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QUASI IN REM ON THE CYBERSEAS

DAVID F. FANNING*

INTRODUCTION

As a symbol of modern society's emergence into the next millennium, the Internet is second to none. It represents one of the purest applications of a principle fundamental to all civilized societies: the free access and dissemination of information. Never before has it been easier to share news with a friend, whether you are across town or around the world. Never before has it been easier to transact business with so many individuals world-wide at such minuscule cost. But attendant to all of the positive aspects of instantaneous and practically cost-free communication, is the opportunity for its exploitation.

A. Pirates on the Cyberseas

The fear is obvious after only a cursory examination of common electronic communications, data transfers, or business transactions: what happens if this electronic communication leads to an injury that has no redress in a convenient forum, or for that matter, in any forum whatsoever? A hypothetical example clearly illustrates the conundrum.

Party X, an individual or corporation of some unknown, possibly foreign, nation owns and operates a Web site called MyKindaMusicOnline.com\(^1\) which is designed for the purpose of engaging in electronic commerce—in this case, the electronic transmission of originally created works of music in MP3 format. Party Y, a citizen of the United States, happens upon MyKindaMusicOnlin--

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1. As of the date of publication, the domain name MyKindaMusicOnline.com has not been registered.
Online.com, listens to several music samples, likes what he hears, and contracts for the purchase of one song. The instructions on the Web site direct Party Y to enter his e-mail address so that the song, an electronic file, can be attached to an e-mail message addressed to Party Y. The instructions also order Party Y to enter his credit card number for payment purposes.

After two days of checking his Hotmail account, Party Y has received no message with the file attachment, prompting him to visit MyKindaMusicOnline.com again to inquire about his order. Unfortunately, MyKindaMusicOnline.com does not offer a telephone number for its customer service department, but instead, instructs its customers to contact the customer service department via e-mail. Party Y sends an e-mail to the address provided, but gets no response. Party Y performs a Whois lookup, which lists the domain name registrant as John Doe, residing at 100 Nowhere, USA—an obviously fictitious name and address. The registration information also includes an e-mail address, but it is the same address listed on MyKindaMusicOnline.com. Ten days after Party Y had placed the order, he attempts to log onto MyKindaMusicOnline.com in order to find any other information regarding the Web site, but his attempt to log on fails because the domain name is no longer in use. Party Y finds only a message from the free Web-hosting service on which MyKindaMusicOnline.com was hosted saying that the address entered could not be found. Party Y is out the purchase price of the music, and he has no information about the party who has wronged him. What does Party Y do from here?

B. The Problem

This question involves two significant problems. First, how can Party Y identify Party X now that all of his efforts to do so have failed? Second, even if Party Y can identify the registrant and putative operator of MyKindaMusicOnline.com, if that person or corporation is located outside of the United States or in some state which is inconvenient for the plaintiff, Party Y must find an

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2. See infra note 16 (regarding alternate payment systems).

3. A Whois lookup is a program which allows users to search several domain name databases, including the database of Network Solutions, Inc., for the identity and contact information of a domain name registrant. Several examples of the Whois program are located at http://www.networksolutions.com/cgi-bin/whois/whois; http://www.allwhois.com/; and http://swhois.net/; http://www.whois.net/; http://www.samspade.org/.
alternative forum that could constitutionally assert jurisdiction over the matter.

Ever since *International Shoe v. Washington*, the assertion of jurisdiction in U.S. courts has been predicated upon the satisfaction of the minimum contacts test: "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." A U.S. court could assert general personal jurisdiction over Party X only if Party X had established contacts with the forum state that were "continuous and systematic," a bar that the Court has set fairly high. The rationale is that the defendant's contacts with the state are "so substantial and of such a nature" that the forum is justified in asserting jurisdiction even where the underlying cause of action is unrelated to the defendant's contacts.

U.S. courts may, in the alternative, assert specific personal jurisdiction over a party where the cause of action arises from or is related to the party's contacts with the forum. The rationale for this limited form of jurisdiction is that the relationship "among the defendant, the forum, and the litigation" gives the defendant "fair warning that a particular activity may subject [it] to the jurisdiction of a foreign sovereign." So how does this all solve Party Y's problems?

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4. 326 U.S. 310 (1945). The plaintiff, the state of Washington, sued the defendant, a shoe company, for nonpayment of a sum assessed in pursuance to a state unemployment compensation tax. See id. at 312. The Supreme Court of Washington had held that because the defendant's contacts were regular and systematic, the law regarded the defendant corporation as present and doing business in the state, such that the assertion of jurisdiction was constitutional. See id. at 314. The United States Supreme Court upheld the state court ruling on grounds that there existed "sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellee has incurred there." Id. at 320.

5. Id. (internal quotations omitted).


9. *International Shoe*, 326 U.S. at 318; see also von Mehren & Trautman, supra note 6, at 1121, 1144 (discussing general jurisdiction).


12. Id. at 218 (Stevens, J., concurring in judgment).
Applying these traditional bases of personal jurisdiction, whether general or specific, to potential defendants whose contacts are wholly online has been difficult; clear guidelines from recent case law confronting the issue of personal jurisdiction on the Internet are somewhat elusive. What does seem fairly clear is that the kind of

13. What appears at first to be a workable rule was obtained in Zipco Mfg. Co. v. Zipco Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997). The court suggested that the "likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." Id. at 1124. This suggests a "sliding-scale" analysis of contacts and interactivity. At one end of the scale are situations in which the defendant clearly does business through a Web site or other online forum. See id. The Zipco court cited CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996), for an example of this kind of interactivity. In CompuServe, the defendant contracted with the plaintiff, a forum resident, to distribute computer files, which the defendant uploaded to the plaintiff's forum computers. See id. at 1260. The Sixth Circuit held that defendant had purposefully directed his business activities to the forum through his deliberate and repeated transmission of files to the forum state. See id. at 164-66. The Zipco court described the opposite side of the interactivity scale by reference to Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996). In Bensusan, concerning a trademark infringement claim, see id. at 297, the defendant's Web site was merely passive; the defendant's Web site contained the infringing mark and general information about the defendant's club, but it was not interactive in that users would have to call the club to order tickets. See id. The Bensusan court held that the defendant had not "reached out" to or maintained contacts with the forum; thus, minimum contacts on which to assert jurisdiction did not exist. Id. at 301. The Zipco court suggested that the middle ground of the sliding-scale was occupied by cases like Maritz, Inc. v. Cybergold, Inc., 847 F. Supp. 1328 (E.D. Mo. 1996). In Maritz, the defendant created a Web site for the purposes of maintaining a registry of electronic mailboxes, to which he would forward advertisements for products that matched the registrants' interests. See id. at 1330. The Maritz court held that, even though the Web site was not yet operational, it amounted to "active solicitations" and "promotional activities" designed to "develop a mailing list of Internet users" and that the defendant made no effort to refrain from responding to users from any particular state; thus, defendant's contacts were sufficient for the assertion of personal jurisdiction. Id. at 1333-34. This sliding-scale of interactivity provides, at least, a starting point for an analysis of Internet personal jurisdiction.


contact between our Party X and Party Y above may not support personal jurisdiction in some forums. The key factor is that because Party X does not have knowledge of Party Y's geographic location, our traditional jurisprudence of jurisdiction based upon meaningful contact directed toward the forum may preclude any forum from constitutionally asserting personal jurisdiction over Party X. But


15. Perhaps the majority of those courts that have chosen to follow the analysis set out in Zippo would characterize our hypothetical site, www.MyKindaMusicOnline.com, as "highly interactive," since users may not only learn about products for sale, but also purchase the same goods without any additional means of communication. Such a holding would countenance, then, an assertion of jurisdiction over Party X if the claim were related to the extant interactivity. However, because the Zippo analysis has not yet been adopted by all courts, including the Supreme Court, the question of the constitutionality of such an assertion of jurisdiction lingers.

Notice that the language employed by the Zippo court, see supra note 13, most probably by design, mirrors the language that is traditionally used in the analysis of personal jurisdiction—the so-called minimum contacts test: "whether due process is satisfied must depend ... upon the quality and nature of the activity in relation to the fair and orderly administration of the laws" related to the activity. International Shoe v. Washington, 326 U.S. 310, 319 (1945). However, the two formulations (Zippo and International Shoe) bear an important difference. Where the Zippo analysis considers the commercial nature of the Web site and the level of possible activity, the minimum contacts test analyzes actual and knowing contacts between the defendant and the forum resident in relation to the claim. Central to the traditional analysis is whether the defendant knew at the time of the contact that his activities would affect interests within the forum. "Quality" and "nature," then, modify not only the contacts between the plaintiff and defendant, but also the relevant accumulated contacts' relation to the forum. The characterization of that relationship must take into consideration the role forum law plays in the kind of activity in which the defendant has already engaged. The central issue is the defendant's purposeful activities, which seek out and rely upon forum rules for the very game he or she is playing.

On the other hand, of course, it is not difficult to recognize how a site's high degree of interactivity may or should put the Web site on notice that its customers might one day file suit against the site based upon claims that arise from online activity. Certainly, the Web site (proprietor) understands that at the other end of the line exists a person who resides in a forum somewhere. However, even where a Web site is highly interactive, as is our hypothetical site, such activity is not, by the very nature of the Internet, absent substantive content that specifically identifies a person or place, targeted at any one particular state. Rather, most Web sites are wisely "directed" at all IP addresses everywhere (where such direction derives from a conscious effort to minimize access barriers). There lies the conundrum. In response, the Zippo analysis implicitly requires that where the defendant/Web site proffers no evidence of its efforts to tailor its activity in a manner designed to limit its amenability to litigation in a foreign forum, the assertion of jurisdiction should be consistent with the Web site's reasonable expectations, and in turn, with the requirements of due process.

Notice, however, that this shifts a significant burden to the defendant. In effect, the defendant must prove a negative—that he or she has no contact with the forum. By the Zippo analysis, evidence that the Web site did not specifically target the forum would be insufficient.
often an even more important practical matter is how to identify and draw a party to the courthouse in order to initiate the litigation process. Is Party Y out of luck? In what forum may he be made whole?16

C. The Solution May Involve Property

In order for Party X to contract business through an Internet Web site, she must first register for an electronic address on which to set up shop, much the same as would a telemarketing firm first procure a phone bank capable of placing or receiving calls. Registration for this domain name ostensibly entitles her to the use of the electronic address, to the exclusion of anyone else. This domain

Several other courts, however, have limited the analysis to those contacts that the defendant has actually initiated or allowed. See Millennium Enters., Inc. v. Millennium Music L.P., 33 F. Supp. 2d 907 (D. Or. 1999); Rothschild Berry Farm v. Serendipity Group L.L.D., 84 F. Supp. 2d 904 (S.D. Ohio 1999). Still, these corrections do not address the fundamental issue, that, at the outset, many online commercial actors direct their online activity to no single forum.

