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Jurisdictional Limits of in rem Proceedings Against Domain Names

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NOTE

JURISDICTIONAL LIMITS OF *IN REM* PROCEEDINGS AGAINST DOMAIN NAMES

*Michael Xun Liu**

In 1999, Congress passed the Anticybersquatting Consumer Protection Act (ACPA) to combat "cybersquatters" who profited by registering domain names that were confusingly similar to established trademarks. Under the ACPA, trademark owners have a specific cause of action against domain name registrants accused of cybersquatting. Moreover, the law gives U.S. courts in rem *jurisdiction over trademark infringing domain names registered to parties that are not subject to personal jurisdiction. Over the past decade, proceeding* in rem *against domain names has proven to be an effective strategy for trademark owners. While many companies have used the ACPA against cybersquatters, others have relied on the* in rem *provision to secure domain names registered to foreign companies that happen to use a similar mark for their goods or services. From a policy perspective, this latter practice is troubling because it allows district courts to determine whether foreign companies can use their marks as domain names, even if these companies lack minimum contacts with the court's forum. To prevent such overreach, courts should limit the ACPA's* in rem *jurisdiction to domain names that were registered in a bad faith attempt to profit from another's trademark.*

INTRODUCTION

In 2013, Google launched dozens of balloons into the air.[1] Each balloon was equipped with antennas that broadcasted wireless Internet signals to the ground below.[2] The goal is to provide Internet access to places beyond the

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1.   Stephen Levy, *The Untold Story of Google's Quest to Bring the Internet Everywhere—By Balloon*, Wired (Aug. 13, 2013, 6:30 AM), http://www.wired.com/gadgetlab/2013/08/googlex-project-loon/.

2.   *Id.*

reach of conventional telecommunication infrastructure.[3] If this project is ultimately successful, individuals in remote rural areas can type "google.com" to access the same web portal that Internet users throughout the world have used for years. This is because "google.com" is a part of the domain name system (DNS) and serves as a singular identifier for the ubiquitous search engine regardless of where the user is located—a feature known as universal resolvability.[4] Over the past few decades, this function of the DNS has helped create a largely borderless Internet,[5] which has in turn fundamentally transformed communication and revolutionized global connectivity.[6] While the Internet and DNS matured without much regard to geography, the rule of law has always been constrained by state and national borders.[7] As such, universal resolvability often clashed with a set of jurisdictional principles that are still deeply rooted in territorialism. Faced with this tension, courts have often struggled to determine the proper scope of jurisdiction over the DNS.

Historically, jurisdiction was based on physical presence.[8] For example, in the traditional framework, a person domiciled in the state of Michigan was subject to Michigan's laws, as was his in–state property. Long before the advent of the Internet, this framework first began to buckle under the weight of an increasingly national economy. By the early twentieth century, the railroad and the automobile had revolutionized individual mobility and commercial operations, and the strictly territorial approach to jurisdiction seemed increasingly under–inclusive as a result.[9] The Supreme Court finally responded to the new national landscape by adopting a more flexible approach to jurisdiction in *International Shoe v. Washington*.[10] In *International Shoe*, the Court articulated a set of important principles underlying

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3.   *Id.*

4.   *How to Get Online: How the Domain Name System Works*, VERISIGN, http://www. verisigninc.com/en_US/why-verisign/education-resources/how-dns-works/index.xhtml?cmp= SEMG02:03 (last visited Nov. 17, 2013); *The Domain Name System: A Non-Technical Explanation – Why Universal Resolvability Is Important*, INTERNIC, http://www.internic.net/faqs/ authoritative-dns.html (last accessed Nov. 24, 2013).

5.   *Id.*

6.   James Manyika & Charles Roxburgh, *The Great Transformer: The Impact of the Internet on Economic Growth and Prosperity*, MCKINSEY & COMPANY (Oct. 2011), http:// www.mckinsey.com/insights/high_tech_telecoms_internet/the_great_transformer.

7.   *See, e.g.*, Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.").

8.   *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877).

9.   *See* Kimberley Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. LITIG. 239, 247 n.27 (1988) (describing how courts used the consent theory to circumvent the territoriality requirements of *Pennoyer*).

10.   Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement, 326 U.S. 310, 321-22 (1945); *see also* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (2011).

any exercise of jurisdiction,[11] the most important of which is that personal jurisdiction must comport with fair play and substantial justice.[12]

As the Internet reshapes the economy, the flexible standard of *International Shoe* has proved increasingly difficult to apply to the virtual world, and courts have struggled to develop a single coherent test for online jurisdiction.[13] This difficulty is especially apparent in the regulation of the DNS, where companies with similar or identical names compete to register their names. Moreover, some individuals purposefully register domain names containing trademarks they do not own in order to sell the domain names back to the trademark owners or purposely mislead consumers.[14] These practices are known as "cybersquatting."[15] To protect trademark owners against such exploitation, U.S. courts will frequently exercise jurisdiction over trademark infringing domain names, including those owned by foreign parties and targeted at foreign web users.[16]

In particular, the Anticybersquatting Consumer Protection Act (ACPA) grants *in rem* jurisdiction over a domain name to the jurisdiction where the domain name's registry or registrar is located.[17] With the ACPA, trademark owners can proceed *ex parte* against domain names, even if they cannot obtain personal jurisdiction over the domain name registrant.[18] For example, if a hypothetical family store in India named "Macy's" decided to launch a website under the domain "macys–store.com," the U.S. department store also named "Macy's" could seek *ex parte* cancellation of the domain name.[19] In this hypothetical case, a U.S. court sitting where "macys–store.com" is registered would have jurisdiction over the domain name—even if the Indian store does no business in the U.S. and the U.S. store has no trademark rights in India.

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11.   *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (due process limits on jurisdiction "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct"); Shaffer v. Heitner, 433 U.S. 186, 207 (1977).

12.   Shaffer, 433 U.S. at 207 (1977) ("The case for applying to jurisdiction *in rem* the same test of 'fair play and substantial justice' as governs assertions of jurisdiction in personam is simple and straightforward. It is premised on recognition that '(t)he phrase, 'judicial jurisdiction over a thing', is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing.'").

13.   Erin F. Norris, Note, *Why the Internet Isn't Special: Restoring Predictability to Personal Jurisdiction*, 53 Ariz. L. Rev. 1013, 1023 (2011).

14.   Thomas R. Lee, *In Rem Jurisdiction in Cyberspace*, 75 Wash. L. Rev. 97, 104 (2000).

15.   *Id.*

16.   Cable News Network, LP v. CNNews.com, 56 F. App'x 599, 603 (4th Cir. 2003).

17.   Anticybersquatting Consumer Protection Act, Pub. L. No. 106-113, § 3002, 113 Stat. 1501, 1501A–547 (1999)

18.   *Id.*

19.   *Cf.* Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214 (4th Cir. 2002) (exercising *in rem* jurisdiction over sixty domain names that infringe the British department store Harrods's trademark).

While this exercise of jurisdiction may comport with the constitutional standard for *in rem* proceedings against traditional property, such *ex parte* actions against domain names undermine important policy principles behind limits on jurisdiction. These broad assertions of jurisdiction invade the province of foreign national sovereignty, undermine the ability of parties to structure their conduct in accordance with their legal obligations, and create procedural unfairness for foreign parties. To address this concern, this Note argues that, rather than canceling any foreign domain name that violates U.S. trademark laws, courts should only exert *in rem* jurisdiction over domain names that were registered in a bad faith attempt to profit from another's trademark. Imposing this bad faith requirement would not only support rational policy interests, but would also be more consistent with the language and purpose of the ACPA.

The remainder of this Note is organized in five parts. Part I provides a brief background of jurisdiction in the United States and explains important policy justifications behind limits on jurisdiction. Part II examines the architecture of the DNS and the legal status of domain names. Part III introduces the problem of cybersquatting and describes how trademark owners have used the ACPA to combat this practice. This part will also discuss the constitutionality of *in rem* actions under the ACPA as well as whether *in rem* jurisdiction should be limited to domain names registered in bad faith. Part IV explains why *in rem* actions under the ACPA violate important policies for jurisdictional limits, even if they comport with the current standard for due process. Finally, Part V argues that courts should be required to find that a domain name was registered in bad faith before it can exercise *in rem* jurisdiction.

I. PRINCIPLES OF JURISDICTION

A core tenet of law is that a court must have jurisdiction over a dispute before it can render a valid judgment.[20] Without jurisdiction, any decision "is a mere nullity, and incapable of binding such persons or property in any other tribunals."[21] Jurisdiction comes in several flavors. First, a court must be able to hear the specific kind of claim that is brought before it.[22] This is known as subject matter jurisdiction.[23] Second, the court must have power over the parties involved or the property in dispute.[24] Individuals are subject to personal jurisdiction, while property is subject to *in rem* jurisdiction.[25]

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20. Pennoyer v. Neff, 95 U.S. 714, 722-23 (1877) (citing Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2).

21. *Id.*

22. Restatement (Second) of Judgments § 11 (1982).

23. *Id.* § 11 cmt. a.

24. *Id.* § 5-6.

25. *Id.*

Taken together, these rules protect important systemic and individual interests.

