COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO.: 08-CI-1409

COMMONWEALTH OF KENTUCKY
ex rel. J. Michael Brown, Secretary,
Justice and Public Safety Cabinet **PLAINTIFF**

v.

141 INTERNET DOMAIN NAMES **DEFENDANT**

MOTION OF THE INTERNET COMMERCE ASSOCIATION FOR LEAVE TO FILE MEMORANDUM *AMICUS CURIAE*

The Internet Commerce Association ("ICA") respectfully petitions this Court for permission to file the attached Memorandum of *Amicus Curiae* in opposition to the Order of the Court, dated September 18, 2008 authorizing the seizure and potential forfeiture of Internet domain names in the above-referenced case.

In support of this Motion, ICA states:

1. The Internet Commerce Association is a trade association composed of Internet domain name registrants and website owners. It is a nonprofit corporation organized under the laws of the District of Columbia.

2. The mission of the ICA is to promote the value and benefits of Internet traffic as well as investment in and development of Internet domain names. The membership of the ICA is composed of individuals and companies that own, buy, sell, resell, and host web sites and manage Internet traffic. These firms include direct navigation firms, search engine affiliated firms that buy and sell traffic, hosting companies that profit from such domains and traffic, and others that are in the primary business of buying and selling Internet traffic. The ICA presently

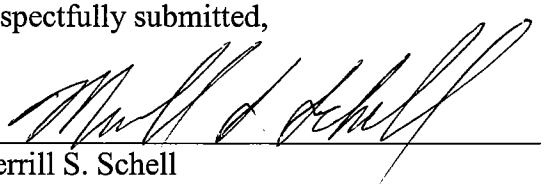
has over 120 members located in the United States and 13 other countries who have collectively registered millions of Internet domain names.

3. The ICA promotes the interests of its members on various areas of Internet governance and domain name administration. In addition to its legislative and regulatory agenda, ICA monitors judicial actions that may have an impact on its members and their business activities.

4. The current proceeding initiated by the Commonwealth of Kentucky is of vital interest to the members of ICA inasmuch as the continued viability of the Internet as an integral part of commercial activity depends in large measure upon the efficient, effective and uniform administration of the rules under which Internet-based and other businesses operate. Indeed, the foundation of all Internet business is the Internet domain name.

5. The Memorandum *Amicus Curiae,* attached hereto as Exhibit A, seeks to provide the Court with background on the nature of ownership interests in domain names which will demonstrate that neither the relevant Kentucky statute nor any other settled federal or state law stands for the proposition that Internet domain names constitute an interest which can be seized *in rem* as has been ordered in this case

Respectfully submitted,



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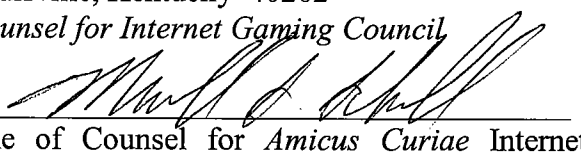

One of Counsel for *Amicus Curiae* Internet Commerce Association

COMMONWEALTH OF KENTUCKY
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COMMONWEALTH OF KENTUCKY
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v.

141 INTERNET DOMAIN NAMES **DEFENDANT**

ORDER GRANTING LEAVE TO FILE
MEMORANDUM *AMICUS CURIAE*

This matter having come before the Court on the motion of the Internet Commerce Association on this ___ day of October, 2008 for leave to file the attached Memorandum *Amicus Curiae* in this matter and the Court being sufficiently advised:

The Court hereby GRANTS said motion for leave, and the Memorandum *Amicus Curiae* attached to the motion as Exhibit A, is hereby deemed filed of record.

DONE AND ORDERED this ____ day of October, 2008.

_____
Judge, Franklin Circuit Court

Copies to all counsel of record

EXHIBIT A

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO.: 08-CI-1409

COMMONWEALTH OF KENTUCKY
ex rel. J. Michael Brown, Secretary,
Justice and Public Safety Cabinet **PLAINTIFF**

v.

