

United States Court of Appeals, Ninth Circuit

Gary KREMEN, Plaintiff-Appellant,
v.
Stephen Michael COHEN et al., Defendants,
and Network Solutions, Inc., Defendant-
Appellee.

July 25, 2003

Before: KOZINSKI and McKEOWN, Circuit
Judges, and FITZGERALD, District Judge.

KOZINSKI, Circuit Judge.

We decide whether Network Solutions may be liable for giving away a registrant's domain name on the basis of a forged letter.

Background

"Sex on the Internet?," they all said. "That'll never make any money." But computer-geek-turned-entrepreneur Gary Kremen knew an opportunity when he saw it. The year was 1994; domain names were free for the asking, and it would be several years yet before Henry Blodget and hordes of eager NASDAQ day traders would turn the Internet into the Dutch tulip craze of our times. With a quick e-mail to the domain name registrar Network Solutions, Kremen became the proud owner of sex.com. He registered the name to his business, Online Classifieds, and listed himself as the contact.

Con man Stephen Cohen, meanwhile, was doing time for impersonating a bankruptcy lawyer. He, too, saw the potential of the domain name. Kremen had gotten it first, but that was only a minor impediment for a man of Cohen's boundless resource and bounded integrity. Once out of prison, he sent Network Solutions what purported to be a letter he had received from Online Classifieds. It claimed the company had been "forced to dismiss Mr. Kremen," but "never got around to changing our administrative contact with the internet registration [sic] and now our Board of directors has decided to

abandon the domain name sex.com." Why was this unusual letter being sent via Cohen rather than to Network Solutions directly? It explained:

Because we do not have a direct connection to the internet, we request that you notify the internet registration on our behalf, to delete our domain name sex.com. Further, we have no objections to your use of the domain name sex.com and this letter shall serve as our authorization to the internet registration to transfer sex.com to your corporation.

Despite the letter's transparent claim that a company called "Online Classifieds" had no Internet connection, Network Solutions made no effort to contact Kremen. Instead, it accepted the letter at face value and transferred the domain name to Cohen. When Kremen contacted Network Solutions some time later, he was told it was too late to undo the transfer. Cohen went on to turn sex.com into a lucrative online porn empire.

And so began Kremen's quest to recover the domain name that was rightfully his. He sued Cohen and several affiliated companies in federal court, seeking return of the domain name and disgorgement of Cohen's profits. The district court found that the letter was indeed a forgery and ordered the domain name returned to Kremen. . . . It awarded \$40 million in compensatory damages and another \$25 million in punitive damages.

Kremen, unfortunately, has not had much luck collecting his judgment. . . . Given his limited success . . . , it should come as no surprise that Kremen seeks to hold someone else responsible for his losses. That someone is Network Solutions, the exclusive domain name registrar at the time of Cohen's antics. Kremen sued it for mishandling his domain name, invoking four theories at issue here. . . . His third theory is that he has a property right in the domain name sex.com, and Network Solutions committed the tort of conversion by giving it away to Cohen. . . .

The district court granted summary judgment in favor of Network Solutions on all claims. . . . The court agreed that sex.com was Kremen's property. It concluded, though, that it was intangible property to which the tort of conversion does not apply. . . . Kremen appeals.

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Conversion

To establish [a conversion claim], a plaintiff must show ownership or right to possession of property, wrongful disposition of the property right and damages. The preliminary question, then, is whether registrants have property rights in their domain names. Network Solutions all but concedes that they do. . . . The district court agreed with the parties on this issue, as do we.

Property is a broad concept that includes "every intangible benefit and prerogative susceptible of possession or disposition." *Downing v. Mun. Court*, 88 Cal. App. 2d 345, 350 (1948). We apply a three-part test to determine whether a property right exists: First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity. Domain names satisfy each criterion. Like a share of corporate stock or a plot of land, a domain name is a well-defined interest. Someone who registers a domain name decides where on the Internet those who invoke that particular name—whether by typing it into their web browsers, by following a hyperlink, or by other means—are sent. Ownership is exclusive in that the registrant alone makes that decision. Moreover, like other forms of property, domain names are valued, bought and sold, often for millions of dollars

Finally, registrants have a legitimate claim to exclusivity. 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. Many registrants also invest substantial time and money to develop and promote websites that depend on their domain names. Ensuring that they reap the benefits of their investments reduces uncertainty

and thus encourages investment in the first place, promoting the growth of the Internet overall.