A. *Subject Matter Jurisdiction*

In the U.S., the federal system divides subject matter jurisdiction between the state and national government.[26] State courts have general jurisdiction, which allows them to "adjudicate any justiciable controversy that is not exclusively consigned to some other tribunal."[27] Federal courts, on the other hand, are courts of restricted jurisdiction.[28] By statute, federal courts can only adjudicate claims that arise under the Constitution, federal laws, international treaties, and those cases that meet diversity jurisdiction requirements.[29]

On the international level, subject matter jurisdiction is still based on territoriality. There are a variety of circumstances that will give a domestic court jurisdiction over an international dispute. For example, a court in any country has jurisdiction over conduct that occurs in its territory, persons and property within its borders, or extraterritorial conduct that has a substantial effect in its territory.[30] The last basis of international jurisdiction, known as the effects doctrine, can give courts considerable power over foreign conduct and often creates international tension.[31] For example, in *Alcoa v. Aluminum Co. of America*, the Second Circuit held that a foreign company was subject to U.S. antitrust laws because their overseas conduct had intended effects on the U.S. aluminum market.[32] Likewise, in *Steele v. Bulova Watch Co.*, the Supreme Court upheld an injunction against the sale of counterfeit Bulova watches in Mexico because the trademark infringement would affect U.S. commerce.[33] Both cases demonstrate the breadth of jurisdiction under the effects doctrine, as the courts adjudicated disputes in which the relevant parties and alleged conduct were entirely foreign.

B. In personam *Jurisdiction*

Historically, the concept of personal jurisdiction was also firmly rooted in principles of territoriality. States, as *quasi*–sovereign entities, could not exert power over parties beyond their borders.[34] As industry and technology

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26.   *Id.* § 11 cmt. a.
27.   *Id.*
28.   *Id.*
29.   28 U.S.C. §§ 1331-32 (2012).
30.   RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987).
31.   Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89, 94, 100-01 (2003).
32.   United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945).
33.   Steele v. Bulova Watch Co., 344 U.S. 280 (1952).
34.   Pennoyer v. Neff, 95 U.S. 714 (1877).

evolved in the late 19th and early 20th centuries, courts increasingly found that territorial limits unduly constrained their ability to regulate interstate companies.[35] In 1945, the Supreme Court formally abandoned the principle of strict territoriality in *International Shoe v. Washington*, and instead held that courts may extend personal jurisdiction to anyone with "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[36]

Over the next decades, courts struggled to make sense of this "minimum contacts" requirement. In the modern era, courts require defendants to have purposefully availed themselves of the privileges of doing business in the forum state in order to satisfy the minimum contacts test.[37] For example, in 1980, the Supreme Court held in *World–Wide Volkswagen v. Woodson* that a state did not have jurisdiction over a manufacturer simply because its products might foreseeably be used in that state.[38] In that case, a plaintiff was injured in Oklahoma while driving a car he purchased in New York.[39] The Oklahoma court found jurisdiction over the New York automobile distributors because they sold products that were "by [their] design and purpose so mobile that [defendants could] foresee [their] possible use in Oklahoma."[40] The Supreme Court reversed, holding that foreseeability is not enough for jurisdiction.[41] Instead, jurisdiction requires that "defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."[42]

In 2011, the Court reaffirmed the *World–Wide Volkswagen* principles in *J. McIntyre Machinery v. Nicastro,* where it held that a foreign manufacturer could not be haled into a New Jersey court to face a product liability lawsuit.[43] There, a worker in New Jersey was injured by a metal shearing machine manufactured by J. McIntyre Machinery, an English company.[44] J. MacIntyre argued that it was not subject to New Jersey's jurisdiction because only four of its machines were in New Jersey, and a third–party distributor sold those machines.[45] The Court accepted this argument, and held that J. McIntyre did not "engage in any activities in New Jersey that reveal[ed] intent to invoke or benefit from the protection of its laws."[46] In so

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35.   *See* Dayton, *supra* note 9, at 247 n.27.

36.   Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement, 326 U.S. 310, 316 (1945).

37.   *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

38.   *Id.* at 299.

39.   *Id.* at 287.

40.   *Id.* at 290 (citation omitted).

41.   *Id.* at 295-96.

42.   *Id.* at 297.

43.   J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2791 (2011).

44.   *Id.* at 2786.

45.   *Id.* at 2790.

46.   *Id.* at 2791.

holding, Justice Kennedy emphasized that personal jurisdiction requires a "sovereign–by–sovereign" analysis, and framed the question as "whether a defendant has followed a course of conduct directed at the [. . .] given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."[47]

C. *Power Over Property:* in rem *Jurisdiction and* quasi–in–rem *Jurisdiction*

Apart from jurisdiction over individuals and parties, courts may also proceed against property through *in rem* jurisdiction.[48] This form of jurisdiction is often described as the "determination of title to or the status of property located—physically or legally—within the court's jurisdiction."[49] Unlike actions *in personam*, jurisdiction *in rem* is still constrained to the territorial restrictions of *Pennoyer v. Neff*.[50] In other words, a court can exert power over property in its borders, but cannot reach extraterritorial property.

There are two types of *in rem* jurisdiction: true *in rem* jurisdiction and *quasi–in–rem* jurisdiction.[51] True *in rem* jurisdiction determines all claims that anyone in the world may have to the property in question, whereas *quasi–in–rem* jurisdiction determines claims to the property in question between identifiable parties.[52] For instance, a court exercising true *in rem* jurisdiction over real property can clear all title to the land, regardless of who the claimant is.[53] By contrast, a court that is partitioning land between two individuals is exercising *quasi–in–rem* jurisdiction because it is adjudicating the claims of specific parties.[54]

Examples of true *in rem* proceedings include admiralty liens, civil forfeiture, title clearance or registration, and estate settlements.[55] Of these proceedings, civil forfeiture has become an increasingly prominent—and controversial—tool for federal law enforcement over the past decades.[56] Under this doctrine, the state can seize property used to commit a crime even

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47.   *Id.* at 2789.
48.   Restatement (Second) of Judgments § 30 (1982).
49.   4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1070 (3d ed. 2002) [hereinafter Wright & Miller].
50.   *Id.*; Pennoyer v. Neff, 95 U.S. 714 (1877) (holding that a state's exercise of jurisdiction is based on territoriality).
51.   Restatement (Second) of Judgments § 6 (1982).
52.   *Id.* at cmt. a.
53.   *Id.* at cmt. b.
54.   Holly S. Haskew, Comment, *Shaffer, Burnham, and New York's Continuing Use of Qir-2 Jurisdiction: A Resurrection of the Power Theory*, 45 Emory L.J. 239, 239 (1996).
55.   Restatement (Second) of Judgments § 30 cmt. a (1982).
56.   *See, e.g.*, Alan Nicgorski, Comment, *The Continuing Saga of Civil Forfeiture, the "War on Drugs," and the Constitution: Determining the Constitutional Excessiveness of Civil Forfeitures*, 91 Nw. U. L. Rev. 374, 376 (1996).

if the property's owner is innocent.[57] First deployed in the 1970s for the War on Drugs, civil forfeiture has now emerged as the signature weapon in the Department of Justice (DOJ) and Immigration and Customs Enforcement's (ICE) crackdown on foreign–owned domain names.[58]

In *quasi–in–rem* jurisdiction, the underlying dispute may involve the property itself or could be entirely unrelated to the property.[59] In the latter scenario, the court is essentially attaching the defendant's property as a proxy for *in personam* jurisdiction.[60] As such, *quasi–in–rem* jurisdiction seemed to allow courts to skip minimum contacts analysis when the defendant had property located in the forum. Responding to this incongruity, the Supreme Court greatly curtailed *quasi–in–rem* jurisdiction in *Shaffer v. Heitner*.[61] There, the Court held that any exercise of *quasi–in–rem* jurisdiction must also comport with the minimum contacts test.[62] In *Shaffer*, the Delaware Chancery Court exercised jurisdiction over corporate directors by sequestering their stocks in a Delaware corporation.[63] However, the underlying dispute involved activities that took place entirely in Oregon, and the directors had no significant contacts with Delaware other than the presence of their shares.[64] In rejecting Delaware's exercise of jurisdiction, the Supreme Court emphasized that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[65] In other words, courts are not free to ignore the minimum contacts test simply because the defendant owns property in their jurisdiction.[66]

Even after *Shaffer*, courts can continue to exercise *quasi–in–rem* jurisdiction when the underlying dispute involves the property itself.[67] Unlike in *Shaffer*, where the lawsuit was unrelated to the sequestered stocks, claims against property have a closer relationship with the state where the property is located.[68] As Justice Marshall stated in *Shaffer*: "when claims to the prop-

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57.   Astol Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974) ("[T]he innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense.").

58.   *See, e.g.*, D.J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 79 (1996); Karen Kopel, *Operation Seizing Our Sites: How the Federal Government Is Taking Domain Names Without Prior Notice*, 28 BERKELEY TECH. L.J. 859, 863 (2013).

59.   The former is often referred to as *quasi-in-rem* type 1, whereas the latter is known as *quasi-in-rem* type 2. WRIGHT & MILLER, *supra* note 49, § 1072.

60.   *Id.*; *see also* Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977).