141 INTERNET DOMAIN NAMES **DEFENDANT**

THE INTERNET COMMERCE ASSOCIATION
MEMORANDUM *AMICUS CURIAE*

The Internet Commerce Association ("ICA") respectfully submits this Memorandum as *Amicus Curiae* in opposition to the Order of the Court, dated September 18, 2008, authorizing the seizure and potential forfeiture of Internet domain names

INTRODUCTION

The Complaint in this case seeks forfeiture of certain domain names that were allegedly used for "casino" websites. In doing so, it proceeds under the premise that Internet domain names constitute some form of tangible property as defined in the Kentucky penal code. This memorandum begins with a discussion of the statute's literal deficiency to confer upon the Commonwealth the authority to proceed *in rem* against Internet domain names. It next reviews the broader legal precedents on the nature of ownership interests in Internet domain names which also demonstrates that the Court erred in its seizure Order of September 18, 2008. There follows a discussion of how federal policy precludes this type of state action impinging the operation of the Internet and why this issue is of paramount importance to the members of *Amicus* ICA.

ARGUMENT

A. Applicable State Law

The Kentucky penal code provision at the core of this controversy reads, in pertinent part, as follows:

> (a) Any so-called slot machine or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and which when operated may deliver, as a result of the application of an element of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
>
> (b) Any other machine or any mechanical or other device, including but not limited to roulette wheels, gambling tables and similar devices, designed and manufactured primarily for use in connection with gambling and which when operated may deliver, as the result of the application of an element of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.[1]

Plaintiff seeks to fit an Internet domain name within the scope of this language and the Court's Order of Sept. 18, 2008 proceeds from the same premise. It is an elementary rule of statutory construction to look first to the words of the statute itself.[2] In this case, this would mean that an Internet domain name would have to be deemed a "machine or mechanical device an essential part of which is a drum or reel with insignia thereon" in order to fit under Subparagraph (a), as referenced above, or that it be "designed and manufactured primarily for use in connection with gambling" in order to fall within Subparagraph (b).

It is incontrovertible that Internet domain names, in general, and the 141 names specifically before the Court, are not constructed of "a drum or reel with insignia thereon" which

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[1] Ky. Rev. Stat. Ann. § 528.010(4)(2008).

[2] Southerland, *Statues and Statutory Construction*, Vol. II, §366; *see also, Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815 (Ky. 2005).

thereby disposes of Subparagraph (a). In order to fit within Subparagraph (b), the Court must find that an Internet domain name is a "machine or any mechanical or other device ... designed and manufactured primarily for use in connection with gambling." Again, by reference to standard rules of statutory construction, the Court must look to the plain meaning of the words in the context in which they are used.[3] Clearly an Internet domain name is neither a "machine" nor a "mechanical device" which leaves only the words "other device" as the possible support for the Plaintiff's Claim and the Court's subsequent Order. To do so, however, requires a statutory leap from the tangible to the intangible and from the specific context of slot machines, roulette wheels and gambling tables to the Internet. The Court's Order fails to address this fundamental flaw.

B. The Nature of the Ownership Interests in Domain Names

Assuming without admitting that an Internet domain name could be construed to be a gambling device, it is by no means clear that it can be seized and or forfeited pursuant to an *in rem* action which, by its very nature, is a proceeding against property.[4] The Kentucky forfeiture statute cited by the Court as the basis for the seizure of the domain names at issue in this proceeding [Paragraphs 4, 6 and 7 of the Sept. 18 Order], refers repeatedly and exclusively to "property."[5] However, there has been no definitive ruling on the question of whether the ownership of a domain is a "property" right, and the case law is very much divided on the subject.

The courts have generally recognized that an Internet domain name encompasses some of the attributes of personal property, trademark, and contract rights, but have split on the critical issue of whether this "bundle of rights" rises to the level of property. In the principal case in this

[3] *Statutes and Statutory Construction*, Vol. II, §366; see also, *Floyd County Bd. of Educ. v. Ratliff*, 955 S.W.2d 531 (Ky. 1997).
[4] Laycock, *Modern American Remedies* (2nd Ed.), p.777.
[5] Ky. Rev. Stat. Ann. § 500.090 (2008).

area, the Virginia Supreme Court concluded that a domain owner has no interest other than the contractual right to utilize the services of a particular domain name registrar.[6] While acknowledging that a domain name is an intangible asset, the court found that it was limited to the contractual rights held under the registration contract and therefore could not be garnished under state law which limits garnishment to "property."[7]

Other state courts have followed and expanded upon the *Umbro* ruling. For example, in *Wornow v. Register.com,* the New York Supreme Court held that domain names are more similar in character to a contractual right than they are to a property right.[8] We are not aware of any Kentucky ruling one way or the other which has addressed this precise issue and the Plaintiff's Memorandum in Support of its Motion for Seizure ("Memorandum of Support") cites no case law precedent for successful civil *in rem* proceedings against Internet domain names.