With regard to the ability to identify individual users (which, incidentally, would implicate serious privacy concerns), to date there is no reliable and inexpensive technology that allows a Web site operator to discern the location of a user who has logged onto its site. However, new technologies have recently come into the market that allow a Web site to collect substantial information about user habits, and the credit card charge-back system or communication with a willing Internet Service Provider may, with some effort, reveal the location of a user, especially if he or she has transmitted bona fide credit card information. To the extent a Web site operator must purchase or develop software suitable for the purpose of geographic location, this would represent a significant outlay of capital which is inconsistent with many of the business models prevalent in the market today. Such a significant expense would undoubtedly prevent an entire class of Web entrepreneurs from engaging in Internet commerce (as would the looming specter of the Web site's nationwide amenability to litigation). Without the technical ability to block users from specific geographic locations, a simple notice on a Web site limiting the site's automated services to users who reside in a particular state would be wholly illusory, especially in light of the extraordinary and sophisticated methods Napster users have employed in circumventing that site's efforts to block copyrighted material, efforts which have included the use of pig Latin and backward spellings of the blocked material. See Canada Firm Uses Pig Latin to Fool Napster Block, at http://www.cnn.com/2001/TECH/internet/03/12/napster.02/ (last visited July 8, 2001).

Instead of looking primarily at whether a user may consummate a commercial transaction through the Web site at issue, a better analysis would take into consideration, presumably in the context of the traditional reasonableness analysis, the financial position of the Web site in relation to the amount and nature of commercial activity in which the Web site engages. See infra notes 99-117 and accompanying text.

16. In reality, the plaintiff's first avenue for relief is his or her credit card company, which pursuant to federal law, may not charge more than fifty dollars for an unauthorized charge. See 15 U.S.C. § 1643 (1994); 15 U.S.C. § 1693-1693r (1994). In turn, the agency that authorized the credit card may attempt to "charge-back" the merchant. However, our hypothetical assumes that these measures are unavailable. New forms of payment may provide for even greater anonymity online. For example, the Condor Project is a software system that runs on a cluster of workstations in order to harness wasted CPU cycles. See The Condor Project Homepage, at http://www.cs.wisc.edu/condor/ (last visited Mar. 26, 2001). Perhaps sometime in the future Internet users may have the ability to exchange unused CPU cycles for digital products, like that which our hypothetical Party X has purchased.
name, because it represents value to the registrant, constitutes a property right. But then, if the domain name is indeed property, where is it located? If one could ascertain the location of the domain name, then there may be a possible cause of action quasi in rem against that property itself.

A traditional action quasi in rem is based on no contact or relation between the defendant and forum other than the defendant’s ownership of forum-property. The resulting judgment award is limited to funds derived from the court’s disposition of the attached property; the property owner is not personally liable for anything more than the attached property.

Unfortunately, jurisdiction in the nature of quasi in rem has been severely limited by the U.S. Supreme Court’s decision in *Shaffer v. Heitner* which held that even the assertion of quasi in rem jurisdiction must derive from an analysis of the defendant’s contacts as set forth in *International Shoe*. However, as this Note will articulate, one may plausibly read *Shaffer* as preserving the assertion of quasi in rem jurisdiction in certain limited situations analogous to the hypothetical controversy described above.

In Part I, this Note will describe and discuss the Internet, domain names, and domain name registration with the domain registrar. Part II contains an analysis of current law and theory regarding whether a domain name can be properly characterized “property.” Part III briefly describes the development of in rem and quasi in rem jurisdiction and argues for its modern justification. Part III also discusses some important factors which may limit the practical applications of an action quasi in rem against a domain name.

**I. THE INTERNET, DOMAIN NAMES, AND NSI REGISTRATION**

Very few would refute the contention that the Internet is the fastest growing method of communication today. What was first established as a military program designed for the defense department as a system of redundant channels of communication that could survive partial destruction, has blossomed into a public forum.

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19. 433 U.S. 186, 213 (1977) (“We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”).
20. See *Reno v. ACLU*, 521 U.S. 844 (1997). The original program was called ARPANET, an acronym for the network developed by Advanced Research Project Agency. See *id.* at 850.
for practically any expression imaginable. This expression most often takes the form of Web pages: complex electronic, often interactive, documents stored in different computers all over the world.

Web surfers, those who browse the Internet for material of interest to them, may find the material for which they are looking in a variety of different ways. The most common method is to enter a series of search terms into a Web browser, software installed on a personal or network computer, which searches the Internet for Web pages that contain the same or similar terms. The Web browser provides the user with a list of hits that when selected, will automatically transmit a message to the computer that contains the Web page. This list is comprised of domain names, i.e., names of Web sites. In response to the electronic request, the Web server transmits to the user the requested Web page or pages.

Another method of requesting material from the Web involves manually typing the domain name into the Web browser as if dialing a telephone number. Because searches often yield thousands of possible matches, Web operators much prefer this method in that it presents the user with only a single operator's Web page, singled out from the myriad of other competing Web pages. Consequently, Web operators much prefer a domain name that users are likely to deduce from the name of the organization that operates the site.

The vast majority of registrations of domain names, are performed by Network Solutions, Inc. ("NSI"), a Virginia

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21. See id. at 853 ("From the publisher's point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers.").

22. See id.

23. Examples of these are Netscape, Microsoft Explorer, Yahoo, and Excite. Most Web browsers offer a number of searching techniques designed to most efficiently direct the user to the desired information.

24. For instance, a Boolean search produces a list for every search term entered into the browser, after which only those documents that contain all terms are selected for display to the user. The results are usually displayed in order of matching strength, which is determined by the number of times the search terms appear in each document. Another type of engine searches for documents that contain not only the search terms, but also other types of characteristics. For example, they can search for terms displayed in larger font than the majority of the surrounding text or for terms associated with a specific Web page by prevalence of past use of previous users, a conscious effort by the creator of the Web browser software to list certain Web sites higher in the list than would naturally occur, ostensibly in exchange for advertising dollars from the operator of the Web site. See generally PRESTON GALLA, HOW THE INTERNET WORKS (1999).

corporation, although many new registrars are beginning to offer registration services. NSI was granted a monopoly by the National Science Foundation, a subordinate office of the U.S. federal government, for the purpose of establishing a workable and efficient system of domain name registration. In exchange for an initial and subsequent annual fee, NSI performs two functions: it screens domain name applications to prevent the registration of identical domain names, and it maintains a directory which links domain names to their respective Internet Protocol ("IP") addresses (four groups of digits which constitute a unique numerical address for every computer linked to the Internet).

NSI has instituted a domain name dispute policy which requires each applicant to verify that the requested domain name does not interfere with intellectual property rights of a third party. If a third party should present evidence to NSI of a valid trademark registration that is identical to the registered domain name, and if the domain name registrant can present no evidence of a pre-existing right to use the domain name, NSI will cancel the registration.

II. ARE DOMAIN NAMES PROPERTY?

The recent phenomena of selling domain names for astronomical prices indicates the obvious, that domain names, at least some, do indeed represent value. But does this mean that domain names are property, and if so, what kind of property are they? On one hand, domain names are similar to trademarks, in that they indicate origin

26. See List of Accredited and Accreditation-Qualified Registrars, The Internet Corporation for Assigned Names and Numbers, at http://www.icann.org/registrars/accredited-list.html (last visited May 3, 2001). 27. See id. 28. See Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 952 (C.D. Cal. 1997). 29. See id. at 953. 30. See id. The court described the resulting dilemma. In short, the exclusive quality of second-level domain names has set trademark owners against each other in the struggle to establish a commercial presence on the Internet, and has set businesses against domain name holders who seek to continue the traditional use of the Internet as a non-commercial medium of communication. Id. 31. See Anick Jesdanun, Domain Name Prices Online Are Sky High, ST. LOUIS POST-DISPATCH, Jan. 22, 2000, (Business), at 2. The following domain names and their sale prices illustrate that domain names can have great value, especially when they are generic: Business.com, $7.5 million; America.com, $10 million; WallStreet.com, $1 million; and Autos.com, $2.2 million. Id.; see also Michael White, Domain Name Sale Makes Internet Entrepreneur Rich, ASHEVILLE CITIZEN-TIMES, Feb. 2, 2000, at E3 (noting that Altavista.com sold for $3.3 million).
and identify goods and services. On the other hand, domain names play a useful role on the Internet by designating where information is sent, a process that might appear like the kind protected by patent.32

One thing is certain: for a domain name to work properly, it can be assigned to only one Web site. The exclusive nature of a domain name is the essential basis of its utility and value. Moreover, domain name registrants may license, sell, or lease domain names, much like other types of intangible property.33 If one can determine that domain names are enough like property to attach or garnish them in a legal proceeding, one must also determine where the location of this property lies. Because, in the language of quasi in rem jurisdiction, a court’s enforcement power is only as broad as its territorial boundaries, where exists the property’s res central.

A. Domain Names As Property Rights

Courts have consistently use the term “property” to connote a wide range of interests that are legitimate objects of protection.34 Courts routinely cite the Corpus Juris Secundum, which reads:

In the strict or true legal sense, the word “property” signifies valuable rights or interests protected by law. This is the primary meaning of the term. Accordingly, in law, it is not the physical material object which constitutes property, as it does when the term is defined in its ordinary sense. The term means something more than the mere thing which a person owns. In its more appropriate and true legal sense property is not alone the corporeal thing or physical object itself, and is not alone the land or chattel itself. The physical objects, although the subjects of property, are, when coupled with possession, only the indicia, the visible manifestations of invisible rights.35

34. See Gibbes v. Nat'l Hosp. Serv., 24 S.E.2d 513, 515 (S.C. 1943) (“In modern legal systems, property includes practically all valuable rights. The term is indicative and descriptive of every possible interest which a person can have, extends to every species of valuable right or interest, and comprises a vast variety of rights.”).
35. 73 C.J.S. Property § 4 (1983), cited in Lott v. Clausens, Inc., 163 S.E.2d 615 (S.C. 1968); see also First Charter Land Corp. v. Fitzgerald, 643 F.2d 1011 (4th Cir. 1981) (holding that “property” refers to both the actual physical object and the various incorporeal ownership rights in the res, such as the rights to possess, to enjoy the income from, to alienate, or to recover ownership from one who has improperly obtained title to the res); Navistar Int'l Transp. Corp.
Important factors which characterize a property right include whether the thing can be made exclusive to its owner, and whether it is alienable. Over the years, courts have held that this can include accounts receivable, telephone numbers, contractual obligations, and stock certificates. Contractual obligations can as well give rise to a property interest, with some exceptions.

In general terms, a domain name consists of the right to access a specific code, which is translatable to letters and numbers listed in electronic format, i.e., pulses of electricity that turn computer switches on and off, on the main DNS registry maintained by the DNS registrar. In other words, somewhere down the line of electronic communications, the domain name is a collection of electric energy that resides on a mainframe computer.
Of course, the physical form of a domain name is not the kind of property that a sheriff can arrest and deposit in a court's register. However, as indicated above, property, especially the kind of property that can be attached or garnished in satisfaction of judgment, need not be physical in form. Domain names are similar to stock certificates in that they represent an exclusive right of ownership, though unlike shares of stock, domain names are not fungible.