61.   Shaffer v. Heitner, 433 U.S. 186 (1977).

62.   *Id.* at 212.

63.   *Id.* at 192-93.

64.   *Id.*

65.   *Id.* at 212.

66.   *Id.*

67.   *Id.* at 207-208.

68.   *Id.*

erty itself are the source of the underlying controversy . . . it would be unusual for the State where the property is located not to have jurisdiction."[69]

D. *Policy Rationales for Jurisdictional Limits*

Although limits on jurisdiction have evolved significantly over the past century and still remain somewhat unsettled,[70] courts have emphasized a set of basic policy considerations present in any exercise of jurisdiction.[71] Most importantly, limits on jurisdiction (1) further systemic interests by weighing federalism and sovereignty interests and (2) protect individual interests such as procedural fairness and liberty interests.[72]

1. Limits on Jurisdiction Further Systemic Interests

Limitations on jurisdiction play an important role in furthering systemic interests by maintaining federalism, preventing encroachment on foreign national sovereignty, and promoting international comity.[73] As one commentator concisely stated, "[j]urisdictional rules are fundamental because they describe community expectations about the reach of sovereign power."[74]

Such systemic interests do more than provide theoretical justification for jurisdictional limits—they serve important practical functions as well. On the international level, perceived encroachment on national sovereignty can lead nations to adopt blocking statutes that hamper international comity and cooperation.[75] For example, courts have read U.S. antitrust laws to grant jurisdiction over any anticompetitive activity that substantially affects U.S. commerce, even if the alleged activities takes place entirely abroad.[76] This

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69.   *Id.*

70.   *Calder v. Jones* is one example of an alternative approach, where the court found that jurisdiction was proper because the alleged tortious conduct was intended to cause effects in the forum state. Calder v. Jones, 465 U.S. 783, 789 (1984).

71.   Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U. L. Rev. 1112, 1113-14 (1981).

72.   *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980) ("The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."); Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement, 326 U.S. 310, 319 (1945).

73.   *See*, *e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (2011); Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 Am. J. Comp. L. 579, 584-85 (1983).

74.   Maier, *supra* note 73, at 580-81.

75.   Chang, *supra* note 31, at 101.

76.   Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795 (1993); United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945). *But see* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (holding that U.S. courts do not have jurisdiction under the Sherman Act in a case where the plaintiff's claims are solely based on foreign harm caused by foreign conduct).

exercise of U.S. jurisdiction has been a source of consternation in U.S. foreign relations throughout the twentieth century.[77] For example, during a U.S. inquiry into alleged uranium price-fixing by a foreign cartel in the 1970s, the U.K. barred the U.S. Department of Justice's attempt to investigate several companies in Great Britain that allegedly participated in the conspiracy.[78] In that case, the U.K.'s Attorney General convinced the House of Lords that "the wide investigatory procedures under the United States . . . legislation . . . constitute an infringement of the proper jurisdiction and sovereignty of the United Kingdom."[79] In addition to clashing with the U.K, this investigation also prompted Australia, where several of the alleged conspirators were based, to pass legislation blocking evidence production in cases that affect Australian national interest.[80] Such legislation makes international cooperation more difficult,[81] as well as hampers private litigation by decreasing access to evidence and creating an unfair playing field between domestic and foreign litigants.[82]

2. Limits on Jurisdiction Protect Individual Liberty Interests and Procedural Fairness

In addition to furthering systemic interests, limits on jurisdiction also protect party expectations and avoid the creation of incompatible legal obligations for litigants.[83] As the Court stated in *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee*, "[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest."[84]

Most importantly, jurisdictional limits prevent burdensome and unforeseeable litigation. This is especially pertinent for foreign litigants, who may be compelled to litigate in a distant and unfamiliar court. The Supreme Court put significant weight on this issue in *Asahi Metal Industry v. Superior Court of California*.[85] There, the Court held that California did not have jurisdiction over a Japanese supplier of a tire component that caused an acci-

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77.   *See* David Lord Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 Nw. J. Int'l L. & Bus. 1 (1979).

78.   M.A. Blythe, Comment, *Extraterritorial Impact of the Anti-Trust Laws: Protecting British Trading Interests*, 31 Am. J. Comp. L. 99, 115 (1983); Laurence W. Maher, *Antitrust Fall-out: Tensions in the Australian-American Relationship*, 13 Fed. L. Rev. 105, 105-07 (1982).

79.   Blythe, *supra* note 78, at 115.

80.   Maher, *supra* note 78, at 107.

81.   *See e.g.*, Mark J. Sadoff, *Hague Evidence Convention: Problems at Home of Obtaining Foreign Evidence*, 20 Int'l Law. 659 (1986).

82.   Note, *Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests, and Treble Damages*, 50 Law & Contemp. Probs. 197, 212 (1987).

83.   World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980).

84.   Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

85.   Asahi Metal Indus. v. Superior Court of Cal., 480 U.S. 102, 114-116 (1987).

dent in California.[86] *Asahi* started as a products liability case, but ultimately turned on an indemnity clause between the Japanese supplier and a Taiwanese manufacturer.[87] In opposing California's exercise of jurisdiction, the Japanese supplier protested that it "ha[d] never contemplated that its limited sales [of components] to [a manufacturer] in Taiwan would subject it to lawsuits in California."[88] The Court sided with the Japanese supplier, and found that it would be a significant burden for the defendant to "not only to traverse the distance between . . . Japan and . . . [California], but also to submit its dispute with [the plaintiff] to a foreign nation's judicial system."[89] Likewise, the Court recognized that "the unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness" of extraterritorial jurisdiction.[90]

In addition, over–extensive jurisdiction over foreign entities can create inconsistent, and occasionally incompatible, legal obligations.[91] *United States v. Imperial Chemical Industries* is a notable example of this problem.[92] There, the district court, exercising jurisdiction under the effects doctrine, found that Imperial Chemical Industries (ICI), an English company, violated U.S. law through its patent licensing practices and ordered ICI to assign certain patents to DuPont.[93] This assignment, however, would have violated a prior license agreement with another English company.[94] In light of ICI's untenable position, the English court blocked enforcement of the U.S. order, and ordered the company to uphold its prior license agreement.[95]

Over the long term, clear limitations on jurisdiction help foster a stable and predictable environment for commercial activity.[96] Businesses need to know their legal obligations in order to plan ahead and make rational decisions. This becomes more difficult when managers are uncertain as to which sets of laws they are subject. Jurisdiction limitations imposed by "the Due Process Clause . . . give[ ] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some

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86.   *Id.*
87.   *Id.* at 106.
88.   *Id.* at 107.
89.   *Id.* at 114.
90.   *Id.* at 103.
91.   United States v. Imperial Chem. Indus., 105 F. Supp. 215 (S.D.N.Y. 1952); Kenneth R. Feinberg, *Economic Coercion and Economic Sanctions: The Expansion of United States Extraterritorial Jurisdiction*, 30 Am. U. L. Rev. 323, 335 (1981).
92.   *Imperial Chem.*, 105 F. Supp. 215.
93.   *Id.* at 228.
94.   P. Capps, M.D. Evans, S.V. Konstadinidis, Asserting Jurisdiction: International and European Legal Perspectives 112 (Patrick Capps et al. eds., 2003).
95.   *Id.*
96.   *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement, 326 U.S. 310, 319 (1945) (emphasizing that limits on personal jurisdiction ensure the "orderly administration of laws").

minimum assurance as to where that conduct will and will not render them liable to suit."[97] Without such limits, it would be difficult for businesses and individuals to operate with knowledge of their legal duties, thus creating unpredictability and inefficiency.

Although the national and global economy has changed dramatically since *International Shoe*, the legal and policy justifications behind minimum contacts and jurisdictional limits remain relevant. Even as commerce becomes increasingly electronic, businesses and individuals still need to discern their legal obligations and plan accordingly. Within the new global economy, the Internet has become one of the primary drivers of economic growth.[98] Companies increasingly reach their customers online, and their virtual presence is often as important as their physical locations, if not more so. In order for individuals and businesses to structure their conduct in accordance with their legal obligations, they must be aware of where they could be liable for suit for their online activities. Likewise, globalization has not washed away traditional borders entirely, so respect for national sovereignty continues to demand reasonable limits on extraterritorial jurisdiction. As such, it is important for courts and legislators to carefully apply jurisdictional limits to the Internet and its core components, including the DNS.

II. THE DOMAIN NAME SYSTEM

Since its humble beginnings as a simple way to look up network addresses, the Domain Name System (DNS) has evolved into the primary gateway for the Internet. VeriSign, one of the largest domain name registries on the Internet, estimated that there were over 252 million total registered domain names at the end of 2012.[99] Individual domain names can have enormous social and commercial value. For example, "investing.com" sold for 2.45 million dollars in 2012.[100] Despite being such an important part of the global economy, the legal rights associated with domain names have proven difficult to characterize, and this lack of clarity has created considerable risk and uncertainty for companies and individuals.[101] To understand why it is difficult to apply traditional legal theories to the DNS, this part first explains the architecture of the DNS and then examines the legal status of domain names as a form of property.

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97.   *World-Wide Volkswagen*, 444 U.S. at 297.