In addition to the question of whether or not the Commonwealth of Kentucky possesses statutory authority to proceed *in rem* against domain names in general, there is the related jurisdictional question of whether it can seize *in rem* the specific 141 domain names at issue in this case. These entities have no particular Kentucky nexus inasmuch as there has been no demonstration that either the registrant(s) of the domain names or the registry administering these names is located in the Commonwealth. This fact situation is the equivalent of the government attempting to seize the cameras and other out-of-state property of the Home Shopping Network simply because its residents can view the broadcast from their living rooms.

No such sweeping grant of authority exists and it cannot be bootstrapped as the Plaintiff seeks to do in its Memorandum of Support (pp.9-13) by citing examples of judicial actions which

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[6] *Network Solutions, Inc. v. Umbro International, Inc.,* 529 S.E.2d 80 (Va. 2000).
[7] *Id.*, at 87-88.
[8] *Wornow v. Register.com,* A.D. 3d 59, 59-60, 778 N.Y.S. 2d 25, 26 (N.Y. App. Div. 1st Dept., June 8, 2004).

were based on personal rather than *in rem* jurisdiction[9] and then asserting, in one instance, *1st Technology LLC. v. Bodog Entertainment Group S.S., et al.* that the ordered remedy extended to the attachment of certain domain names.[10] For example, the Memorandum of Support cites *World Interactive Gaming Corp.*, in that case the headquarters of the Defendant corporation was located in the State of New York.[11] Similarly, in *1st Technology*, Plaintiff fails to mention that the Internet domain names attached in the Order of the Superior Court of the State of Washington involved Internet domain names in the State of Washington where the registrant named a Defendant was located.[12]

C. State Law Was Applied in Derogation of Federal Law and Policy

The Internet is not just an instrument of interstate commerce; it is the medium which now serves as the cornerstone of global commerce and communication of all types. The domain name system (DNS) is the fundamental basis of the Internet's operation. The United States government created the Internet and remains strongly involved in the operation and management of the DNS to this day. As part of this continuing involvement, the U.S. government has established a comprehensive framework for the establishment and orderly transfer of domain names. The Kentucky action in question stands entirely outside that framework.

The precursor of today's Internet, the ARPANET, was launched by the Advanced Research Projects Agency (ARPA) in October 1969. ARPA had been created a decade earlier to promote U.S. technological leadership following the USSR's launch of the Sputnik satellite. Its next iteration, NSFNET, was launched by the National Science Foundation in 1985 to create a packet-switched communications linkage between major universities. The opening of this new

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[9] *E. g., People ex rel. Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S. 2d 844 (N.Y.S. 1999).
[10] Memorandum of Support, Ex. 7.
[11] *Supra*, n. 8, at 845.
[12] *Supra*, n. *9,* Order of Writ of Execution, Paragraph 6.

medium to commercial interests began in 1988, when NSFNET permitted a connection to the MCI Mail system.[13]

Control of the Internet was then transferred to the Department of Commerce, and in January 1998 its National Telecommunications and Information Administration (NTIA) proposed in the so-called Green Paper to transfer the technical management of the Internet to a non-profit corporation overseen by the U.S. government.[14] The Internet Corporation for Assigned Names and Numbers (ICANN) took control of technical management of the DNS in September 1998.

While ICANN is a nonprofit corporation headquartered in Marina Del Rey, California, since its inception it has operated under the oversight of the U.S. government, with that function centered in the NTIA. As this history shows, the involvement of the federal government in the Internet and its fundamental means of operation, the DNS, is longstanding and pervasive. In October 1999, ICANN established a mandatory, non-binding, low-cost administrative procedure to resolve claims of abusive, bad faith registration. This Uniform Dispute Resolution Policy (UDRP) provides that a complainant can have an Internet domain name transferred to its control only under carefully prescribed circumstances requiring registrants to submit to mandatory arbitration of disputes.[15]

The UDRP also provides for national laws addressing domain name disputes, either as an appeals mechanism from UDRP decisions or as an independent course of action. In 1999, the U.S. Congress enacted such legislation in the form of the Anticybersquatting Consumer

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[13] *See* http://en.wikipedia.org/wiki/Internet.
[14] 63 Fed. Reg. 8825 (Feb. 20, 1998).
[15] The text of the UDRP can be found at http://www.icann.org/en/udrp/udrp-policy-24oct99.htm.