It is fairly clear that domain names are not equivalent to trademarks (though the two function similarly) and that domain name registration of a domain name confers no trademark rights apart from the common law rights created by usage. Moreover, registration of a domain name does not exempt one from liability for trademark infringement. While trademarks are generally not transferable independent of the goodwill they represent, domain names are clearly alienable.

The process of domain name registration creates a set of correlative rights between the registrant and the registrar. The registrant agrees to transmit the domain name to the DNS registry, the "master list" of all domain names which the several intermediate registries reference daily; and, the registrant agrees in exchange to pay an initial and annual fee. This simplistic transmission to the DNS registry belies the significance and value of the transaction. As described above, the value of a domain name is a function of the exclusive nature of domain name registration, which, in turn, allows the domain name to identify goods and services offered over the Internet.

The first case that presented the issue of whether a domain name is property was *Umbro v. 3263851 Canada, Inc.*, in which the


41. See 15 U.S.C. § 1060. However, courts have upheld transfers of trademarks where the purchaser used the mark for goods or services that were similar. See Marshak v. Green, 746 F.2d 927, 929 (2d Cir. 1984); Visa v. Birmingham, 696 F.2d 1371, 1375 (Fed. Cir. 1982); Raufast S.A. v. Kicker's Pizzazz, Ltd., 208 U.S.P.Q. 699, 702 (E.D.N.Y. 1980).

42. See Cardservice Int'l, 950 F. Supp. at 741.

43. See 48 Va. Cir. 139, 141 (1999).
plaintiff, an internationally known manufacturer of soccer apparel and equipment, attempted to satisfy a default judgment against the defendant, a Canadian corporation that had registered the domain name “umbro.com” through NSI. The plaintiff sought to garnish the defendant’s “property” held by the registrar, the domain name which was the subject of the initial trademark infringement claim. In response to the garnishment procedure, NSI denied that it held garnishable property of the judgment debtor.44

NSI’s main arguments characterized domain names as interests that are not subject to garnishment proceedings because of two factors. First, the domain name registrant’s rights, as defined by the registration agreement, are dependent upon unperformed conditions, namely the duty to indemnify the registrar and the continuing obligation to maintain an accurate registration record.45 Second, a forced domain name transfer to a third party would require NSI to perform services for those with whom it had not contracted.46 In response to the first argument, the court reasoned that because NSI had, by its own dispute resolution policy, agreed to the very conditions this garnishment procedure presented, and because property may be garnished even if it is subject to liens that affect the value of the property, the contractual conditions concomitant to the registration and maintenance of a domain name do not present an obstacle to the garnishment.47 With regard to NSI’s claim that garnishment would force them to do business with a party with whom they have not contracted, the court referred to NSI’s general practice of passive domain name registration and the fact that registration is accomplished without human interaction in over ninety percent of all domain name registrations, as evidence that the garnishment procedure would not significantly burden NSI.48 The court concluded that because the garnishment procedure “extends to all manner of property,” domain names are subject to garnishment.49

NSI appealed to the Virginia Supreme Court, which overturned the lower court ruling.50 The Virginia Supreme Court focused on the

44. See id.
45. See id. at 143.
46. See id. at 144.
47. Id.
48. Id.
49. Id. at 145.
fact that the value of the judgment debtor's domain name manifested only by NSI's continuing provision of service, and that therefore, the "domain name was a product of a contract for services between the registrar and registrant."\(^{51}\) Citing the general concern that its approval of domain name garnishment would inextricably lead to further attempts to garnish every kind of right created by service contract,\(^{52}\) the court held that a domain name was not a liability and was thus not subject to garnishment.\(^{53}\)

But the court's application of the general principle that a judgment creditor may not "step into the shoes" of the judgment debtor misreads the context in which the principle has traditionally obtained. Judicial reluctance to the attachment or garnishment of a judgment debtor's contractual obligations stems from two concerns which are similar to those involving claims for specific performance of a personal services contract: that such an order would require extensive judicial supervision, and that the Thirteenth Amendment prohibits involuntary servitude.\(^{54}\) Neither of these concerns are present in the attachment of a domain name. As the plaintiff in *Umbro* argued, NSI's registration procedure requires very little human interaction, to say nothing of judicial supervision.\(^{55}\) Indeed, there is very little that is "personal" about NSI's service contract. The cancellation or transfer of a domain name can be accomplished in seconds and with finality. Moreover, even if NSI objected to the provision of registration services to the judgment creditor on Thirteenth Amendment grounds, NSI's own Registrar License and Agreement requires it to transfer any domain name in its rolls to an alternate registrar upon a valid request from the domain name registrant.\(^{56}\) Were NSI subject to a garnishment procedure by a party

51. *Id.*; see also *Dorer v. Arel*, No. CIV.A.98-266-A, 1999 U.S. Dist. LEXIS 13558 (E.D. Va. Sept. 3, 1999) (deferring plaintiff's motion to compel transfer of domain name until the parties utilize the dispute resolution policies of NSI).

52. The court gave two examples: a satellite subscription service and a corporate name administered through the State Corporation Commission. See *id.* Implicit in the second example especially is the concern that judicial approval of domain name garnishment would, by virtue of NSI's then monopoly on domain name registration and the huge bank of domain names it had registered already, inundate Virginia courts with similar garnishment procedures. However, since the court's decision, many corporations have begun to offer the same registration service. See *List of Accredited and Accreditation-Qualified Registrars*, supra note 26.

53. See *id.*


56. See *NSI-Registration License and Agreement*, Internet Corporation for Assigned Names
with whom it did not wish to perform registration services, the issuing
court could make the garnishment subject to the judgment creditor's
voluntary transfer of the domain name to an alternate registrar.

Suspension of registration services or outright transfer of a
domain name is consonant with other uses of the procedure,
especially in light of domain name transferability. For example, in
United States v. Global Building Supply, the judgment creditor, a
supplier of drywall materials, attempted to garnish a contractual debt
owed to the judgment debtor, a drywall installer, by a local building
contractor. The Fourth Circuit Court of Appeals enforced the
garnishment procedure on grounds that it granted to the judgment
creditor merely "the right to hold the garnishee liable for the value of
the contract right," and that it did not allow the judgment creditor to
step into the shoes of the judgment debtor. The court reasoned that
garnishment simply warned the holder of property belonging to the
judgment debtor not to transfer the property to the judgment
debtor. Garnishment does not grant a clear and full lien over
property within the garnishee's possession. The court allowed the
judgment creditor's claim for the value of the obligation the garnishee
owned to the judgment debtor, as opposed to the outright grant of the
contractual obligation to the judgment creditor.

Taking this language, then, the attachment of a domain name,
especially in light of the underlying purpose of the hypothetical
controversy between Party X and Party Y, and in light of the
transferability of domain names as part and parcel of every domain
name registered by an accredited registrar, comports with traditional
applications of the same procedure. Even were a court to refrain
from ordering a transfer of a domain name for the reasons expressed
by the Virginia Supreme Court above, the suspension of registration
services, correlated with the transfer of the domain name by the
judgment creditor, aligns with the garnishment procedure in Global
Building Supply. The court would prevent NSI from performing the
continuing registration service. At the same time, the judgment
creditor, by order of the court, would request a transfer of the domain

and Numbers, at http://www.icann.org/ab/ab-rla-04n099.htm#ExhB (last visited Mar. 26,
2001). All registrars accredited by the Internet Corporation for Assigned Names and Numbers
("ICANN") have agreed to the uniform agreement. See id.

58. See id. at 833. The original Umbro court used the same language, attributing its
meaning to a literal translation of garnishment from the Norman French word "garnir": to warn.
See Umbro, 48 Va. Cir. at 142 (1999).
59. See Global Bldg. Supply, 45 F.3d at 833.
name to a different registrar. Such a procedure would grant the judgment creditor use of the domain name (or the ability to sell it) while allowing NSI to refrain from offering registration services. Garnishment would grant to the judgment creditor the same value of registration services the garnishee owed to the judgment debtor, but would not transfer the actual obligation itself.

In any event, since the Virginia Supreme Court handed down its decision, a new federal statute, the Anticybersquatting Consumer Protection Act ("ACPA"), has been enacted. This statute authorizes a trademark holder to attach an allegedly infringing domain name for the purposes of in rem jurisdiction. The ACPA offers the ultimate remedy of forfeiture or cancellation of the domain name or transfer of the domain name to a prevailing mark owner. Other courts have offered the same remedy in the nature of an equitable lien against a domain name. The most important point for the purposes of this Note is that domain names do indeed possess value and display characteristics analogous to traditional property rights.

B. Domain Names Are Located Where They Are Registered

As the above description of domain names indicates, there is a good argument that domain names physically exist where they are registered by virtue of their electronic physical existence. But even regarding domain names as intangible property, their location is most likely where the registrar is located. Courts have consistently held that intangible property has its situs within the district where the entity controlling the property may be found. For example, in *Jellenik v. Huron Copper Mining, Co.*, the Supreme Court held that the situs of a stockholder's intangible property interest in corporate stock is the district in which the corporation is domiciled, since an order canceling certificates held by the nonresident stockholders is properly enforceable within the district. In *Chicago, Rock Island and Pacific Railway Comp. v. Sturm*, the Supreme Court held that the situs of intangible rights to payment by creditors or financial institutions is the district in which the debtor or financial institution

61. See id. § 1125(d)(2)(A), (D)(i).
63. 177 U.S. 1, 13-14 (1900); see also McQuillen v. Nat'l Cash Register, 112 F.2d 877 (4th Cir. 1940).
may be found.\textsuperscript{64} Borrowing from Justice Story's famous treatise, \textit{Commentaries on the Conflict of Laws},\textsuperscript{65} Justice McKenna stated that "considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only, has something in his hands. That something is the res, and gives character to the action, as one in the nature of a proceeding in rem."\textsuperscript{66}

Since it is probable that the domain name registrar would be subject to personal jurisdiction in the state in which it is found (i.e., its principal place of business or state of incorporation), the situs of the domain name itself is most likely in the same location. Were there an action by a domain name registrant against the registrar (for example, a claim against the Virginia-based NSI), it is likely that the court would find little reason to refrain from asserting personal jurisdiction upon the registrar; the registrar has a definite location within some forum (i.e., principal place of business, domicile, state of incorporation, etc.), and most domain name contracts include a forum selection clause. This clause usually contains language to the effect that the registrar shall deposit the domain name certificates with the court in the event of any legal action involving the domain name.\textsuperscript{67} These domain name certificates are analogous to stock certificates and other types of intangible property that represent intangible rights.\textsuperscript{68}

\begin{itemize}
\item \textsuperscript{64} 174 U.S. 710, 716 (1899).
\item \textsuperscript{65} JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 549 (8th ed. 1883).
\item \textsuperscript{66} Sturm, 174 U.S. at 714.
\item \textsuperscript{68} See First Trust Co. of St. Paul v. Matheson, 246 N.W. 1, 3 (Minn. 1932).
\end{itemize}

But when debtor and creditor create such a corporeal thing as bearer bonds, they have created something upon which jurisdiction of any kind may act. They have made more than mere symbol. They have fabricated a matrix-like container for the property, wherein it is to be carried from place to place, jurisdiction to jurisdiction, at the will of the possessor. Mere manual transfer of the container transfers the property itself to new ownership. The property is so sealed in the container that he who has it must have the contents.

