for Anticybersquatting Judgments

By: David A. Einhorn and Naomi Mbys-Davidson

During the past few years, discussions of internet cybersquatting have occupied an increasingly important place in litigation, legislation, and the mass media. A recent case, *America Online, Inc. v. aol.org*, decided in the U.S. District Court on April 23, 2003, has brought a welcome improvement in remedies available to victims of cybersquatting. In that case, the court allowed a victorious plaintiff to obtain relief against a registry when the foreign registrar did not comply with a court's order. To fully understand the implications of that decision, it is worthwhile to provide some background to the domain name registration process.

The organization of the domain name registration process is controlled by the global, nonprofit, non-governmental organization called ICANN, which stands for the Internet Corporation for Assigned Names and Numbers. The purpose of ICANN is to ensure that domain names are assigned according to a unified system in order to avoid confusion and duplication. ICANN has set up a two-tier organization of domain names.

The first level is known as the "Registry." Registries are actually online databases housing the I.P. (internet protocol) addresses of thousands of Web sites, commonly known as "Domains." There are the Top Level Domain registries, such as .com, .net, and .org, and there are the Country-Specific Domain registries: two-letter abbreviations for each country, such as .ca for Canada, .jp for Japan, or .af for Afghanistan. When ordinary mail is sent, it is first delivered to the post office corresponding to the country and zip code indicated at the bottom of the envelope. From there, it is sorted by street and eventually by house, apartment, and individual addressee. Thus the address is read from bottom to top. The Web site domain-name is read from right to left. The two- or three-letter designation appearing at the end of the address indicates the domain registry with which the specific Web site is registered. Thus, just as a zip code indicates which post office will deliver a letter to a particular address, the domain registry indicates which database houses a particular I.P. address. Upon receipt of a request to go to a particular Web site, the computer will first address itself to the registry database indicated at the end of the domain name (.com, for example) in order to get the specifics of the rest of the I.P. address.

Registries are promulgated and controlled directly by ICANN. The major registries, those known as Top Level Domains, have physically located their servers in the United States. This detail is highly relevant to the America Online, Inc. case. The country-specific registries are usually located in the country to which they refer. The exceptions to that rule are certain third world countries where the infrastructure is not sufficiently advanced to house the large computers necessary. Their domain registries are situated in western countries with whom they are closely associated politically.

The process of actually registering a domain name for a Web site takes place with a company called a "Registrar." A registrar is a usually a privately owned (for-profit) company, which can be physically located in absolutely any country in the world. In order to register a domain-name, it is necessary to select (and pay) a registrar and provide them with the required contact and technical information. A list of authorized registrars can be accessed from the ICANN Web site. Each registrar sets its own prices for registering and maintaining domain names. These prices can vary according to market conditions. Upon verification that the requested domain name is not registered to someone else, the technical information will be sent to the registry in order to permit completion of I.P. addresses while the contact information is made available for public use.

Recently, the U.S. District Court for the Eastern District of Virginia analyzed appropriate remedies in *in rem* cybersquatting cases in cases where enforcement of the Registry proved to be impossible: *GlobalSantaFe Corporation v. globalsantafe.com*, and *America Online, Inc. v. aol.org*. Both of these cases were brought in the U.S. District Court for Eastern Virginia because of the presence of the domain name registry for the ".com" domain in Dulles, Virginia.

In GlobalSantaFe Corporation v. globalsantafe.com, the court held that the ACPA authorized it to order the ".com" domain name registry , VeriSign Global Registry Services, to cancel the infringing domain name by disabling it. This case involved a company which had been recently created through the merger of two older companies, which sued a Korean cybersquatter. This Korean company had registered this domain name less than a day after the announcement of the merger which created the Globalsantafe corporation. *In personam* jurisdiction was impossible because of a complete lack of United States contacts for either the Korean registrant of globalsantafe.com or the Korean company, Hangang Systems, Inc., which served as the registrar of the domain name. Following an initial court decision directing Hangang to transfer the domain name to its rightful owner, the Korean registrant obtained the Korean equivalent of a preliminary injunction from a Korean court ordering Hangang not to comply with the American court. As a result, Globalsantafe Corporation returned to court to request a new remedy: the cancellation by the domain name registry of the illegal registration for the globalsantafe.com domain name. This cancellation was intended to enable them to register the domain name in the company's own name.