Protection Act (ACPA).[16] As to jurisdiction, the ACPA sets strict jurisdictional rules for such actions:

> In an in rem action under this paragraph, a domain name shall be deemed to have its situs in the judicial district in which—
>
> (i) the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located; or
>
> (ii) documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court.

The ACPA has been cited by some courts as evidence of a federal view that Internet domain name disputes are to be decided only in the jurisdiction where either the registrar or registry is located.[17] The requirement to bring an *in rem* action in a judicial district where the domain registry or registrar is located is discussed at length in *Mattel, Inc. v. Barbie-Club.com, et al.*[18]. There, the court held that the "ACPA's basic *in rem* jurisdictional grant ... contemplates exclusively a judicial district within which the registrar or other domain-name authority is located. A plaintiff must initiate an *in rem* action by filing a complaint in that judicial district and no other."[19] Similarly, attempts to import *in rem* jurisdiction into a district within which the registrar, registry, or other domain authority was not located have been uniformly rejected.[20]

In the absence of a specific state law to the contrary, we respectfully assert that a state court should take this federally-prescribed jurisdictional scheme under strong advisement when dealing with the question of whether it has proper jurisdiction over a domain name, especially, as here, where the seizure of domain names was ordered in advance of any deliberative proceedings

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[16] 15 U.S.C. § 1125(d) (2008).
[17] See, e.g., *Office Depot, Inc. v. John Zuccarini,* 2007 U.S. Dist. Lexis 69774 (N.D. Cal., Sept. 9, 2007).
[18] *Mattel, Inc. v. Barbie-Club.com, et al.,* 310 F.3d 293 9 (2nd Cir. 2002).
[19] *Id* at 306.
[20] *See Ford v. Greatdomains.com, Inc.,* No. 00-CV-75144-DT (E.D. Mich. Dec. 2001); *See also Stone Media, Inc. v. Indiancountrytoday.com,* 193 F. Supp. 2d 529 (N.D.N.Y. 2002); *FleetBoston Fin'l Corp. v. Fleetbostonfinancial.com,* 138 F. Supp. 2d 121 (D. Mass. 2001) (In none of these cases was *in rem* jurisdiction maintained on the basis of a registrar merely doing business in the judicial district where the action was brought).

and where there is strong reason to doubt that the Commonwealth's jurisdictional claim can meet either of the federally-prescribed standards.

D. The Effect of the Court Order on Members of the Amicus Organization

Members of the *Amicus* ICA have developed an industry that relies upon the unique features of the DNS as described in the foregoing section. Because of the large number of Internet domain names held by members of the A*micus* organization, any change in the legal status or *situs* of these names will have a significant impact on their business model.

Were the Order of the Court to stand, the immediate impact would be to redefine and greatly expand the rules under which Internet domain names can be brought into judicial proceedings. The consequence of that is to multiply the jurisdictions in which Internet domain name owners can be subject to process directly or indirectly by having, as here, to enter an appearance in order defend their interests.

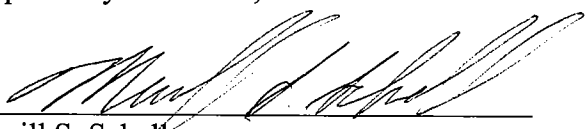
"Judicial presence," once established, can of course, have ramifications well beyond the legal area as it raises questions of business registration, taxation, and a host of other so-called "doing business" issues. It is no exaggeration to say that the net result of these changes would be to raise costs, encumber the efficiency of the Internet and ultimately discourage the free flow of goods and services to the residents of the Commonwealth from Internet-based businesses.

CONCLUSION

As indicated by the large number of organizations interested in this proceeding, the issues involved are national, indeed international in scope. Internet domain names are a critical component of everyday life which the users take for granted but which rest on the intricate network conceived, constructed and still regulated by the federal government in cooperation with other sovereign nations and multinational bodies.

The anti-gambling statutes of the Commonwealth were never drafted with the Internet in mind and it requires a distortion of that statute's plain meaning to claim otherwise. To then utilize the Commonwealth's forfeiture statute for an *in rem* seizure of the type of intangible asset constituting the core component of Internet communication is to venture further into the area of non-established precedents. Finally, this action is in clear contravention of federal policy. For all of these reasons, the Order of the Court should be vacated.

Respectfully submitted,



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