\textit{Id.}

This concept of container is analogous to the domain name registration to the extent that the certificate of registration can be physically placed within the depository of the court. However, unlike the bearer bonds at issue in \textit{First Trust}, domain name registration certificates are created for the express purpose of deposit with the court. \textit{See id}. Possession of the certificates by a private individual may not entitle the possessor to the domain name, although a similar document between the registrant and a third party could convey the interest in the domain name. But the underlying notion that a legal document could embody the property right itself is supported by both the creation of the domain name registration certificate for the purpose of judicial disposition, and by the terms of most domain name registration agreements.
III. THEORIES OF JURISDICTION

A. Brief Historical Background

What we know today as the law of jurisdiction came not from the Fifth or Fourteenth Amendments, but from traditional international law. More precisely, the rules that governed whether one nation would enforce the judgment of another nation were international in nature and obtained by what was called general law. Commercial law, like maritime law, was general in nature in that it developed independent of state common law, and derived its authority from international norms, where American states were much more like separate sovereigns, developing a course of dealings to their mutual benefit. Long before the formation of American states, a vast course of international dealings naturally created a body of commercial law that governed commercial intercourse. The Supreme Court referred to this general commercial law in Swift v. Tyson in holding that it was not bound by a state court ruling regarding negotiable instruments: “the law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, to be in a great measure, not the law of a single country only, but of the commercial world.” It was only natural that sovereign American states adopt this international law without the added measure of incorporating it into federal law.

By this general law, then, the propriety of foreign judgments as a starting point for the eventual enforcement in a secondary forum considered two general notions. The first was the concept of notice. One of the precepts of the conflict of laws is that notice is a

indicating that the registrar will abide by any court order to transfer possession of the domain name.

70. See id. at 1085. English common law was comprised mainly of this general law, which supposedly represented the customary law of England as a whole. Id. Unlike England, America lacked a central authority that could utilize general law to provide for the uniformity of substantive state law. Id.
71. See id. at 1086.
72. See id.
73. 41 U.S. 1, 37-38 (1842) (internal citations omitted). Of course, this tension between the general law and substantive state law would later play out in Erie Railroad Co. v. Topkins, 304 U.S. 64 (1938) (reversing Swift on grounds that the application of federal law to a state law negligence claim was unconstitutional).
74. See Conison, supra note 69, at 1086, 1115. The adoption of general commercial law without federal incorporation was natural concomitant to the general maxim that “there can be no common law of the United States.” Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658 (1834).
prerequisite to one state’s enforcement of another state’s judgment.\textsuperscript{75} Justice Story once stated that “if a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations, and the principles of public and national law in the administration of justice.”\textsuperscript{76} Story concluded that “if they choose to proceed without... notice to the parties,... it is but just, and conformable to the rights of other independent nations, to disregard such sentences as mockeries, and as in no just sense judicial proceedings.”\textsuperscript{77} As the American state courts analyzed whether or not to enforce a foreign state judgment, the general international law of nations, along with the notion of notice, was central. The law of personal jurisdiction as we know it today was born from this traditionally international law, as it was applied to notions of comity among the American states.\textsuperscript{78}

The second important concept in the propriety of foreign judgments professed the bromidean sequitur that nations generally have the power to govern their own affairs. The notion that the sovereign right of a government to power over all within its boundaries was firmly recognized by the U.S. Supreme Court much later in \textit{Pennoyer v. Neff}.\textsuperscript{79} The majority opinion, by Justice Field, stated three “principles of public law”:

(1) that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory...

(2) that no State can exercise direct jurisdiction and authority over persons or property without its territory...

(3) that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.\textsuperscript{80}

Notice, however, that unlike the general international law focus on notions of comity in the enforcement of foreign judgments, these principles describe a general theory of state court jurisdiction

\textsuperscript{75} See Conison, \textit{supra} note 69, at 1099. Conison suggests that in the first half of the century, the notice requirement, often cast in terms of natural justice, was not often regarded as a matter of procedural due process, though this is the modern view. See \textit{id.} at 1098.


\textsuperscript{77} Id.


\textsuperscript{79} 95 U.S. 714 (1877).

\textsuperscript{80} Id. at 719-20.
premised upon territorial *limits* of state power, a shift in the underlying mode of analysis. The general philosophy behind this theory was not only derived from an analysis of actual power, but also predicated upon continental theories of limited power as outlined by Justice Story in his *Commentaries on the Conflict of Laws.* The Court required first that there be a court of competent jurisdiction, which was defined by the law of its creation; this is to say that courts must have subject jurisdiction over the matter. For example, it is a general maxim that the law of the individual states governs the disposition of property within the state.

*Pennoyer* was based not only on the principle of state sovereignty, but also upon notions of due process, in turn, creating a two step process for determining whether a state had jurisdiction over a person or his property. The first step, as described above, is the identification of the person or property to be brought within the power of the state court. The second step, though only implicit in the *Pennoyer* Court’s reasoning, involves an analysis of the process that is due the defendant before he suffers actual deprivation of his property. The Court described the process due as “rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.”

This process is initially validated upon notice of the pendency of the litigation. Notice, then, is merely the first requirement of the general process due.

The notice requirement with regard to due process and quasi in rem jurisdiction called for either personal service, or, where only an interest in property that lies within the forum state was at stake, attachment of that property. Along with substitute service of process by publication, the attachment of property gave the defendant sufficient notice of the pendency of the suit.

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81. See *Story*, supra note 65.
82. See *Pennoyer*, 95 U.S. at 733.
83. *Id.; see also* Rush v. Savchuk, 444 U.S. 320, 328 n.14 (1980) (holding that whether property is garnishable is a matter of state law); Cargill v. Sabine Trading, 756 F.2d 224 (N.Y. 1985) (supporting the prejudgment attachment of defendant’s property to create jurisdiction as governed by state law, even if the matter is in federal court); *Fed. R. Civ. P.* 64.
84. *Pennoyer*, 95 U.S. at 733.
85. See *id*.
86. *Id*.
87. *Id*. 
1. Maritime and Admiralty in Rem and Quasi in Rem Jurisdiction

These two conflicting interests modulate differently in the context of maritime law. As part of the general law, maritime law developed independently of state law. Maritime law was, and largely is still, predicated on the notion that the traditional calculus of personal jurisdiction in civil actions is incompatible with commercial activities that are, as in maritime law, uniquely international and where assets are extremely mobile; the mobility of assets, in conjunction with the practical inability to enforce a judgment in a foreign nation, provides any given plaintiff with only a poor prognosis of obtaining an adequate remedy. Because of these essential differences from those activities that give rise to traditional civil actions, maritime law provided for the attachment or arrest of a vessel so that a plaintiff would have a modicum of security that his or her claim would not go unanswered and that the judgment would enjoy the benefit of a forum with the power of enforcement. In the context of maritime law, the traditional importance of the state's interest gives way to the national interest in protecting a plaintiff's claim generally, while still moderately protecting the defendant's interest in limiting liability to the assertion of jurisdiction to places in which his or her vessel may be found.

Rule C and B actions in admiralty and maritime law are predicated on nothing more than (in the somewhat incompatible parlance of personal jurisdiction) the single contact of the owner's

88. See Conison, supra note 69, at 1086.
89. See id. at 1085-86.
92. See id.; see also Cargill, Inc. v. Sabine Trading & Shipping Co., 756 F.2d 224, 227 (1985) (suggesting that quasi in rem jurisdiction is a useful tool for securing a future judgment).
93. In rem jurisdiction in admiralty and maritime law can take two forms. First, the Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C, provides, inter alia, that in rem jurisdiction is available to enforce any maritime lien; jurisdiction is predicated upon the arrest of any maritime property found within the forum provided that the plaintiff has a lien on the property attached, either by federal statute or under maritime law. See FED. R. CIV. P. SUPP. R. C (1). Second, Federal Rule B allows that where in personam jurisdiction does not exist over a defendant in federal court, plaintiffs may attach the defendant's assets; the court's jurisdiction is predicated upon attachment of these assets, and the judgment is limited to the value thereof. See FED. R. CIV. P. SUPP. R. B.
vessel in the forum, even where the presence of the vessel in the forum bears no relationship to the underlying cause of action. This single contact fits into the existing context of minimum contacts analysis in that contacts are analyzed in reference to the nation as a whole. The significance of maritime and admiralty law to this Note is the underlying theory that supported maritime law’s evolution: because maritime activities are so different than those activities that give rise to civil causes of action, a new regime of jurisdiction jurisprudence must govern causes of action that arise from maritime activities.

2. Quasi in Rem Jurisdiction

The history of quasi in rem jurisdiction reaches a time before the birth of the United States. The attachment of property might have occurred as early as 250 years ago, as a method of compelling a defendant to participate in the primitive trial by ordeal. In the early history of England, anything within the king’s physical reach was subject to his power; but, concomitantly, this exercise of jurisdiction was also limited by the king’s enforcement power. As is the case with foreign judgments generally, foreign nations regarded English judgments that were reached without an underlying valid assertion of jurisdiction as void.

The tool of outlawry, although expensive and often lengthy, allowed plaintiffs to reach property located in England that was owned by a party abroad. However, this tool was limited in

94. See David M. Collins, Comments on the American Rule of In Rem Liability, 10 MAR. LAW., 71, 72 (1985) (describing the personification of the vessel in admiralty in rem cases).
95. To some extent, admiralty law found support for this assertion of jurisdiction from the traditional use of quasi in rem jurisdiction. See Rutherglen, supra note 90, at 556 n.84 (suggesting that the justification for admiralty arrest and attachment predicated upon civil quasi in rem and personification of the vessel). This aspect of admiralty in rem and quasi in rem jurisdiction is not unique to American law. See id. at 558 n.91.
96. See id. at 533 n.69.
100. See Hazard, supra note 98, at 270 n.102.
102. See id. at 90.
application to situations in which the plaintiff could prove that defendant's absence constituted a conscious effort to avoid service. Generally, though, outlawry was similar to what later developed in America as an action quasi in rem.

The development of land-based quasi in rem jurisdiction in America owes much to the development of America itself. During the first few years of the nascent New World colonies, judgments in one region of the New World were not readily enforceable in another. The practical solution was to allow a plaintiff to seize property of the defendant located within the forum, which would provide the basis for jurisdiction. A prevailing plaintiff could then satisfy the judgment by further disposition of the seized property. This practice began to proliferate in response to the first economic depression. As colonists pushed farther west to escape the effects of the depression (as well as their localized debt), the general occurrence of loan and credit default increased. Often, the hastily defecting colonists left valuable property behind. Quasi in rem jurisdiction allowed creditors to obtain at least partial satisfaction of the debts they were owed.