98.   J. Manyika & C. Roxburgh, *supra* note 6.

99.   VeriSign, *The Domain Name Industry Brief*, 10 Verisign Domain Rep. 1, 2 (2013), *available at* http://www.verisigninc.com/assets/domain-name-brief-april2013.pdf.

100.   Heather R. Huhman, *Investing.com Domain Purchased for an Historic $2.45 Million*, Bus. Insider (Dec. 11, 2012 3:38 PM), http://www.businessinsider.com/investingcom-domain-purchased-for-an-historic-245-million-2012-12.

101.   Norris, *supra* note 13 at 1023 ("These varying approaches [to jurisdiction over the Internet] have left the doctrine in a tangled and unpredictable state.").

A. *The DNS Architecture*

The Internet is commonly defined as a network of electronic devices that use the Transmission Control Protocol/Internet Protocol (TCP/IP) to transmit and exchange data.[102] Each device on this network is identified by an Internet Protocol (IP) number, which is a set of binary numbers that indicates the network address of the device.[103] In order for one device to send data to another device, the sender must have the IP address of the receiving device.[104] For example, if a personal computer is trying to access a webpage on a server, the personal computer must have the IP address of the webpage's server.

The obvious way to access a website is to manually enter the IP address of its server, much like dialing a phone number. However, early in the Internet's history, its architects recognized that numeric strings are difficult to remember and enter.[105] To solve this problem, computer scientists set up a directory that matched English language names with network addresses.[106] This way, users could look up the English language name on the directory, which would direct computers to the correct network address. In this early system, a copy of the directory was locally stored on every networked computer.[107] As such, each local directory file had to be updated whenever a network address was changed or added, making the system difficult to manage and scale up.[108] In response to these shortfalls, researchers proposed a hierarchal distributed system of directories.[109] Instead of using locally–saved directories, the proposed system would store directories on multiple remote servers.[110] Networked computers would access the remote directory to match names with IP addresses, thus eliminating the need to update a local file on every computer. This system eventually evolved into the modern DNS.

Concisely stated, the DNS allows users to access websites by entering a domain name instead of an IP address.[111] The DNS naming convention uses a series of characters separated by the "." sign.[112] The characters after the

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102.   *Definition of Internet*, The Networking and Information Technology Research and Development Program, http://www.nitrd.gov/fnc/Internet_res.aspx (last visited Nov. 16, 2013).

103.   Timothy Rooney, Introduction to IP Address Management 2 (2010).

104.   *Id.*

105.   National Research Council Computer Science and Telecommunications Board, Signposts in Cyberspace: The Domain Name System and Internet Navigation 40 (2005).

106.   *Id.* at 39-40.

107.   *Id.*

108.   *Id.*

109.   *Id.* at 40.

110.   *Id.*

111.   *Id.* at 34.

112.   *About gTLDs*, Internet Corp. for Assigned Names & Numbers, http://www.icann.org/en/resources/registries/about (last visited Nov. 16, 2013).

last "." correspond to the top–level domain (TLD).[113] The characters immediately preceding the last "." correspond to the second–level domain (SLD).[114] For example, in the domain name "umich.edu," the TLD is ".edu," while the SLD is "umich." Domain names may have further subdomains that designate a particular division of a website. For example, in the domain name "law.umich.edu," the term "law" is a subdomain of "umich."

As mentioned earlier, the DNS is hierarchal. At the top of the hierarchy, there is a "root file" that serves as a directory for TLDs.[115] The "root file" is stored on hundreds of root servers around the world, and is maintained by the Internet Assigned Names Authority.[116] Under the root file, registry servers manage all domain names ending with any particular TLD.[117] For example, VeriSign, Inc., is the registry for all domain names that end in ".com."[118] Finally, the registries generally contract with registrars, which sell individual domain names to members of the public.[119]

B. *Legal Status of Domain Names*

When disputes about domain name ownership inevitably arise, most courts have treated domain names as a form of property.[120] For example, in *Kremen v. Cohen*, the Ninth Circuit held that domain names are property because they represent a well–defined interest capable of exclusive control.[121] There, the court noted "registering a domain name is like staking a claim to a plot of land at the title office. It informs others that the domain name is the registrant's and no one else's."[122]

Academic commentators have been quick to point out problems in this logic.[123] If registering a domain name is truly analogous to staking a claim to land, then individuals who speculate on domain names containing trade-

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113.   *Id.*

114.   *Id.*

115.   *Root Servers*, INTERNET ASSIGNED NUMBERS AUTHORITY, http://www.iana.org/domains/root/servers (last visited Nov. 16, 2013).

116.   *Id.*

117.   *What Does ICANN Do?*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, http://icann.org/en/participate/what-icann-do.html (last visited Aug. 13, 2010).

118.   *Fact Sheet*, VERISIGN, http://www.verisigninc.com/en_US/company-information/about-verisign/fact-sheet/index.xhtml (last visited Nov. 16, 2013).

119.   Scott P. Sonbuchner, Note, *Master of Your Domain: Should the U.S. Government Maintain Control over the Internet's Root?*, 17 MINN. J. INT'L L. 183, 186 (2008).

120.   Daniel Hancock, *You Can Have It, but Can You Hold It?: Treating Domain Names As Tangible Property*, 99 KY. L.J. 185, 194 (2011).

121.   Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003); *but see* In re Alexandria Surveys Int'l, 500 B.R. 817, 821-22 (E.D. Va. 2013) (holding that, in the context of a bankruptcy dispute, a domain name is a contractual right instead of a property right).

122.   *Id.*

123.   Jacqueline D. Lipton, *Bad Faith in Cyberspace: Grounding Domain Name Theory in Trademark, Property, and Restitution*, 23 HARV. J.L. & TECH. 447, 454 (2010).

marks should have a property right in those names.[124] However, such registrants cannot keep their domain name if they do not own the trademark.[125] The reason is, as one scholar explains, that "a trademark holder has some rights in a domain name corresponding with her mark as a matter of trademark policy. A real property holder, on the other hand, has no pre–existing rights in adjacent land."[126]

Despite any conceptual hurdles to classifying domain names as property, this characterization allows courts to exert *in rem* jurisdiction over domain names based on where the domain names are registered.[127] Proceedings *in rem* give private parties and government agencies powerful weapons to enforce intellectual property rights. For trademark owners, *in rem* jurisdiction allows for *ex parte* proceedings against domain names, thus eliminating the need for personal jurisdiction over the registrant.[128] Similarly, characterizing domain names as property subjects them to civil forfeiture; a tactic used by the DOJ and ICE to seize hundreds of domain names.[129]

The remainder of this Note will focus on *in rem* jurisdiction over domain names, and examines whether such jurisdiction supports the policy rationales previously discussed. Under the Anticybersquatting Consumer Protection Act (ACPA), trademark owners can proceed *in rem* against a domain name if the name infringes or dilutes a valid trademark.[130] Although such proceedings do not violate the due process standard set by *International Shoe* and its progeny, this exercise of jurisdiction is inconsistent with basic rationales for limiting jurisdiction. Moreover, exercising *in rem* jurisdiction over domain names that were not registered in bad faith also violates the spirit and text of the ACPA.

III. *IN REM* JURISDICTION UNDER THE ACPA

The ACPA is an amendment to § 43 of the Lanham Act, and constitutes the key legislation that regulates domain name disputes in the United States.[131] Under the ACPA, "a person shall be liable in a civil action by the owner of a mark . . . if . . . that person" registers, traffics, or uses a domain name that is confusingly similar or likely dilutive of the owner's mark and does so in bad faith.[132] Moreover, the ACPA also gives trademark owners the right to file an *in rem* action against a domain name registrant in any

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124.   *Id.*
125.   *Id.*
126.   *Id.* (footnote omitted).
127.   *See* 15 U.S.C. 1125(d)(2) (2012).
128.   *Id.*
129.   Kopel, *supra* note 58, at 863.
130.   Anticybersquatting Consumer Protection Act, Pub. L. No. 106-113, § 3002, 113 Stat. 1501 (1999).
131.   *Id.*
132.   *Id.*

jurisdiction where the "domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located" if the mark owner cannot obtain personal jurisdiction over the registrant.[133]

This part first looks at the background of the ACPA and how courts have applied the law. Second, it will examine how the Fourth Circuit held that *in rem* jurisdiction is not limited to domain names registered in bad faith. Finally, this part looks at potential constitutional issues presented by *in rem* jurisdiction over foreign–owned domain names.

A. *Background of the ACPA*

With the advent of the DNS, enterprising individuals quickly realized the commercial value of domain names.[134] Soon enough, domains such as "sex.com" and "drugs.com" started cropping up on the Internet, even before there were any legitimate businesses behind the domain names.[135] More problematically, domain names comprised of valuable trademarks were being registered by parties entirely unrelated with the actual trademark owners.[136] Some of these registrants hoped to sell the domain name back to the trademark owner for a profit, while others purposely misled consumers "about the source of product or services on the Internet."[137] These practices eventually became known as "cybersquatting."[138]

Trademark owners initially responded by arguing that domain name registrants were diluting the value of their marks under the Lanham Act.[139] The problem, however, is that trademark law only imposes liability if the alleged infringer has used the mark in commerce.[140] Since many cybersquatters never sold products or provided services through their domain names, it is unclear if they used any trademark in commerce.[141] There was another problem as well. While some trademark owners successfully sued identifiable registrants in the U.S.,[142] this strategy was useless against unidentifiable domain name registrants or those beyond the scope of U.S. jurisdiction.[143]

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133.   *Id.*

134.   Jessica Litman, *The DNS Wars: Trademarks and the Internet Domain Name System*, 4 J. Small & Emerging Bus. L. 149, 151 (2000).