Kremen therefore had an intangible property right in his domain name, and a jury could find that Network Solutions "wrongful[ly] dispos[ed] of" that right to his detriment by handing the domain name over to Cohen. The district court nevertheless rejected Kremen's conversion claim. It held that domain names, although a form of property, are intangibles not subject to conversion. This rationale derives from a distinction tort law once drew between tangible and intangible property: Conversion was originally a remedy for the wrongful taking of another's lost goods, so it applied only to tangible property. See Prosser and Keeton on the Law of Torts § 15, at 89, 91 (5th ed.1984). Virtually every jurisdiction, however, has discarded this rigid limitation to some degree. See *id.* at 91. Many courts ignore or expressly reject it. See [citations]. Others reject it for some intangibles but not others. . . .

[Because the Ninth Circuit was a bit unsure of whether California law permitted a conversion claim based on intangible property, the Circuit certified the legal issue to the California Supreme Court, but the Supreme Court declined to provide any guidance]: We invoked the California Supreme Court's certification procedure to offer it the opportunity to address the issue. The Court declined, *Kremen v. Cohen*, No. S112591 (Cal. Feb. 25, 2003), and the question now falls to us. [After surveying California case law on the subject of conversion, the Ninth Circuit concluded that the California Supreme Court would likely permit a conversion claim based on intangible property].

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Kremen's domain name is protected by California conversion law, even on the grudging reading we have given it. Exposing Network Solutions to liability when it gives away a registrant's domain name on the basis of a forged letter is no different from holding a corporation liable when it gives away someone's shares under the same circumstances. We have not "creat[ed] new tort duties" in reaching this result. We have

only applied settled principles of conversion law to what the parties and the district court all agree is a species of property.

The district court supported its contrary holding with several policy rationales, but none is sufficient grounds to depart from the common law rule. The court was reluctant to apply the tort of conversion because of its strict liability nature. This concern rings somewhat hollow in this case because the district court effectively exempted Network Solutions from liability to Kremen altogether, whether or not it was negligent. Network Solutions made no effort to contact Kremen before giving away his domain name, despite receiving a facially suspect letter from a third party. A jury would be justified in finding it was unreasonably careless.

We must, of course, take the broader view, but there is nothing unfair about holding a company responsible for giving away someone else's property even if it was not at fault. Cohen is obviously the guilty party here, and the one who should in all fairness pay for his theft. But he's skipped the country, and his money is stashed in some offshore bank account. Cohen is out of the picture. The question becomes whether Network Solutions should be open to liability for its decision to hand over Kremen's domain name. Negligent or not, it was Network Solutions that gave away Kremen's property. Kremen never did anything. It would not be unfair to hold Network Solutions responsible and force it to try to recoup its losses by chasing down Cohen. This, at any rate, is the logic of the common law, and we do not lightly discard it.

The district court was worried that "the threat of litigation threatens to stifle the registration system by requiring further regulations by [Network Solutions] and potential increases in fees." Given that Network Solutions's "regulations" evidently allowed it to hand over a registrant's domain name on the basis of a facially suspect letter without even contacting him, "further regulations" don't seem like such a bad idea. And the prospect of higher fees presents no issue here that it doesn't in any other context. A bank could lower its ATM fees if it didn't have to

pay security guards, but we doubt most depositors would think that was a good idea.

The district court thought there were "methods better suited to regulate the vagaries of domain names" and left it "to the legislature to fashion an appropriate statutory scheme." The legislature, of course, is always free (within constitutional bounds) to refashion the system that courts come up with. But that doesn't mean we should throw up our hands and let private relations degenerate into a free-for-all in the meantime. We apply the common law until the legislature tells us otherwise. And the common law does not stand idle while people give away the property of others.

The evidence supported a claim for conversion, and the district court should not have rejected it.

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Kremen had a viable claim for conversion. The judgment of the district court is reversed on this count, and the case is remanded for further proceedings.