Because the modes of communication and transportation were so rudimentary in colonial America, a strict jurisdictional requirement of presence or domicile (or personal service, for that matter) would have left creditors with no real ability to seek and obtain a remedy. Moreover, without the Full Faith and Credit Clause (that would come only after ratification of the U.S. Constitution), enforcing a judgment obtained in a separate region of colonial American was as difficult as enforcing a U.S. judgment outside of the United States is today. Injured parties were often left with no adequate forum in which to seek relief. In 1641, the passage of the first American quasi in rem

103. Id.
104. See Wille, supra note 99, at 152.
106. Kalo, supra note 91, at 33.
107. See Kalo, supra note 105, at 1150-62.
108. Id. at 1155.
109. Id. at 1150-62. The increase in population resulted in decrease of economic and social cohesiveness. Id.
111. Id.
112. Id. at 1067.
113. Id. at 1066-67.
jurisdiction law authorized jurisdiction independent of the common law system of attachment.\textsuperscript{114}

B. International Shoe and the Minimum Contacts Test

In 1945, the Supreme Court decided \textit{International Shoe v. Washington},\textsuperscript{115} and in turn, changed the legal landscape of personal jurisdiction.\textsuperscript{116} The new analysis, the so-called minimum contacts test, would have the effect of broadly expanding state power to adjudicate over individuals who were not present in the forum state.\textsuperscript{117} This expansion was in response to a rapidly changing society in which commercial activity increasingly ignored state boundaries.\textsuperscript{118} Prior to \textit{International Shoe}, commentators called for a reprise from the \textit{Pennoyer} rule which many found too restrictive; requiring actual presence in the forum as a prerequisite for in personam jurisdiction allowed many would-be defendants to escape liability.\textsuperscript{119} The \textit{International Shoe} Court recognized that advances in transportation and communication had made it much less burdensome for nonresident defendants to defend themselves away from home.\textsuperscript{120}

The new test took into account both the increasing degree of interstate activity and the modern advances of legal procedure. The Court held that because service of process had obviated the use of traditional physical arrest procedures, due process required only that the defendant have minimum contacts with the forum state “such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice,” for the state to assert jurisdiction over an out-of-state nonresident defendant.\textsuperscript{121} This minimum contacts requirement was culled from the traditional analysis of whether a corporate entity was “present” in the forum state such that it had

\textsuperscript{114} See Kalo, supra note 105, at 1158-59.
\textsuperscript{115} See 326 U.S. 310 (1945).
\textsuperscript{116} See Mushlin, supra note 110, at 1069.
\textsuperscript{117} Id. (explaining that after \textit{International Shoe}, every state in the Union passed a long-arm statute to qualify for the newly expanded breadth of state court jurisdiction).
\textsuperscript{118} See McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) (“Increasing nationalization of commerce [and] modern transportation and communication system have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.”).
\textsuperscript{119} See \textsc{Jonathan M. Landers et al.}, \textsc{Civil Procedure} 73 (2d ed. 1988); Philip B. Kurland, \textit{The Supreme Court, the Due Process Clause and the in Personam Jurisdiction of the State Courts—From Pennoyer to Denckla}, 25 U. CHI. L. REV. 569, 577-86 (1958); Mushlin, supra note 110, at 1069.
\textsuperscript{120} See Milliken v. Meyer, 311 U.S. 457 (1940).
\textsuperscript{121} \textit{International Shoe}, 326 U.S. at 316.
consented to its jurisdiction. The International Shoe Court held that this "presence" analysis was better characterized as a minimum contacts analysis, with an ultimate end of satisfying the requirements of due process.

The "minimum contacts" component of a now two-step analysis focuses on whether the defendant has purposefully directed activities toward the forum. Such activities provide good evidence that the defendant actually and purposefully availed itself of the privilege of conducting activities in the forum, where the laws of the forum are available for its protection. The only relevant factors of analysis in this regard are those activities attributed to the defendant; "the unilateral activity of those who claim some relationship with the nonresident defendant cannot satisfy the requirement of contact with the forum State."

The assertion of jurisdiction also modulates by the "quality and nature" of the contacts in relation to the fair and orderly administration of those laws that were enacted to govern the same activity. Several factors comprise this general reasonableness analysis. The relationship between the contacts and the legal claim and forum, where strong enough, provides a due process justification for pulling the defendant into the forum court: "to the extent that a corporation exercises the privilege of conducting activities within a state," the party may be brought to enforce the obligations and duties that were the product of those state contacts. Reasonableness analysis also takes into account the probable effect on the defendant: the "inconvenience which would result to the corporation from trial away from its 'home' or principal place of business is relevant in this connection."

International Shoe was not just a wholesale expansion of state adjudicatory power; it recast notice requirements as required by due process. The Court reasoned that "it is enough that appellant has

122. Id. at 317.
124. Id.
125. Id.
126. Id. at 319.
127. Id.
128. Id.
129. This new analysis of due process and personal jurisdiction has been the source of considerable confusion, "launching the Court and commentators on a journey into the mysteries [sic] personal jurisdiction over nonresident defendants from which no one has yet returned." Mushlin, supra note 110, at 1069 n.40; see, e.g., Asahi Metal Indus. Co., Ltd. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Keeton v. Hustler
established contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual.

In the most general terms, the assertion of personal jurisdiction over a defendant has come to embody a conflict between two important interests. The first is the defendant's desire and opportunity to limit its contacts with any sovereign state in such a way as to limit its liability to the assertion of jurisdiction to only those jurisdictions in which it intends to avail itself of the benefits and privileges of that forum. The Supreme Court has only recently characterized this goal as a personal liberty interest, though the import of this distinction has quickly permeated the jurisprudence of personal jurisdiction.

The second important factor is the state's interest in adjudicating the rights and duties of persons and property that exist within the state's borders. As discussed above, in the past, the law's recognition of the state interests was such that a state could assert jurisdiction whenever the defendant or its property could be found within the forum. After International Shoe, the minimum contacts test has provided the arena for the struggle between these two important interests; the result has been a plethora of cases that delve into the fact-specific analysis of contacts.


131. See Drobak, supra note 78, passim. Drobak argues that the protection of state sovereignty should not play a role in the law of personal jurisdiction. See id. at 1050.

132. See Flavio Rose, Comment, Related Contacts and Personal Jurisdiction: The "But for" Test, 82 CAL. L. REV. 1545, 1562 (1994) (suggesting that nonaffiliation is the principle that justifies rules of personal jurisdiction); Margaret G. Stewart, A New Litany of Personal Jurisdiction, 60 U. COLO. L. REV. 5, 19 (1989) (describing nonaffiliation as basic to our governmental structure).

133. Since Pennoyer was handed down prior to the passage of the Fourteenth Amendment, the constitutional source of this personal liberty interest was originally the Fifth Amendment. See Burger King Corp., 471 U.S. at 471-72 (quoting International Shoe); see also Ins. Corp. of Ir., 456 U.S. at 703 n.10. However, courts have held that the Fourteenth Amendment conveys the same personal liberty interest as did the Fifth Amendment, i.e., the relevant factors spelled out in International Shoe. See, e.g., Am. Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V., 710 F.2d 1449, 1452 n.1 (10th Cir. 1983). The Ireland court explained the reference in World-Wide Volkswagen to interstate federalism as an expression for the concern of an individual liberty interest, not of state sovereignty per se. See 456 U.S. at 703 n.10. But the Court went on to say that the individual liberty interest modulates with the question of state power to form the bounds of due process. See id. at 712; Ronan E. Degnan & Mary Kay Kane, The Exercise of Jurisdiction over and Enforcement of Judgments Against Alien Defendants, 39 HASTINGS L.J. 799, 814 n.66 (1988).
C. Shaffer v. Heitner

1. The Holding

In Shaffer v. Heitner, the Supreme Court finally applied the minimum contacts analysis to state court assertions of quasi in rem jurisdiction. The Shaffer Court agreed with commentators who rejected the premise from Pennoyer that "a proceeding against property is not a proceeding against the owners of that property," and argued that "the basis for [in rem] jurisdiction must be sufficient to justify exercising jurisdiction over the interests of persons in a thing." Moreover, the "assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification."

The Court's opinion also included some examples of actions in rem that might satisfy the minimum contacts analysis by virtue of the contacts themselves (i.e., the relationship between the forum state, the defendant, and the litigation) that the ownership of property in the forum represents. First, "when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction." This is so because the defendant expected to benefit from the state's protection of that interest. Second, where the cause of action is otherwise related to rights and duties growing out of ownership of the in-state property, mere ownership of that property may give rise to jurisdiction.

The concurring opinions in Shaffer expressed reservations about the extent of the majority's holdings. Justice Powell stated that he would explicitly reserve judgment "on whether the ownership of some forms of property whose situs is indisputably and permanently located within a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State to the extent of the value of the property."

134. 433 U.S. 186, 207 (1977) ("[T]he standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts analysis standard elucidated in International Shoe.").
135. Id. at 205.
136. Id. at 207.
137. Id. at 212.
138. See id. at 207.
139. Id.
140. Id.
141. Id.
some assertions of quasi in rem jurisdiction, especially involving real property, should remain a valid method of reaffirming the common-law traditions that obviate the nebulous minimum contacts test.\textsuperscript{142} Justice Stevens's concurring opinion focused on the traditional use of quasi in rem as a tool for effecting sufficient notice.\textsuperscript{143} Justice Stevens argued that "if I visit another State, or acquire real estate or open a bank account in it, I knowingly assume some risk that the State will exercise its power over my property or my person while there."\textsuperscript{144} Justice Stevens distinguished the Delaware statute at issue in \textit{Shaffer} on the grounds that those who purchase stock in a public corporation are not sufficiently on notice that their interest may become subject to the court of the forum state.\textsuperscript{145} Indeed, it is entirely possible that one who purchases securities in a publicly held corporation may not even have knowledge of that corporation's state of incorporation, much less of the vagaries of state law to which his or her interest may be subject. Finally, Justice Stevens suggested a narrow reading of the majority's opinion, stating that he would "not read it as invalidating other long-accepted methods of acquiring jurisdiction over persons with adequate notice of both the particular controversy and the fact that their local activities might subject them to suit."\textsuperscript{146}

2. \textit{Shaffer}'s Effect on Maritime Law

Several courts have held that even though the property attached in Rule C and B admiralty actions may be unrelated to the underlying cause of action,\textsuperscript{147} \textit{Shaffer} simply does not apply to maritime arrest or attachment. But the reasoning behind these holdings varies. Many courts have held that Rule C admiralty actions (predicated mostly upon the existence of maritime liens) are supported by a distinct body of law such that \textit{Shaffer} is inapplicable.\textsuperscript{148}

\begin{flushleft}
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 217-18.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 218.
\textsuperscript{147} Id.
\end{flushleft}
Many courts have held that Rule B actions also survive *Shaffer*. In *Amoco Overseas v. Compagnie Nationale Algerienne de Navigation*, the Second Circuit stated that “since the constitutional power of the federal courts is separately derived in admiralty, U.S. Constitution Art. III §2, suits under admiralty jurisdiction involve separate policies to some extent.” The application of maritime quasi in rem in *Amoco* is especially relevant in that the defendant’s property was not a maritime vessel, but rather, funds deposited in a U.S. bank in connection with the contract, the breach of which gave rise to the action. Thus, to some extent, this kind of maritime quasi in rem action is extremely similar to its land-based counterpart. Several courts have reasoned that the *Shaffer* holding is limited to assertions of state court jurisdiction, as opposed to federal, thereby making the holding inapplicable to federal maritime quasi in rem.