135.   *Id.*; Christine Soares, *Are Domain Name Property? The Sex.com Controversy*, 2001 Duke L. & Tech. Rev. 32 (2001).

136.   *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998); Litman, *supra* note 134 at 155 (describing how this practice became derisively known as "cybersquatting").

137.   Lee, supra note 14, at 104.

138.   *Id.* at 105-06.

139.   *Id.*

140.   15 U.S.C. §§ 1114, 1125 (2012); Litman, *supra* note 134, at 154.

141.   *See, e.g.*, Litman, *supra* note 134, at 154.

142.   *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998).

143.   Lee, *supra* note 14, at 106.

To get around these obstacles, some trademark owners attempted to proceed *in rem* against cybersquatting domain names under the Lanham Act.[144] Before the ACPA, these attempts were often unsuccessful.[145] For example, in *Porsche Cars v. Porsch.com*, the district court dismissed Porsche's dilution claim for lack of jurisdiction.[146] In that case, Porsche filed an *in rem* action against multiple trademark infringing domain names, including "Porsche.net" and "Porscheclub.net."[147] Rejecting Porsche's arguments, the court held that it could only exercise *in rem* jurisdiction "either (1) if a federal statute so provides; or (2) if state law so permits and personal jurisdiction over the property owner cannot be had."[148] Accordingly, the court found that the Lanham Act did not permit *in rem* actions and the state law did not recognize claims for trademark dilution.[149]

In response to cases such as *Porsche Cars*, Congress passed the Anticybersquatting Consumer Protection Act (ACPA) in 1999.[150] The ACPA amended the Lanham Act so that anyone who registers a domain name to profit from the goodwill of another's trademark may be liable for damages.[151] The first section of the ACPA, codified at 15 U.S.C. § 1125(d)(1), creates personal liability against parties who registered trademark infringing domain names in bad faith.[152] Additionally, § 1125(d)(1) articulates a non–exclusive list of factors to determine whether a domain name was registered in bad faith.[153]

Congress also attempted to address domain name registrants who are outside the reach of U.S. jurisdiction or cannot be located altogether.[154] The ACPA *in rem* provision, codified at 15 U.S.C. § 1125(d)(2), states that "[t]he owner of a mark may file an *in rem* civil action against a domain name in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located" if the owner "is not able to obtain in personam

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144.   *See, e.g.,* Porsche Cars N. Am., Inc. v. Porsch.Com, 51 F. Supp. 2d 707 (E.D. Va. 1999), *vacated and remanded sub nom.* Porsche Cars N. Am. Inc. v. AllPorsche Com., 215 F.3d 1320 (4th Cir. 2000), *aff'd in part, vacated in part sub nom.* Porsche Cars N. Am., Inc. v. Porsche.net, 302 F.3d 248 (4th Cir. 2002).

145.   *Id.*

146.   *Id.* at 713.

147.   *Id.* at 709-10.

148.   *Id.* at 711.

149.   *Id.* at 712-13.

150.   Lee, *supra* note 14, at 124 ("In direct response to the district court's ruling, Porsche and other prominent trademark holders urged Congress to clarify that in rem jurisdiction is appropriate in trademark actions against cybersquatters. These efforts culminated in the 'Anticybersquatting Consumer Protection Act,' which was signed into law by President Clinton on November 29, 1999.").

151.   *Cf.* 15 U.S.C. § 1125(d)(1)(A) (2012).

152.   *Id.*

153.   *Id.* § 1125(d)(1)(B)(i).

154.   *Id.* § 1125(d)(2)(A).

jurisdiction over a person who would have been a defendant in a civil action under [§ 1125 (d)(1)]."[155] Under this part of the law, a trademark owner who cannot hale a cybersquatter into court can commence an *ex parte* proceeding to cancel the infringing domain name.

American Girl v. Nameview helps illustrate how the ACPA bolstered the trademark owner's position against cybersquatters.[156] In that case, an unknown party registered the domain name "amercangirl.com."[157] Although this domain name appears very similar to the American Girl doll company's domain, it actually directed users to a pornographic website instead.[158] Understandably, American Girl sought a temporary restraining order in Wisconsin against the unknown website operator and its registrar in order to disable the domain name.[159] However, the Wisconsin court declined to grant the restraining order because the defendants' only known contact with the forum state was the website, which was not enough to satisfy the minimum contacts test.[160]

Instead of exercising personal jurisdiction, the court recommended that plaintiffs seek relief at the Eastern District of Virginia under the *in rem* provision of the ACPA.[161] Had American Girl done so, it could have asked the Virginia court to compel cancellation of the infringing domain name, regardless of whether the court had personal jurisdiction over any of the defendants.[162] Recall that registries for each TLD maintain a directory of all domain names under the TLD. By far, the most common TLD is ".com," which is generally used to designate commercial websites.[163] VeriSign Inc., the registry for ".com" and ".net," is based in Virginia.[164] Therefore, under the ACPA, the Eastern District of Virginia could exercise *in rem* jurisdiction over the infringing domain name.[165]

B. In rem *Jurisdiction and the Bad Faith Requirement*

Although the ACPA clearly covers flagrant cybersquatters such as the registrant in *American Girl*, it left some ambiguity regarding the outer limits of a court's *in rem* jurisdiction under the law. In particular, is *in rem* juris-

155.   *Id.*

156.   *See* Am. Girl, LLC v. Nameview, Inc., 381 F. Supp. 2d 876 (E.D. Wis. 2005).

157.   *Id.* at 878.

158.   *Id.*

159.   *Id.*

160.   *Id.* at 880-81.

161.   *Id.* at 882.

162.   *Id.* at 882-83.

163.   As of December 2012, there were 106.2 million domain names ending in ".com," out of a total of approximately 252 million domain names. VeriSign, *supra* note 99, at 2.

164.   *Am. Girl*, 381 F. Supp. 2d at 882.

165.   *Id.*

diction only available against domain names registered in bad faith?[166] Unlike personal liability under § 1125(d)(1), the *in rem* provision under § 1125(d)(2) does not explicitly contain a bad faith requirement.[167] However, § 1125(d)(2) cross–references "a person who would have been a defendant in a civil action under [§ 1125 (d)(1)]."[168] By doing so, it is unclear if § 1125(d)(2) also incorporates the bad faith requirement of § 1125(d)(1).

Presented with this ambiguity in *Harrods Ltd. v. Sixty Internet Domain Names*, the Fourth Circuit decided the cross–reference simply refers to any domain name registrant, regardless of whether they are acting in bad faith.[169] In *Harrods*, Harrods Ltd. (Harrods U.K.) sought an order to cancel sixty domain names registered in Virginia by an Argentinian competitor also named Harrods (Harrods SA).[170] Harrods SA could not be reached by in personam jurisdiction, so Harrods U.K. relied on *in rem* jurisdiction.[171] Although the district court "limited the scope of the *in rem* provision to claims under § 1125(d)(1) for bad faith registration," the Fourth Circuit reversed and "ultimately conclude[d] that § 1125(d)(2) is not limited to violations of § 1125(d)(1)."[172]

In overruling the lower court's findings, the Fourth Circuit held that "the best interpretation of § 1125(d)(2) is that the *in rem* provision not only covers bad faith claims . . . , but also covers infringement claims under § 1114 and § 1125(a) and dilution claims under § 1125(c)."[173] Starting with the statutory language, the court noted that § 1125(d)(2) grants *in rem* jurisdiction over any "domain name [that] violates *any right of the owner* of a [protected] mark."[174] Since "*any right*" of a mark owner is not limited to rights under §1125(d)(1), the court held that *in rem* jurisdiction under § 1125(d)(2) does not require the mark owner to prove bad faith.[175] Turning to the legislative history, the court found that Congress did not frame *in rem* jurisdiction "in terms of subsection (d)(1) or bad faith. . . . Rather, it sa[id] the *in rem*

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166.   *Compare* BroadBridge Media, LLC v. Hypercd.com, 106 F. Supp. 2d 505, 511 (S.D.N.Y. 2000) (finding that bad faith intent to profit is a necessary element for *in rem* proceedings under the ACPA), *with* Jack In The Box, Inc. v. Jackinthebox.org, 143 F. Supp. 2d 590, 592 (E.D. Va. 2001) ("The plain terms of the statute clearly state that the 'bad faith' analysis applies only to 15 U.S.C. § 1125(d)(1), the *in personam* prong, not 15 U.S.C. § 1125(d)(2), the *in rem* prong.").

167.   15 U.S.C. § 1125(d)(1)-(2) (2012).

168.   *Id.* § 1125(d)(2).

169.   Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 230 (4th Cir. 2002) ("[T]he phrase 'a person who would have been a defendant in a civil action under paragraph (1)' can fairly be understood as a short-hand reference to the current registrant of the domain name.").