The court in *Globalsantafe* engaged in an extensive analysis of the relationships and roles of the domain name registrars and domain name registries in order to determine whether it could order the domain name registry, VeriSign Global Registry Services, to cancel a registration and, if so, how it should most appropriately proceed with that cancellation. As noted above, the registry normally plays a passive role in the domain name registration process, contenting itself with merely verifying that no duplications occur and that the provided contact information is accurately maintained. In addition, it has contractual restrictions barring it from changing the information in the registry database on its own initiative. However, the court noted that "*the interest in vindicating congressionally provided trademark rights trumps contract*." The court decided ultimately that while "*it is normally appropriate to direct a cancellation order primarily at the current domain name registrar and to direct that the cancellation proceed through the usual channels*," in situations such as the instant case where this is impossible, in order to achieve the proper result, it becomes necessary to direct the domain name registry to act unilaterally to carry out the cancellation remedy authorized by the ACPA.

Following the *GlobalSantafe v. globalsantafe.com* case, the same court once again addressed the issue of remedies authorized by the ACPA for *in rem* cybersquatting cases with its decision in *America Online, Inc. v. aol.org*. In that case, the Court interpreted the ACPA as allowing it to order the ".org" domain name registry, Public Interest Registry, to transfer the name to its rightful owner in a case where the foreign Registrar, located in China, had proven uncooperative. This case involved the well-known company, America Online, owner of trademark registrations for AOL and AOL.COM which sought to obtain the domain name registration for aol.org. This registration had been registered in 2001 to a South Korean entity and subsequently transferred to an individual identified only as "Will E." The domain registrar used for this registration, a Chinese company called OnlineNIC, Inc., maintained an office in San Francisco, California. A judgment order was entered against this domain name registrar and sent to the San Francisco address, ordering them to transfer the registration for the domain name to the rightful owner, America Online, Inc. However, instead of complying with the Order, OnlineNIC, Inc.

transferred the domain name, presumably at the owner's request, to another registrar, Netpia.com, Inc. This registrar was located in South Korea with no U.S. contacts. Thus, America Online, Inc. brought an *in rem* action in the Virginia Eastern District requesting that the ".org" registry transfer the registration into its name.

The Globalsantafe Corporation had not asked the court to order a transfer of the domain name registration, only the cancellation of the illegally owned registration at issue in that case. The court, therefore, did not need to decide whether transfer of the domain name would have been appropriate. America Online, Inc. specifically requested that the domain name registration for aol.org be transferred to its name. In addition, the ".org" domain name registry for, Public Interest Registry, had, unlike the ".com" domain name registry in the *Globalsantafe* case, indicated its willingness to transfer the domain name registration provided it received a court order specifically directing it to do so. These differences compelled the court to analyze whether it could extend its holding from the *Globalsantafe* case.

The Court's remedy analysis in the America Online case began, thus, where it left off in the *Globalsantafe* case. The court took note of the fact that the ACPA explicitly provides for both transfer and cancellation of domain names as remedies for violations. It also noted that not only does the statute not limit such remedies to orders directed to domain name registrars, but it also provides for *in rem* jurisdiction in the district where the domain name registry is located. This clearly implies that an order to cancel or transfer an improper registration can be directed at either the registry or the registrar. Furthermore, even assuming that an order directing a registry to transfer a domain name registration would involve a breach of its contractual agreements with ICANN or the registrar, such private agreements cannot serve to limit the trademark rights granted under U.S. Federal Law. Finally, from a technical point of view, there is no practical difference to the registry between a cancellation order and a transfer order. Therefore, the Court concluded its analysis by deciding that an order directing the domain name registry to act unilaterally, without the registrar, and transfer the domain name registration to its rightful owner would be an appropriate and available remedy under the ACPA.

This new line of cases will open the door to more meaningful remedies in future *in rem* cases brought against foreign cybersquatters. Until now, remedies obtained in these cases were often impossible to enforce because they involved the difficulty and expense of bringing cases in foreign courts, most of whom do not have any laws giving protection equivalent to that offered by the Anticybersquatting Consumer Protection Act. Because the most important cases to American companies involve domain names registered on the top level domains such as, ".com" and ".org," who are physically located in the United States, recognition that it is possible to enforce remedies against their registries renders them much more meaningful and easier to obtain. The argument that this is unfair to foreign registrants was addressed by the court in the conclusion to the America Online case. The court re-marked that these registrants, like all registrants, had a choice of top-level domains in which to register and could easily have chosen one located in another country. Thus, by deliberately choosing one controlled in the United States, they chose "to play Internet ball in American cyberspace." ■

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