D. The Assertion of Quasi in Rem Jurisdiction upon a Domain Name Comports with *Shaffer*

1. Contacts

As described above, the current analysis of whether a court should assert personal jurisdiction over a defendant entails two inquiries: first, whether the defendant has had minimum contacts with the forum state such that “traditional notions of fair play and substantial justice” would not be offended by asserting jurisdiction; and second, even if the defendant has established minimum contacts with the forum, whether it would be unjust for the court to assert jurisdiction over the defendant, taking into consideration various factors that courts deem relevant. The Supreme Court has suggested that even where the defendant has had minimum contacts

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150. *See id.* at 650.
151. *See Kalo, supra* note 91, at 27 n.7, 47. Kalo asserts that “when the claim is unrelated to the property, the rule B action is facially indistinguishable from the assertion of quasi in rem jurisdiction held unconstitutional in *Shaffer*.” *Id.* at 30-31.
with the forum, an analysis of relevant factors might sway the court into refraining from asserting jurisdiction over the defendant.\textsuperscript{155}

In analyzing the contacts of a defendant to the forum in the context of our hypothetical above, we must first struggle with a factor which heretofore has not been adequately addressed in personal jurisdiction analysis: what if the defendant is an alien? Where the defendant is foreign to the nation as a whole, many courts have, nevertheless, counted its contacts with the specific U.S. state in which the case had been brought.\textsuperscript{156} However, to some extent, it is not logical to calculate the individual state contacts of a defendant who is an alien;\textsuperscript{157} our hypothetical defendant, Party X, most likely does not care about the specific state that she fortuitously contacts.\textsuperscript{158} In the realm of international law, the propriety of one nation's assertion of jurisdiction over the citizen of another nation is gauged by the contacts that citizen makes with the nation as a whole.\textsuperscript{159} Such is not the case in U.S law, but some commentators suggest that it should be.\textsuperscript{160}

A change to a \textit{national} minimum contacts\textsuperscript{161} analysis would better represent both the foundations of adjudicatory power as derived from

\begin{footnotesize}
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\item[155.] See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980). Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

\textit{Id.}


\item[157.] See Note, \textit{Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard}, 95 HARV. L. REV. 470, 475 (1981) (arguing that "[a]n alien having significant contacts with the United States, but not with any individual state, therefore cannot be forced to submit to the jurisdiction of any district court under the current scheme").

\item[158.] Party X’s disinterest in her customer’s geographic location is consonant with her business model. Party X’s solicitations and sales (or lack thereof) do not require postal addresses of customers or postage charges of any kind. The success of Party X’s business depends on how far she can cast her commercial net; her commercial exposure is not limited by any significant transaction costs whatsoever.

\item[159.] This philosophy finds support from the geographic nature of many other nations: the relatively small size of the majority of nations of the world arguably allows more international contact than does an amalgamation of many country-sized states (as in the United States).


\item[161.] See Degnan & Kane, \textit{supra} note 133, at 799. Some courts apply a minimum national contacts standard to cases in which a federal long-arm statute is in use. See \textit{id.} Degnan and Kane argue that “[t]o the extent that state boundaries are used to limit the enforceability in the United States of an American judgment against an alien, we thus may be unnecessarily restricting its potential enforcement abroad.” \textit{Id.} at 813 n.61. Some courts have applied a national minimum contacts test to bolster the constitutionality of maritime attachment. See
\end{enumerate}
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traditional notions of sovereignty, and the alien defendant’s realistic intention to avail itself of the benefits and privileges of the forum nation, in the international sense.\textsuperscript{162} Courts\textsuperscript{163} that employ the minimum national contacts test generally find support for this practice in the Fifth Amendment, as opposed to the Fourteenth Amendment.\textsuperscript{164} Were the net of adjudicatory power cast wider than just the bounds of Oklahoma or Virginia, the citizens of the United States would be better protected from online mischief.\textsuperscript{165}


\textsuperscript{162} See Rutherglen, supra note 90, at 813. With some jocularity on the Supreme Court’s holding in \textit{Asahi Metal Industry Co., Ltd. v. Superior Court}, 480 U.S. 102 (1987), Rutherglen comments that

\[\text{\textquote{In the international order, there is no such thing as Oklahoma. . . . It is a fabled land in a musical comedy, where the corn grows as high as an elephant’s eye and wind goes sweeping across the plain. . . . Yet Oklahoma, even if not a state in the international sense, does have courts. It is true that some are federal and some are state, and their restrictive spheres are sharply defined. But in a world order of things, those are simply American courts. How we choose to distribute our judicial business by either geography or subject matter is our own business, and further, is a matter as to which Germany and Japan are profoundly disinterested. If the Japanese courts ever are asked to enforce a judgment against Asahi, their question would be: “Is this a valid American judgment?,” not whether it would be valid internally within the United States.}}\]

\textit{Id.}

The holding in \textit{Asahi}, that the defendant did not have minimum contacts with the forum, was grounded on the defendant’s lack of purposeful availment or contacts directed anywhere. \textit{See Asahi}, 480 U.S. at 112. Justice O’Connor, writing for the majority, commented in a footnote that

\[\text{\textquote{We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the State in which the federal court sits.}}\]

\textit{Id. at 113.}


\textsuperscript{164} See \textit{Degnan & Kane, supra note 133.}

\textsuperscript{165} Of course, whether the Web site was in English or not would play an important role in determining whether the alien defendant could assume that many of his viewers are Americans. Many Web browsers look only for sites that are in the language of its users; it does not produce
But remember here that although Party X’s Web site can be viewed anywhere in the world, including Virginia, there is no evidence that anyone in the forum, or in the nation as a whole besides the plaintiff who may or may not be from Virginia, has actually viewed or purchased something from MyKindaMusicOnline.com. It is tempting to look to a stream of commerce theory to impute upon the defendant an intention to ultimately contact the United States. Justice O’Connor seemed to leave room for a “stream-plus” theory of commercial contacts in *Asahi Metal Industry Co., Ltd. v. Superior Court.* But the plus required is not merely additional contact but some meaningful direction of the stream at the outset. It is possible, though arguable, that Party X’s domain name registration in our hypothetical forum, in addition to her knowledge that her solicitations and/or goods could find their way to the forum (especially on a national basis), could satisfy the stream-plus approach. A better argument would include not only the stream-plus approach, but also other several factors, which are described below.

2. Relation to the Cause of Action

An important exception that several courts have drawn from *Shaffer* predicates upon Justice Marshall’s statement regarding the cases that he felt the Court’s holding would presumably and most notably affect: “cases where the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff’s cause of action.” The property attached in *Shaffer* was not the “subject matter” of the litigation, nor was the “underlying cause of action related to the property.” Several courts have held that where the property upon which quasi in rem jurisdiction is premised bears a relationship to the litigation, even though slight, *Shaffer* does not apply.
This suggests a per se rule that supports quasi in rem jurisdiction wherever there is some conceivable relation between property of a certain nature and the subject matter of the cause of action. Such a rule would give deference to the traditional notion that property ownership itself intimates some intention of the putative defendant to direct its contacts towards the forum, thereby purposefully availing itself of the benefits of the forum. Justice Scalia, in Burnham v. Superior Court, characterized the holding in Shaffer not as an application of the minimum contacts test, but rather, as an application of the principle of relatedness that embodies traditional notions of fair play and substantial justice. But the brief look above at the history of jurisdictional jurisprudence sheds light on the relatedness factor which Justice Scalia found controlling in Burnham and Shaffer.

The traditional factors of jurisdiction were predicated not on limitations of sovereign power, but rather on a judgment creditor’s ability to enforce a judgment in some other forum. The secondary or enforcing forum focused on issues of natural rights, one of which was the existence vel non of notice to the defendant of the original matter that informed him that there was to be an adjudication that could affect the disposition of his property. Traditionally, notice, in actions quasi in rem, came both from the attachment of property and from the defendant’s original action of placing the property in the forum in the first place. In recognition of this first kind of notice, Justice Stevens stated in Shaffer that “[t]hroughout our history the acceptable exercise of in rem and quasi in rem jurisdiction has included a procedure giving reasonable assurance that actual notice of the particular claim will be conveyed to the defendant.” Justice Stevens identified the second kind of notice: “The requirement of fair notice also, I believe, includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign.”

The relatedness requirement acts much the same as this second form of notice or fair warning: the act of putting property in the

171. 495 U.S. 604, 620 (1990) ("Shaffer, like International Shoe, involved jurisdiction over an absent defendant, and it stands for nothing more than the proposition that when the 'minimum contact' that is a substitute for physical presence consists of property ownership it must, like other minimum contacts, be related to the litigation."). Justice Scalia also reasoned that "quasi in rem jurisdiction, i.e., that form of in personam jurisdiction based upon a 'property ownership' contact and by definition unaccompanied by personal, in-state service, must satisfy the litigation-relatedness requirement of International Shoe." Id. at 621.
172. 433 U.S. at 217-18 (Stevens, J., concurring).
173. Id. at 218.
The per se rule suggested above, which considers any conceivable relation between the property and the cause of action, better represents the notion that notice is fundamental to jurisdiction.

Here, the character of the property at issue is what is under analysis, not the character of the defendant's alleged contacts with the forum generally. This is a subtle but important distinction: the fundamental factor of analysis should be the character of the property, not on the defendant's forum contacts that ownership of a particular kind of property, property of such nature that its owner would naturally assume it to be within the adjudicatory province of the forum in which it lies. The per se rule suggested above, which considers any conceivable relation between the property and the cause of action, better represents the notion that notice is fundamental to jurisdiction.

Using this per se, fact-specific mode of analyzing the character of the property, the propriety of asserting quasi in rem jurisdiction over Party X's domain name is evident. A domain name is of paramount importance to its registrant and user. It is every Web site's most identifiable feature. It acts as an advertisement, a billboard, a calling card, a phone number, an address, a store-front window, and a common name. The importance and practical geographic permanence of the domain name should reasonably apprise Party X of the possibility that the forum in which her chosen domain name registrar resides has an interest in regulating the continuing obligation of the registrar. As indicated above, the registration of the domain name is performed through a forum corporation. It is in the forum that that registrar maintains and governs the use and functionality of the domain name. The forum corporation has actual control over the

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174. See Shaffer, 433 U.S. at 217 (Powell, J., concurring):
I would explicitly reserve judgment, however, on whether the ownership of some forms of property whose situs is indisputably and permanently located within a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State to the extent of the value of the property.
use and transmission of the domain name. Party X depends upon the laws of the forum to protect her interest in the domain name.