170.   *Id.* at 222-23.

171.   *Id.*

172.   *Id.* at 228.

173.   *Id.*

174.   *Id.*

175.   *Id.* at 229.

action is available for domain names that violate 'substantive Federal trademark law' or which are 'infringing or diluting under the Trademark Act.'"[176] As such, the court reasoned that §1125(d)(2) covers a broader range of domain names than those registered in bad faith.[177] Although *Harrods* only represents the Fourth Circuit's reading of the ACPA, its holding had a broad impact because some of the world's most common TLDs are hosted by registries in Virginia.[178] As such, this interpretation allows district courts in Virginia to exercise *in rem* jurisdiction over a significant portion of domain names on the Internet without making a bad faith inquiry, including all domain names ending in ".com," ".net" and ".org."[179]

C. In rem *Jurisdiction and Due Process Concerns*

In light of the ACPA's broad conferral of jurisdiction over domain names registered by foreign entities, registrants have also argued that, under *Shaffer*, the ACPA *in rem* provision violates due process because it allows courts to exercise jurisdiction over parties that lack minimum contacts with the forum.[180] As described previously, *Shaffer* held that courts cannot use *in rem* jurisdiction to run around the minimum contacts requirement.[181] In that case, the Court noted that "in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient for 'jurisdiction over the interests of persons in a thing.'"[182]

To date, courts have correctly limited *Shaffer* to claims that do not involve the attached property, thus holding it inapposite to the exercise of *in rem* jurisdiction under the ACPA.[183] Unlike the plaintiffs' claim in *Shaffer*, the ACPA expressly precludes any claim that does not involve the domain name.[184] Therefore, all proceedings under § 1125(d)(2) must adjudicate

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176.   *Id.* at 231.

177.   *Id.*

178.   *See, e.g.*, *About Verisign*, VERISIGN, http://www.verisigninc.com/en_US/company-information/index.xhtml (last visited Apr. 16, 2014); *Get to know us*, PUBLIC INTEREST REGISTRY, http:www.pir.org/about-us/get-to-know-us/ (last visited Apr. 16, 2014).

179.   *Id.*

180.   *Harrods*, 302 F.3d at 224; Cable News Network LP v. CNNews.com, 177 F. Supp. 2d 506 (E.D. Va. 2001), *aff'd in part, vacated in part*, 56 F. App'x 599 (4th Cir. 2003). This issue was not lost on Congress when it drafted the ACPA. During committee hearings for the bill, Senator Orrin Hatch asked the counsel for Porsche about whether *in rem* actions against domain names raised due process concerns. Counsel replied by arguing that true *in rem* jurisdiction over domain names does not offend due process even if the registrant is not subject to personal jurisdiction. *Cybersquatting and Consumer Protection: Ensuring Domain Name Integrity: Hearing on S. 1255 Before the S. Comm. on the Judiciary*, 106th Cong. 65–67 (1999) (statement of Orrin G. Hatch, Chairman, Senate Judiciary Committee).

181.   Shaffer v. Heitner, 433 U.S. 186, 207 (1977).

182.   *Id.*

183.   *Harrods*, 302 F.3d at 224.

184.   15 U.S.C. § 1125(d)(2) (2012).

rights to the disputed property itself.[185] For *in rem* actions under the ACPA, "the location of the [ ] registry in [a forum] establishes the *situs* of the [ ] domain name . . . and thus provides jurisdiction for an *in rem* action against the domain name itself in [the forum]."[186]

Looking at the issue another way, *Shaffer* reaffirms the minimum contact standard under *International Shoe*, in which the contact strength needed to satisfy due process depends on the nature of the underlying dispute.[187] In *Shaffer*, Delaware's exercise of jurisdiction would have been proper if the dispute involved the sequestered stock certificates.[188] The contact established by the location of the stock certificates would have been sufficient for disputes closely related to the stocks, but not for disputes unrelated to the stocks.[189] Extending this logic to websites, the *situs* of the domain name is strong enough to confer jurisdiction over disputes related to the domain name, but not disputes unrelated to domain names. Therefore, exerting *in rem* jurisdiction over the domain name comports with the minimum contacts standard for due process.

Others, however, have argued that ACPA *in rem* proceedings are inconsistent with the existing framework for due process.[190] According to this argument, the ACPA only allows a trademark owner to proceed *in rem* if she cannot obtain personal jurisdiction over the domain name registrant.[191] *In rem* proceedings over domain names effectively adjudicate personal interests of the registrant, but *Shaffer* holds that such proceedings are subject to the same minimum contacts standard as personal jurisdiction.[192] Therefore, a court cannot constitutionally exercise *in rem* jurisdiction over a domain name if the court cannot obtain personal jurisdiction over the registrant.[193]

The registrant in *Harrods* raised this precise argument, contending that the Virginia court's exercise of *in rem* jurisdiction over its domain name violated due process because the registrant lacked minimum contacts with Virginia.[194] The court rejected this argument, and looked to dicta in *Shaffer* stating that "'when claims to the property itself are the source of the under-

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185.   *Id.*

186.   Am. Online, Inc. v. Aol.org, 259 F. Supp. 2d 449, 456-57 (2003).

187.   *Shaffer*, 433 U.S. at 207.

188.   *Id.* at 207-08.

189.   *Id.*

190.   *See, e.g.*, Michael P. Allen, In Rem *Jurisdiction from* Pennoyer *to* Shaffer *to the Anticybersquatting Consumer Protection Act*, 11 Geo. Mason L. Rev. 243, 245 (2002); Catherine T. Struve & R. Polk Wagner, *Realspace Sovereigns in Cyberspace: Problems with the Anticybersquatting Consumer Protection Act*, 17 Berkeley Tech. L.J. 989, 1006 (2002).

191.   Struve & Wagner, *supra* note 190, at 1006-07.

192.   *Id.*

193.   *Id.*; *see also* Adam M. Greenfield, *Reviving the Distinction Between In Rem and In Personam Jurisdiction by Way of the Anti-Cybersquatting Consumer Protection Act*, 35 AIPLA Q.J. 29, 32-33 (2007).

194.   Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 224 (4th Cir. 2002) (citing Shaffer v. Heitner, 433 U.S. 186, 208 (1977)).

lying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction.'"[195] Since the controversy here "is related to [the registrant's] rights and duties arising out of" its ownership of domain names registered in Virginia, a court in that state has jurisdiction.[196]

Similarly in *Cable News Network v. CNNews.com*, the Virginia Court also exercised *in rem* jurisdiction over a foreign–owned domain name despite the registrant's due process objections.[197] In that case, the registrant operated a Chinese language news website under the domain cnnews.com.[198] Additionally, the registrant also operated other websites with domain names starting with "CN," including "cnnav.com" and "cnsport.com"—all of which catered to Chinese audiences.[199] Believing that Internet users might attribute the source of cnnews.com to the Cable News Network (CNN), CNN secured a district court order to transfer cnnews.com from its Chinese registrant to CNN.[200] In response, the registrant protested that transferring its domain name would "unconstitutionally disrupt[ ] the contract between two foreign entities [and would be] tantamount to the issuance of an unconstitutional extraterritorial injunction."[201] As in *Harrods*, the court distinguished *in rem* jurisdiction under ACPA from the exercise of jurisdiction in *Shaffer*.[202] Because the dispute was over domain names, "there [was] no requirement that the owner or claimant of the *res* have minimum contacts with the forum [and] it [was] not necessary that the allegedly infringing registrant have minimum contacts with the forum."[203] The court emphasized that "due process is not offended by adjudicating the rights to the cnnews.com domain name in an ACPA *in rem* claim where, as here, the domain name certificate is located in this district."[204]

Although *in rem* jurisdiction under the ACPA comports with the Supreme Court's approach to due process, there is still a separate question of whether such proceedings against domain names violate important policies behind jurisdictional limits.

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195.   *Id.*
196.   *Id.*
197.   Cable News Network, LP v. CNNews.com, 56 F. App'x 599, 603 (4th Cir. 2003).
198.   *Id.*
199.   *Id.*
200.   Cable News Network LP v. CNNews.com, 177 F. Supp. 2d 506 (E.D. Va. 2001), *aff'd in part, vacated in part*, 56 F. App'x 599 (4th Cir. 2003).
201.   *Id.* at 527.
202.   *Id.*
203.   *Id.*
204.   *Id.*

IV. POLICY IMPLICATIONS OF *IN REM* JURISDICTION OVER DOMAIN NAMES

As Section I notes, jurisdictional principles serve systemic interests, protect individual liberty, and ensure procedural fairness.[205] The Supreme Court has stressed that any exercise of jurisdiction should be consistent with these principles and, when necessary, has modified jurisdiction rules so they continue to serve these policy concerns.[206]

In looking at the policy implications of the ACPA, it is important to consider that Congress may have envisioned that jurisdiction under the *in rem* provisions would be narrower than its current scope.[207] As previously discussed, the history of the ACPA suggests that it was largely designed to target cybersquatters who registered trademark infringing domain names.[208] Typically, such registrants tried to sell their domain names to the mark's owners or purposefully misdirected web users.[209] Therefore, cybersquatters often do not maintain actual webpages or host content that is entirely unrelated to the domain name, such as the cybersquatter in *American Girl*.[210] In these cases, there is a no nexus between the domain name and the underlying website, and it is sensible to separate the domain name from the underlying web content for jurisdictional purposes. In other words, the impact of *in rem* action is limited to the domain name itself in "true" cybersquatting cases.

