

No More Sex (.com) -- But Still Have Hanky Panky

The final chapter in the tortuous history of the sex.com case may have just been written. The Ninth Circuit's rejection this past March of the latest appeal by fugitive Stephen Michael Cohen of the \$65 million awarded to Gary Kremen as a result of the conversion of the sex.com domain name, probably ends the legal saga. Mr. Kremen has also settled his conversion claim against the one available "deep pocket," Network Solutions, Inc. ("NSI") who was the registrar in question. The settlement reportedly was for somewhere around \$15 million. In the course of this decade-long adventure, Mr. Kremen succeeded in blazing new trails in the field of registrar liability and domain name law. However, as was recently seen with the "slamming" of the panix.com domain, these lessons have still not succeeded in preventing further "hanky panky" with regard to such domains.

The sex.com case originated back in the "dark ages" of the Internet world: in 1994 before the explosion of the Web as a media for commercialization of goods and services, especially...pornography. When Mr. Kremen first registered sex.com, there was only one registrar registering names: NSI--and it was giving away the domain names for free! In fact, Mr. Kremen and the courts were forced to grapple with the thorny question of whether a domain name is property capable of being converted, because there was no enforceable contract, as he had paid no consideration for the domain. The method by which control of the domain was wrested away from Mr. Kremen was not so trailblazing, however. It was done the "old fashioned" way: by simple forgery and fraud.

Mr. Cohen sent a letter to NSI purporting to have come from Mr. Kremen's company, purporting to disclaim any interest in sex.com and asking Mr. Cohen to so inform NSI. The letter is purportedly signed by Mr. Kremen's then-housemate, though the court noted her signature was misspelled. NSI did nothing to verify the authenticity of the letter and transferred the registration of sex.com to Mr. Cohen who then built a multi-million dollar pornography empire around the domain, much to the chagrin of Mr. Kremen who by then, saw the value of a nice generic second level domain name such as "sex" in the .com space.

Millions of dollars and several court battles later, Mr. Kremen succeeded in procuring the return to him of the sex.com domain registration. To boot, he obtained a \$40 million compensatory and a \$25 punitive damages award against Mr. Cohen, who was last reported to have taken all his assets and left the country to somewhere where even bounty hunters (offered \$50,000 by Mr. Kremen), cannot seem to find him. Whether or not Mr. Kremen ever collects his judgment, and whether or not the case is finally over, issues remain.

Despite the Ninth Circuit's published opinion in *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003), the issue of whether a domain name registration is "property" subject to conversion remains open. The Ninth Circuit based its ruling on its self-described "grudging reading" of California law. It had offered the opportunity to clarify California law, by means of certified question, to the California Supreme Court but that court demurred. The Ninth Circuit noted that if it were necessary for it to do so it would hold

all property, tangible or intangible, as being capable of conversion and would reject the Restatement approach permitting conversion only where there is a merger of intangible property in some document (which the court figured could be electronic, such as the DNS system). It remains to be seen where the other circuits will come down on this debate.

But the times they are a changing. Today we have hundreds of registrars vying to register names in all sorts of TLDs (no longer just in .com). ICANN, a non-profit, private corporation today oversees the domain name system and approves contracts with registries and the terms for their agreements with registrars. ICANN recently adopted rules to facilitate the change of registrars (as NSI no longer is the sole player, yet many names were originally registered with NSI). In the process of doing so, the adopted Transfer Policy rules did not squarely place responsibility on any one person (such as the new registrar) to verify the authenticity of the transfer request. Problems have already arisen.

This past January, New York area ISP, panix.com found its domain had been transferred to a different registrar without its consent and the registration issued to a new owner purportedly in Las Vegas. Fortunately, the scam was promptly discovered and the actions reversed forthwith though subscribers of the ISP were without service for a weekend and presumably panix.com suffered real damages. In its investigation, ICANN expressed concern that the registrar had delegated the verification to a third party reseller, yet a proposed rule that would have required the registrar to have sole responsibility for doing just that had been rejected when ICANN adopted the new procedures.

In sum, the *Kremen v. Cohen* legal battles may be over, but it seems that another Sex.com is just waiting to happen. We will see where the courts come down the next round.

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