This kind of practical notice would not result where Party X owned any other kind of property. Consider, for example, an analysis of Party X’s vacation property that happens to lie in Virginia. The permanent nature of the real property should put Party X on notice that ownership of the property may give rise to certain liabilities that relate to the property. Party X should reasonably expect that Virginia has enacted an administration of law that will certainly affect her property interest. However, Party X’s vacation property bears no relationship with Party Y’s breach of contract claim. Party X’s ownership or use of the vacation property did not give rise to Party Y’s claim. Here, then, quasi in rem jurisdiction should not lie.

That Party X may, as described above, in effect, take her domain name to some other registrar supports the notion that she has chosen the forum in which she contracts for registration services. Party X has invested in an ongoing and continuing relationship with the forum corporation, a relationship that is the foundation of her entire commercial enterprise. Without the domain name, Party X would have no way to engage in her chosen business. The domain name, by its very nature, is inexorably linked to the commercial transactions that it facilitates. Thus, the relationship between the domain name and the commercial transaction that gave rise to Party Y’s cause of action is great, and surely is enough to give Party X fair warning that a forum court may assert quasi in rem jurisdiction over the domain name in a cause of action that stemmed from Party X’s use of that very property.

Notice that this analysis considers only those claims that arise from use of the domain name. Another claim against Party X by someone other than Party Y that did not arise from Party X’s use of the site would not manifest the same notice-giving relation. For example, in a suit against Party X by a Virginia resident who claims that Party X failed to pay for a magazine subscription she ordered over the telephone from a Virginia publishing company, the breach of contract claim would not have arisen from Party X’s ownership or use of her Virginia-registered domain name. Thus, the Virginia publishing company would have no valid argument for quasi in rem jurisdiction.
Courts regularly analyze the relationship between the property and the cause of action (as opposed to the contact and the forum). In *John N. John, Jr., Inc. v. Brahma Petroleum Corp.*, the plaintiff hauled property for the defendant to a storage facility located in forum. The court asserted quasi in rem jurisdiction over that property in the claim for payment of services rendered partly on grounds that "the property attached is the very subject of the cause of action." In *Holt v. Holt*, the defendant bought forum real estate after a divorce decree was entered in a foreign state. The plaintiff alleged that the purchase of that property prevented the defendant from honoring the foreign divorce decree (by decreasing his ability to pay alimony), and brought an action quasi in rem against the forum property. The North Carolina Appellate Court upheld the assertion of quasi in rem jurisdiction, reasoning that although there was no direct relationship between the property and the cause of action, the purchase of that property was related enough to support quasi in rem jurisdiction.

Even if we employ the relatedness test as used to analyze the assertion of in personam jurisdiction, quasi in rem jurisdiction may withstand constitutional scrutiny. One test that has emerged for judging whether forum contacts are related to the cause of action is the "but for" test. In *Shute v. Carnival Cruise Lines, Inc.*, the plaintiff filed a Washington state negligence suit for injuries received while on defendant's ocean vessel which was cruising in international waters. The Washington supreme court upheld in personam jurisdiction.

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175. See Papendick v. Bosch, 410 A.2d 148 (Del. 1979). In *Papendick*, plaintiff sued to collect a finder's fee that was payment for the service of locating a piece of real estate in the forum that defendant could and did acquire. The real estate was attached for the purpose of quasi in rem jurisdiction after defendant refused to pay. The Delaware Supreme Court upheld the assertion of quasi in rem jurisdiction based upon a reasonableness analysis that took into account the size and strength of the defendant corporation as compared to the plaintiff. See id.


177. Id.


179. See id.

180. See id. at 352 ("[G]ranted, there is no direct relation between the parties' separation agreement and divorce decree entered in Missouri and the real property owned by the defendant in North Carolina. . . . Here, however, we believe that the controversy Does [sic] have 'some relation' to the North Carolina real estate owned by defendant.").


jurisdiction over the defendant on the grounds that had the defendant never advertised in the state of Washington, plaintiffs would have never purchased cruise tickets, and that this constituted the requisite degree of relatedness for specific jurisdiction.\textsuperscript{183} The Supreme Court reversed the decision on grounds that the forum selection clause that was printed on the tickets was controlling, but did not comment on the lower court's standard for relatedness.\textsuperscript{184}

The standard in \textit{Carnival Cruise Lines} would support quasi in rem jurisdiction in our hypothetical. The argument is obvious: but for Party X's registration of the domain name in the forum, Party Y would never have attempted to purchase anything from Party X. This line of analysis, in the context of the argument above, should be sufficient to support jurisdiction.

3. Jurisdiction by Necessity

The Court's \textit{Shaffer} opinion suggests another argument for quasi in rem jurisdiction over our hypothetical case between X and Y. Justice Marshall asserted: "we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff."\textsuperscript{185} Several courts have held that where there is no other forum in which to bring suit, the assertion of jurisdiction is "necessary" and \textit{Shaffer} does not apply.\textsuperscript{186}

The basic theory of jurisdiction by necessity is that where there appears to be no other forum in which to bring a claim, U.S courts may entertain the litigation. In practice, however, jurisdiction by necessity acts more as a fudge factor, where the defendant's contacts appear to be slightly shy of the constitutional mark as drawn by the traditional analysis of \textit{International Shoe}. And so it was in \textit{Perkins v. Benguet Consolidated Mining Co.}, where the defendant, a Philippine mining company that lied dormant as a result of Japanese occupation during World War II, was sued in Ohio.\textsuperscript{187} Though the defendant engaged in very little activity in the forum state (the company president had several management meetings and drew several

\textsuperscript{187} 342 U.S. 437 (1952).
paychecks in Ohio), the Court allowed Ohio to assert jurisdiction because the in-state activity suggested that such an imposition was reasonable.\textsuperscript{188} Implicit in the Court’s analysis was that because the defendant’s principal place of business was located in Japan, the only forum available to the plaintiff was that of Ohio; jurisdiction was necessary because there was no other forum available.

Jurisdiction by necessity makes sense in the context of \textit{Shaffer’s} discussion of the Full Faith and Credit Clause. Justice Marshall downplayed the importance of quasi in rem where a plaintiff sought to prevent the defendant from removing property from the forum in order to shield the property from the plaintiff. Marshall reasoned that the Constitution would not forbid the attachment of property quasi in rem where a plaintiff sought to enforce or secure a judgment that was already or could be entered in a court that could constitutionally assert in personam jurisdiction.\textsuperscript{189} In other words, where there has already been entered a valid judgment by a court that has constitutionally asserted in personam jurisdiction over the defendant, the Constitution does not forbid the plaintiff from taking that judgment to the state where the defendant’s property lies. Indeed, the Full Faith and Credit Clause arms the plaintiff with the constitutional authority to do just that. Therefore, as \textit{Shaffer} implies, the necessity of asserting jurisdiction in a forum with which the defendant has maintained constitutionally insufficient contacts is quite unapparent. In essence, the Court says: “Go somewhere else first, then come back!”

The obvious corollary to this is that where there is no forum that could constitutionally assert jurisdiction over the defendant at the outset, where the plaintiff is unable to find a forum that satisfies the \textit{International Shoe} test, the Full Faith and Credit Clause can play no meaningful role. The plaintiff cannot go somewhere else first because there is no where else to go. Therefore, the assertion of jurisdiction in the forum at issue evinces a greater degree of necessity.

\textsuperscript{188} See id. at 448.
\textsuperscript{189} See \textit{Shaffer}, 433 U.S. at 210.

[The] [s]tate in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with \textit{International Shoe}. Moreover, we know of nothing to justify the assumption that a debtor can avoid paying his obligations by removing his property to a State in which his creditor cannot obtain personal jurisdiction over him. The Full Faith and Credit Clause, after all, makes the valid in personam judgment of one State enforceable in all other States. \textit{Id.} (internal citations omitted).
But some courts have suggested that this jurisdiction by necessity might apply only where there is no other forum anywhere in the world. Dicta in Justice Blackmun's opinion in *Helicopteros Nacionales de Columbia, S.A. v. Hall* seems to bolster this argument:

We conclude, however, that respondents failed to carry their burden of showing that all three defendants could not be sued together in a single forum. It is not clear from the record, for example, whether suit could have been brought against all three defendants in either Colombia or Peru. We decline to consider adoption of a doctrine of jurisdiction by necessity—a potentially far-reaching modification of existing law—in the absence of a more complete record.\(^{190}\)

However, this argument does not apply to our hypothetical case simply because Party Y may never discover Party X's true identity.\(^{191}\) "Necessity" in our case does not derive from a lack of a constitutionally suitable forum, though jurisdiction over the defendant, at least during the initial stages of litigation, is necessary nonetheless. Like a proceeding against an unnamed party, our John Doe-type hypothetical allows the plaintiff to take affirmative steps in resolving the situation that gave rise to the litigation, without the burden of first identifying the defendant specifically. Unlike a John Doe proceeding, however, our hypothetical allows the added security of attaching property of the defendant, which in turn, increases the chance that notice of the suit will reach the defendant, and that the plaintiff will receive at least something for his litigation troubles.

The Anticybersquatting Consumer Protection Act,\(^{192}\) as described earlier, seizes upon this same necessity extant where a party is unable to discover the identity of the wrongdoer. The statute requires, in an apparent appeal to necessity as described above, that the court first find that it could have asserted in personam jurisdiction over the defendant were he or she present within the forum, or that after a diligent attempt to locate and give notice to the putative defendant, the trademark holder is unable to discern the identify of the registrant of the allegedly infringing domain name.\(^{193}\)

For example, if our Party Y was himself an owner of a chain of record stores famous for its creative name, MyKindaMusicOnHand,

191. See *Porsche v. Porsche.com*, 51 F. Supp. 2d 707, 713 (E.D. Va. 1999) (observing that some owners of domain names are unable to be found and that in personam proceedings against such persons may be fruitless).
and if that name was a registered trademark, Party Y would have available to him the vehicle of the ACPA for enforcing his trademark rights against an allegedly infringing domain name. If Party Y could demonstrate that, after a diligent attempt to locate and give notice to the operator of a Web site with the domain name www.MyKinda-MusicOnline.com, he is unable to identify the owner of the allegedly infringing domain name, Party Y can attach that domain name. Upon this property, a court would be authorized by the ACPA to assert in rem jurisdiction. With regard to necessity, the general procedures authorized by the ACPA and proposed in this Note are quite similar. However, notice that because the underlying issue in a claim of trademark infringement is that of who rightly owns and may use the mark itself, the ACPA authorizes only in rem jurisdiction for the purpose of restoring the mark to its rightful owner. In contradistinction, the original hypothetical contemplates the attachment of a domain name for the more limited purpose of identifying the owner of the allegedly breaching www.MyKindaMusic-Online.com, with an end toward pressuring him or her to appear in court.