In reality, however, parties do not always use the ACPA against "true" cybersquatters; they also invoke the *in rem* provision against domain names owned by legitimate foreign businesses.[211] As *Cable News* demonstrates, litigants have effectively relied on the ACPA to capture trademark rights in cyberspace through *ex parte* proceedings.[212] In such cases, the registrants were not simply cybersquatters who hoped to turn a quick profit by registering someone else's trademark. Rather, the disputed domain names were closely related to the registrant's underlying web content and business.[213] In this scenario, there is a strong nexus between the domain name and the registrant's web content, and it is far less sensible to separate the website from its domain name for jurisdictional purposes. Often, the two users of the mark existed in separate geographic areas until the universal accessibility of the Internet brought them into conflict. By exerting *in rem* jurisdiction over a disputed domain name, the court effectively determines which party has

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205.   *See supra* Part I.C-D.
206.   *See, e.g.*, Shaffer, 433 U.S. 186.
207.   *See supra* Part IV.A.
208.   H.R. Rep. No. 106-464, at 114 (1999) (Conf. Rep.).
209.   *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1318 (9th Cir. 1998).
210.   Am. Girl, LLC v. Nameview, Inc., 381 F. Supp. 2d 876, 878 (E.D. Wis. 2005).
211.   *See supra* Part IV.A.
212.   Cable News Network, LP v. CNNews.com, 56 F. App'x 599, 603 (4th Cir. 2003).
213.   For instance, the registrant in Cable News operated multiple websites with domain names that started with "CN." *Id.* at 601.

the right to use the mark on the Internet to signify their goods and services. District courts are certainly no stranger to adjudicating trademark disputes, and they are entirely capable of applying the Lanham Act to the virtual world.[214] The problem, however, is that many cases arising under the ACPA involve foreign parties that would never be subject to the U.S. trademark law but for the fact that the dispute involves a domain name. In other words, the ACPA allows courts to apply U.S. trademark law to international disputes between foreign parties.

Such a broad conferral of power undermines the traditional policy rationale behind jurisdictional limits in two important ways. First, *in rem* jurisdiction over domain names allows U.S. courts to overreach into international and foreign disputes. Second, *ex parte* proceedings against domain names violate party expectations and create unpredictability for businesses. Given the problems associated with the current scope of *in rem* jurisdiction, this Note argues that courts should require trademark owners to show bad faith on the part of the registrant before exercising *in rem* jurisdiction.

A. In rem *Jurisdiction Allows U.S. Courts to Overreach into Foreign Disputes*

In rem jurisdiction over domain names is inconsistent with systemic interests for jurisdictional limits because it allows district courts to adjudicate disputes that, in reality, have little connection to the United States.[215] *Harrods* helps illustrate this issue. In that case, Harrods BA and Harrods U.K. used the Harrods mark in Argentina and Great Britain independently.[216] Although Harrods BA's registration of multiple domain names may have been in bad faith, the underlying dispute still involved two foreign companies that did not have significant contacts with the United States.[217] Nonetheless, by exercising *in rem* jurisdiction over the domain names, the Eastern District of Virginia applied U.S. domestic law to adjudicate a dispute between foreign parties doing business in other countries.

The ACPA *in rem* provision's broad extraterritorial reach can also create incompatible legal obligations. For example, in *Globalsantafe v. Globalsantafe.com*, the Eastern District of Virginia ordered VeriSign to disable a domain name despite a conflicting order from a foreign court.[218] In that case, GlobalSantaFe filed an *in rem* action against Globalsantafe.com, a do-

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214.   *See, e.g.*, 1-800 Contacts, Inc. v. Lens.com, Inc., 755 F. Supp. 2d 1151 (D. Utah 2010).

215.   *See, e.g.*, Xuan-Thao N. Nguyen, *The Digital Trademark Right: A Troubling New Extraterritorial Reach of United States Law*, 81 N.C. L. Rᴇᴠ. 483 (2003).

216.   Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 220-21 (4th Cir. 2002).

217.   *Id.* at 223.

218.   Globalsantafe Corp. v. Globalsantafe.com, 250 F. Supp. 2d 610, 612 (E.D. Va. 2003).

main name registered by Fanmore, a Korean company.[219] The domain was also registered through a Korean registrar.[220] The district court ordered VeriSign and the Korean registrar to transfer the domain name to Global-SantaFe.[221] In the meantime, Fanmore convinced a court in Seoul, Korea to enjoin the Korean registrar from transferring the domain name because Virginia lacked jurisdiction over the dispute.[222] Notwithstanding the foreign injunction, the Virginia court nonetheless ordered VeriSign to unilaterally disable the domain name.[223] The court noted the potential international comity issue, but refused to cede jurisdiction because "the foreign proceeding did not commence until the matter had been fully adjudicated here" and because "the Korean proceeding was obviously begun with the intent of blocking the Judgment Order."[224]

By creating incompatible legal obligations for entirely foreign parties, the exercise of *in rem* jurisdiction over domain names undermines the orderly administration of laws. A state's sovereign interest in applying its own laws to its own domiciliaries is a fundamental part of an ordered international legal regime and a basic precept of territorialism.[225] As such, the Korean court in *Globalsantafe* had an interest in adjudicating the rights of Internet companies based in Korea. By exercising *in rem* jurisdiction at the registry level, however, the U.S. court imposed U.S. trademark law on both the Korean registrar and the Korean domain name registrant, thus undermining the Korean court's ability to regulate conduct in its own borders.

B. In rem *Jurisdiction Undermines Individual Interests*

In addition to overreaching into foreign disputes, the exercise of *in rem* jurisdiction under the ACPA also harms individual interests by undermining party expectations and creating procedural unfairness for foreign litigants. *In rem* jurisdiction undermines party expectations because there is often no relationship between the *situs* of the domain name and the registrant's actual activities. In establishing a web presence, individuals and companies work with a number of companies for web–hosting space, domain name registration, and other services.[226] The physical location of each service provider

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219.   *Id.*
220.   *Id.*
221.   *Id.* at 613-14.
222.   *Id.* at 614.
223.   *Id.* 626-27.
224.   *Id.* at 625.
225.   Howard B. Stravitz, *Sayonara to Fair Play and Substantial Justice?*, 63 S.C. L. Rev. 745, 764 (2012).
226.   Emma Lunn, *Self-Employment: How to Set Up Your Company Website*, The Guardian (Jul. 22, 2011, 6:01 PM), http://www.theguardian.com/money/2011/jul/22/self-employment-set-up-website.

usually has little impact on the website's functionality or accessibility.[227] This is especially true for the DNS, where the registry's location is largely meaningless from a practical standpoint. Likewise, generic TLDs such as ".com," and ".org" are fairly perceived as independent of any geographic territory. Many non–U.S. websites that exclusively target non–U.S. audiences use the ".com" TLD because it is perceived more favorably by consumers, regardless of geographic location.[228]

Given the lack of connection between the location of the registry and a company's online activities, registrants should not reasonably expect to defend their rights in a foreign forum simply because their domain name ends in ".com." *Cable News* helps illustrate this issue. In that case, the Chinese registrant of cnnews.com operated a series of websites with domain names that ended in ".com."[229] All of the websites provided Chinese language content, targeted Chinese web users, and only accepted payment from China.[230] The content of the website, along with any potential trademark infringement, bore no relationship with the physical location of the ".com" registry. In other words, the registry's location was inconsequential before CNN sued. Accordingly, it is hard to imagine that the Chinese registrant could have foreseen being haled into a Virginia court. By forcing the registrant to litigate in Virginia, the court imposed the hardships of litigating in a foreign forum on a party that had little reason to expect trial in the U.S.[231] This practice likewise erodes the legal predictability that businesses need to structure their online conduct.

Even assuming that registrants should foresee U.S. litigation for a ".com" domain name, defining the *situs* of a domain name by the location of the registry is still procedurally unfair for non–U.S. registrants. Under the ACPA, a foreign registrant is forced to choose between using non–U.S. based TLDs or face potential litigation in a U.S. court.[232] The problem is that the ".com" TLD, which is based in Virginia, remains the gold standard

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227. *See, e.g.*, *The Domain Name System: A Non-Technical Explanation – Why Universal Resolvability Is Important*, INTERNIC, http://www.internic.net/faqs/authoritative-dns.html (last visited Nov. 24, 2013). *But see* John Mueller, *Working with Multi-regional Websites*, GOOGLE WEBMASTER CENTRAL BLOG (Mar. 12, 2010, 7:50 AM), http://googlewebmastercentral.blogspot.com.es/2010/03/working-with-multi-regional-websites.html (explaining that the location of the webhosting server may impact how Google indexes the websites for geo-targeting services).

228. *See, e.g.*, Bob Cullinan, *.com, .net, .biz. . .Is There a Difference? Perception Says Yes, the Survey Says No; Lexicon Branding Survey Looks at the Real Differences in Internet Names*, BUS. WIRE (Mar. 17, 2006, 6:01 AM), http://www.businesswire.com/news/home/20060316005223/en/.com-.net-.biz. . .Is-Difference-Perception-Survey-Lexicon.

229. Cable News Network, LP v. CNNews.com, 56 F. App'x 599, 601 (4th Cir. 2003).

230. *Id.*

231. *Cf.* Asahi Metal Indus. v. Superior Court of Cal., 480 U.S. 102, 114 (1987) (noting the "unique burdens placed upon one who must defend oneself in a foreign legal system").

232. *See* 15 U.S.C. § 1125(d)(2)(A) (2012).

for commercial domain names.[233] Consumers often perceive ".com" websites to be more reliable or trustworthy.[234] By giving *in rem* jurisdiction to the forum where the registry is located, the ACPA makes consent to Virginia jurisdiction and U.S. trademark law a condition to using the world's most recognizable TLD. This imposes a much greater burden on non–U.S. website operators, who must resort to less attractive TLDs or face exposure to liability in a foreign legal system.

V. RECONSIDERING THE BAD FAITH REQUIREMENT FOR *IN REM* JURISDICTION

Rather than exercising *in rem* jurisdiction over any trademark infringing domain name, courts should only proceed *in rem* when it determines that a domain name was registered in a bad faith attempt to profit from a protected trademark. As previously discussed, there is a distinction between cybersquatters and foreign registrants who happen to use the same mark as another company to denote their products. In the former, *in rem* jurisdiction impacts fewer personal rights because cybersquatters do not use the domain name as a gateway for a related online business. Nevertheless, instead of limiting *in rem* jurisdiction to this purpose, courts have allowed litigants to invoke the ACPA in all trademark litigation over domain names. By doing so, U.S. courts effectively exert power over entirely foreign disputes and extend the Lanham Act to parties with little U.S. connection. This is a deeply problematic extraterritorial application of U.S. law.

To correct this overextension of U.S. jurisdiction, this Note proposes that courts should limit *in rem* jurisdiction to domain names that were registered in bad faith, as defined by the factors under § 1125(d)(1). The purpose of these factors is precisely to separate cybersquatters from foreign businesses who happen to infringe trademarks through their domain name.[235] Incorporating this standard into the *in rem* provision will allow U.S. courts to continue protecting mark owners against domain names that are registered solely to extort value from businesses, but limit the role of U.S. courts in international trademark disputes involving legitimate online activity by foreign companies. For example, under the proposed interpretation, a Virginia Court could still exercise jurisdiction over "amercangirl.com" because the

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233.   *See, e.g.*, Kyle Eslick, *Why Dot Com Domains are the Gold Standard*, SLICKAFFILIATE http://slickaffiliate.com/why-dot-com-domains-are-the-gold-standard (last visited Nov. 30, 2013); Adam Grunwerg, *Why New Top-Level Web Domains are Doomed to Fail*, THE GUARDIAN, (Feb, 12, 2013, 11:33 AM) http://www.theguardian.com/media-network/media-network-blog/2013/feb/12/icanns-gtlds-internet-domain-name.

234.   T. Halvorson et al., *The BIZ Top-Level Domain: Ten Years Later*, 7192 PASSIVE & ACTIVE MEASUREMENT LECTURE NOTES IN COMPUTER SCI. 221, 221 (2012) ("To the average user, com became synonymous with the Web, its iconic status earning it a place in the Oxford English Dictionary in 1994.").

235.   *See e.g.* H.R. Rep. No. 106-412, at 10-13 (1999); H.R. Rep. No. 106-140, at 8-9 (1999).

domain name was likely registered in bad faith.[236] However, if *Cable News* was decided under the proposed interpretation, the Virginia court would likely not have jurisdiction over cnnews.com because the domain name did not appear to have been registered in a bad faith attempt to profit from the CNN mark.[237] Rather, cnnews.com was part of a whole series of websites starting with "CN," and likely constituted an important part of the registrant's virtual presence. Such cases involve issues of substantive trademark law and would be more appropriately adjudicated by the forum where the registrant directs her online activity, rather than the forum where her domain name happens to be registered.

To reach this outcome, courts must revisit the Fourth Circuit's interpretation of the ACPA *in rem* provision in *Harrods*.[238] In that case, the court held that § 1125(d)(2) did not incorporate a bad faith requirement after analyzing the statutory text and its legislative history.[239] However, neither the text of the ACPA, nor its legislative history, mandates such an interpretation. Rather, a better reading of § 1125(d)(2) would limit the *in rem* provision to domain names registered in bad faith.

Starting with the statutory text, § 1125(d)(2) imposes two independent conditions for an *in rem* action under the ACPA. Under the first subsection, the "domain name [must] violate[ ] [a] right of the owner of a mark registered in the Patent and Trademark Office, or protected under subsection (a) or (c) of [§ 1125]."[240] This first condition defines the substantive trademark rights that may be enforced through an *in rem* action. Under the second subsection, the court must find that the trademark owner cannot "obtain *in personam* jurisdiction over a person who would have been a defendant in a civil action under paragraph (1); or . . . through due diligence was not able to find a person who would have been a defendant in a civil action under paragraph (1) . . . ."[241] This second condition limits the *in rem* action to a specific subset of trademark infringing domain names, namely those registered by someone who "would have been a defendant under [§ 1125(d)(1)]."[242]

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236.   Applying the bad faith factors in § 1125(d)(1), "amercangirl.com" appears to have been registered with "intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark. . ." Additionally, the registrant of "amercangirl.com" also provided "material and misleading false contact information when applying for the registration of the domain name." Am. Girl, LLC v. Nameview, Inc., 381 F. Supp. 2d 876, 878 (E.D. Wis. 2005); 15 U.S.C. § 1125(d)(1).

237.   Cable News Network, LP v. CNNews.com, 56 F. App'x 599 (4th Cir. 2003).

238.   Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214 (4th Cir. 2002).

239.   *Id.* at 232 (interpreting the Senate Report to suggest that Congress intended the *in rem* provision to apply to domain names that violate *any* substantive federal trademark law, regardless of whether the domain name was registered by a cybersquatter).

240.   15 U.S.C. §1125(d)(1) (2012).

241.   *Id.* § 1125(d)(2).

242.   *Id.*

Roughly speaking, the first condition defines *what* rights are enforceable, while the second condition defines *who* may be subject to such enforcement.

Instead of analyzing these conditions separately, the Fourth Circuit appeared to conflate two subsections that independently limit *in rem* jurisdiction. The court recognized that the first subsection "identifies the substantive rights actionable under the *in rem* provision" while the second subsection "deals with the proper defendant to a cybersquatting claim."[243] Nevertheless, the court held that a bad faith requirement would create "tension between this language and subsection (d)(2)(A)(i)'s broad language of "'any right of the owner of a mark.'"[244] It is not clear why this tension would preclude a bad faith requirement if the two conditions are read independently. Even if *in rem* actions can be used to enforce any federal trademark right, it is still perfectly rational to impose a separate limitation on the class of domain names subject to *in rem* jurisdiction through a bad faith requirement.

Turning to the legislative history, it appears that Congress deliberately tried to avoid creating liability for domain names registered in good faith, even if the domain names infringe federal trademark rights. In a House of Representatives Report, Congress stated that the ACPA "does not extend . . . to someone who is aware of the trademark status of the name but registers a domain name containing the mark for *any reason* other than with bad faith intent to profit from the goodwill associated with the mark."[245] Likewise during debates, Senator Leahy emphasized that "[t]he mere presence of a trademark is not enough" to trigger liability under the ACPA.[246] He goes on to state that "legitimate conflicts may arise between companies offering different services or products under the same trademarked name . . . . There is a world of difference between these sorts of sites and those which use deceptive naming practices to draw attention to their sites."[247] Later, he repeated that "it is important [to] distinguish between the legitimate and illegitimate use of domain names, and this legislation does just that."[248] Unfortunately, by leaving out the bad faith requirement from the *in rem* provision, courts that interpret the ACPA no longer make such a distinction. As such, the ACPA has become another tool for enforcing trademark rights against legitimate businesses—the precise outcome that Congress hoped to avoid. Given this legislative history, courts should adhere to the most natural interpretation of the ACPA and limit *in rem* jurisdiction to domain names that were registered in bad faith.

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243.   *Harrods*, 302 F.3d at 230.
244.   *Id.*
245.   H.R. Rep. No. 106-464, at 109 (1999) (emphasis added).
246.   145 Cong. Rec. 20011 (1999).
247.   *Id.*
248.   *Id.*

CONCLUSION

As the Internet ties together more nations and communities, there will be inevitable conflicts over the rights to use valuable marks in cyberspace. By exercising *in rem* jurisdiction over a substantial portion of the DNS, U.S. courts encroach upon foreign sovereignty, undermine the ability of companies to structure their conduct, and create procedural unfairness for foreign website operators. Even if such an exercise of jurisdiction comports with due process, courts should still take steps to limit their exercise of *in rem* jurisdiction to cybersquatting cases, instead of using it as a means to adjudicate the substantive rights of foreign parties. To do so, courts should only exercise *in rem* jurisdiction over domain names registered in bad faith. Such restraint will help ensure that the Internet continues to drive global entrepreneurship and development.