4. Reasonableness

In an appeal to the most fundamental level of jurisdictional analysis, where there is no other forum in which to bring suit for one reason or another, an assertion of jurisdiction may be reasonable even given the dearth of constitutionally meaningful contacts with the forum. Since Virginia is the state in which NSI is incorporated, a reasonableness analysis must also include Virginia’s interest in resolving a dispute against a domain name registrant. Claims involving Virginia residents involve an obvious Virginia interest in the protection of its residents. However, even where our plaintiff, Party Y, resides elsewhere, Virginia still has an interest in claims that arise from Party X’s transaction with NSI, a Virginia corporation.

With regard to Party Y’s desire for convenient and effective relief, Virginia is a reasonable forum, especially since the plaintiff’s choice of forum is already severely limited to the one state in which the defendant owns property (the domain name). That there exists

only one forum in which this particular necessity argument plausibly
lies should significantly mollify the understandable reluctance to
allowing what might otherwise be a far-reaching exception to the
minimum contacts standard. The exclusive nature of domain name
registration precludes the kind of forum shopping against which the
Court militated in Helicopteros. 197

The discussion of "fair warning" above applies also to an analysis
of Party X’s reasonable expectation of being hailed into the forum
state. 198 NSI’s domain name registration agreement should
reasonably put any registrant on notice that the state of Virginia may
play some role in domain name registration. 199 All domain name
registrants should be aware that NSI is a Virginia corporation, and
that payment is due to the Virginia corporation annually. 200 This
suggests that the defendant’s activities were not "random," "fortuitous," or "attenuated." 201 Moreover, the defendant’s contact
with the forum (registration with NSI) was not due to a "unilateral
activity of another party or a third person." 202 Because NSI’s
registration agreement indicates that registrants shall pay an annual
fee, the defendant’s contact with NSI can legitimately be
characterized as a "continuing obligation." 203 Also, Virginia state laws
create "benefits and protections" of which any domain name
registrant could avail himself. 204 All of these factors, though relevant
to the initial question of contacts, play a modulating role in a
reasonableness analysis as well. More than anything else, however,
all of the factors above that appeal to reasonableness in one way or
another must necessarily comport with the way the Internet works, as
well as with the existing jurisprudence of personal jurisdiction.

Reasonableness, in other words, must derive from an analysis of
the public policy interests perceivable in the current legal landscape,
especially where the Court’s last word on quasi in rem jurisdiction
came from a world of commerce many revolutions prior to the wired
world in which the law now operates. When Shaffer was decided, it
appeared that the minimum contacts analysis provided for the

198. Shaffer, 433 U.S. at 216.
199. See NSI-Registration License and Agreement, supra note 56.
200. See id.
203. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 470 (1985); Travelers Health Ass’n
204. Id.
adequate protection of state interests and that quasi in rem was no longer as useful as it once had been.\textsuperscript{205} As described above, Justice Marshall asserted that many types of actions that had been quasi in rem would be unaffected by the holding in \textit{Shaffer}.\textsuperscript{206} Indeed, several commentators and lower courts had predicted the fall of quasi in rem jurisdiction even before \textit{Shaffer} was handed down.\textsuperscript{207} Some commentators welcomed the holding in \textit{Shaffer} as a change for the better, and others argue now that quasi in rem jurisdiction is no more useful today than when \textit{Shaffer} was decided.\textsuperscript{208}

However, the advent of the Internet and the great proliferation of Internet transactions have changed the legal landscape. At the very least, and perhaps as a last resort, quasi in rem jurisdiction would allow a single forum in which to seek relief. Indeed, without a modicum of reassurance that operators of Web sites will be held to their online promises, it is doubtful whether the Internet will blossom to its full potential. This “last resort” quasi in rem action might serve as a “silent veto” of the malicious or negligent actions of Web administrators. If Web administrators know that their sites could be shut down by a valid claim in Virginia, it follows that they would be deterred from illegal or tortious online activity. Moreover, such power in the hands of consumers would provide some balance where now, as a result of our increasingly electronically mechanized and anonymous world, there is little.

5. Caveat

Suing a domain name quasi in rem, along with the obvious limitations concomitant to the necessity and reasonableness requirements above, may involve other important limitations. First, where a domain name is also a trademark, registered or otherwise, it is doubtful that a court would award the name to a party who is neither the trademark registrant nor able to evidence a colorable claim to the domain name.\textsuperscript{209} A transferring of a trademarked domain

\textsuperscript{\textsuperscript{205} See Shaffer v. Heitner, 433 U.S. 186, 211 (1977).}
\textsuperscript{\textsuperscript{206} See id. at 208-09.}
\textsuperscript{\textsuperscript{208} Holly S. Haskew, Shaffer, Burnham, and New York's Continuing Use of QIR-2 Jurisdiction: A Resurrection of the Power Theory, 45 EMORY L.J. 239 (1996); Mushlin, supra note 110, at 1059.}
\textsuperscript{\textsuperscript{209} See Panavision Int'l, L.P. v. Toeppen, 945 F. Supp. 1296 (C.D. Cal. 1996); Intermatic,
name to one who is not the registrant would instantly cast the judgment creditor in the role of cybersquatter. The judgment creditor would be in violation of federal trademark law for simply holding the domain name. Moreover, the judgment creditor would be unable to legally transfer it to anyone else who was likewise not the registered mark holder.  

Another limitation relates to the value a domain name represents to its owner. A domain name may represent value by virtue of its obvious meaning; the domain name "buysocks.com" conveys a clear expression of what one might find on the associated Web site. Assume that the owner of the domain name understandably registered the domain name because of its innate ability, and that lots of other Web entrepreneurs could and would take advantage of it similarly. Because the domain name is comprised of generic terms, it is less likely that trademark rights have accrued as a result of its use, even if the domain name has come to represent valuable goodwill. If the original Web site fails, the domain name owner may sell the name to another in the field of hosiery (or in a completely different field). In this situation, then, the domain name owner may very well be pressured to come to court were his or her domain name rendered inoperable by an allegedly aggrieved seller.

However, the same is not true where a domain name represents little value to its owner. Where a Web administrator depends upon registered users who rely upon frequent e-mail contact, and where the content of the Web site bears little relationship to the domain name, a Web site operator may simply change the domain name with little disruption. This is especially true because the Web site operator is able to contact users directly in order to inform them of the name change. Were the Web site operator to find that his or her domain name had been rendered inoperable, he or she could simply register a new domain name and send this to registered users. Unquestionably, many Web sites hold a stock of domain names dormant for similar purposes. Here again, an action quasi in rem may offer little utility.


211. See Streitfeld, supra note 32.
CONCLUSION

The advent of the Internet, and of a new economy in which commercial activities are commenced in ways far different from traditional methods, is analogous to the advent of maritime activity, and should, in turn, give rise to a new regime of jurisdictional jurisprudence that is tailored to the exigencies and vagaries of international electronic commerce. Just as the law and procedures of traditional civil actions were inadequate to provide for an equitable basis for the assertion of jurisdiction in causes of action that stemmed from maritime activities, the law of traditional civil actions cannot adequately provide for a comprehensive theory of jurisdiction in causes of action that stem from electronic commerce.

However, electronic commerce is different than commercial maritime activities in an important way: there is no real ability for electronic commercial actors to avoid real commercial contacts with any specific part of the world. Without a comprehensive regime of physical borders on the Internet, electronic commercial actors can generally do nothing to avoid contact with a specific jurisdiction. It would be a direct assault on a traditional interest—allowing a commercial actor to tailor its commercial activities in such a way as to limit its amenability to suit—to merely subject a defendant to jurisdiction anywhere his or her Web page could be seen (the practical equivalent of asserting jurisdiction anywhere where there is a plaintiff that had been harmed by an online electronic commercial action). Maritime law may provide some insight into the creation of a method whereby electronic victims can seek redress. The registration of a domain name, like the docking of a ship at a forum pier in order to take on fuel and supplies, manifests a physical and direct contact with an island among seas, where an aggrieved plaintiff could identify the defendant or his goods, thereby calling him to a forum of law, and by the same procedure, could levy upon a specific property interest as security for any judgment that may result.

The most vexing hurdle of legal vindication is often the initial step of identifying the defendant and his property. Often times, a Whois search produces only a string of false personal information. Without further investigation, at considerable cost to the plaintiff, the case is effectively dead in the water. However, the attachment of the defendant's domain name would immediately accomplish two things.

First, it would give notice to the defendant that the plaintiff has filed suit against it. Its immediate inability to operate the Web site would quickly inform it of, at a minimum, the fact that its domain name is no longer being listed on the top registry. Faced with this predicament, it has a choice of doing nothing, in which case, its e-business is out of business, or contacting its domain name registrar to ascertain the status of the domain name. The registrar would inform it that after receiving a writ of attachment, the registrar was compelled to deposit the domain name with the court registry.

The defendant's next action would serve the second main purpose of pretrial attachment. In maritime attachments and arrest, and in the attachment procedures of many state courts, the trial judge has discretion in requiring the plaintiff to post a bond that would compensate the defendant for wrongful arrest or attachment. Moreover, the attachment and arrest procedures of both maritime and state law guarantee that the defendant’s due process rights are not violated by virtue of immediate hearings after attachment or arrest to provide the defendant with an opportunity to argue against the plaintiff’s case. In order to get its domain name out of hoc, the defendant would have to post bond or other security or stipulation to the plaintiff. This would guarantee that the plaintiff would find compensation, albeit possibly limited and insufficient, by virtue of the collateral bond.

In this age of free access to information via the information superhighway, it is increasingly important that those who transact business on the Internet have a forum in which to seek judicial remedy. The use of one of the most traditional bases of jurisdiction, quasi in rem jurisdiction, may help provide such a forum. Although the Supreme Court has limited most applications of quasi in rem to instances in which the minimum contacts requirements of International Shoe are met, Shaffer preserved several important applications of quasi in rem. Several state courts have upheld the assertion of quasi in rem jurisdiction based upon these exceptions. Moreover, Shaffer did not speak to situations in which there may be no alternative forum in which resolve a dispute. These exceptions support the assertion of quasi in rem jurisdiction against a domain name in the forum in which the domain name registrar is located.

213. See Rutherglen, supra note 90, at 551 (describing release of property upon bond or other stipulation in maritime arrest and attachment).

Moreover, an analysis of traditional notions of fair play and substantial justice suggests that the assertion of quasi in rem jurisdiction would not violate the defendant's due process rights.

The proposed action may not adequately compensate all plaintiffs.\textsuperscript{215} However, the ability to assert jurisdiction over a domain name would present some plaintiffs with a forum for the redress of Internet wrongs where before there was none. Although defendants would be liable for no personal assets other than the domain name, the loss of the domain name itself may serve as an adequate deterrent to online impropriety. The first successful action quasi in rem against a domain name would effectively express the message that online mischief can lead to the loss of one's Web site.\textsuperscript{216} This message may be more effective in promoting Internet use than broader bandwidth or cheaper home computers in that Internet users will know that, if all else fails, they may seek a remedy in the forum in which a domain name is located.

\textsuperscript{215} Id.