CAN A STATE SEIZE AN INTERNET GAMBLING Website's Domain Name? An Analysis OF THE KENTUCKY CASE

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Introduction

Chris Moneymaker, an accountant turned professional poker player, won his seat at the 2003 World Series of Poker ("WSOP") by winning a thirty-nine dollar buy-in satellite tournament hosted by pokerstars.com. Playing at the WSOP main event tournament, Moneymaker eliminated 1987 and 1988 WSOP champion, Johnny Chan, and winner of seven WSOP bracelets, Phil Ivey.² Wearing a pokerstars.com shirt and hat, Chris Moneymaker made it to the final table of the tournament hosted at the renowned Binion's Horseshoe in Las Vegas, where he played against notable professional poker players Jason "Jaky" Lester, Ihsan "Sammy" Farha, and the 1995 WSOP champion, Dan Harrington.³

Moneymaker started the final table as the chip leader with \$2.3 million in chips, nearly \$1 million ahead of the next nearest competitor, Amir Vahedi.⁴ After playing at the final table for over eleven straight hours, Moneymaker eliminated Dan Harrington to go "heads up" with Sammy Farha.⁵ Just forty minutes later, Chris Moneymaker beat Sammy Farha's two pair with a full

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¹ Team PokerStars: Chris Moneymaker, Pokerstars.com, http://www.pokerstars.com/ team-pokerstars/chris-moneymaker/ (last visited Aug. 16, 2010).

² The 2003 World Series of Poker Final Table, Texasholdem-poker.com, http://www. texasholdem-poker.com/wsop03 (last visited Aug. 16, 2010); Chris Moneymaker eliminates Phil Ivey out of the 2003 WSOP, PRO-POKER-BLOG.COM, http://pro-poker-blog.com/846/ chris-moneymaker-eliminates-phil-ivey-out-of-the-2003-wsop/ (last visited Oct. 3, 2010); Phil Ivey Wins Second 2009 WSOP Bracelet For An Overall Total of Seven, LASVEGAS VEGAS.COM, http://www.lasvegasvegas.com/content/phil-ivey-wins-second-2009-wsopbracelet-overall-total-seven (last visited Oct. 3, 2010).

³ Id.; Nolan Dalla, Poker Tournament Gallery: Binion's Horseshoe Presents The 2003 World Series of Poker Championship Event "The Final Table", POKERPAGES.COM, http:// www.pokerpages.com/pokerinfo/tournamentgallery/wsop/gallery2003-finaltable.htm. (last visited Aug. 16, 2010).

⁴ Dalla, *supra* note 3.

⁵ Poker Info: WSOP 2003 Final Table Transcript of the Final 9 Players, POKERPAGES.COM, http://www.pokerpages.com/pokerinfo/tournamentgallery/wsop/wsop-transcript-2003.htm. (last visited Aug. 16, 2010).

house, fives over fours, and became the 2003 WSOP champion, winning the highly sought tournament bracelet and \$2.5 million in cash.⁶

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Chris Moneymaker earned his entry seat at the 2003 WSOP the modern way: gambling online. The following year, Greg "Fossilman" Raymer, the 2004 WSOP champion, also won his seat at the tournament by winning a satellite tournament on pokerstars.com.⁷ Moneymaker's run revolutionized the game of poker by taking a game played only by professionals and opening the poker-playing field to the accountant next door. Now poker players and fans attempt to replicate Moneymaker's reign by starting at the seat in front of their computers.

The newly developed Internet gambling forum has produced myriad legal issues affecting state, federal, and international law. The difficulty in addressing the issues arises from the ubiquity of the Internet. Based on an analysis of the Kentucky Case, 8 this Note argues that a state cannot seize an Internet gambling website's domain name for violating that state's laws. First, Kentucky did not have personal jurisdiction over the gambling domain names' registrars to have authority to seize them. Second, Kentucky's gambling statute violates the Commerce Clause.⁹ Part II provides background to and the facts underlying the Kentucky Case and its procedural posture. Part III discusses legislation—both federal legislation and Kentucky's statute—affecting Internet gambling. Part IV addresses the critical jurisdictional and constitutional issues that arise when a state attempts to seize domain names. Finally, Part V articulates the rationale behind this Note's argument that a state cannot seize an Internet gambling website's domain name for violating a state law.

A Brief History of Online Gambling

In 1931, Nevada was the first state that legalized gambling to capitalize on the tourism boom expected after the completion of the Hoover Dam. 10 In addition, legalization was an effort to gain control and regulate the already flourish-

⁶ *Id.*; Pokerstars.com, *supra* note 1.

⁷ Toby Bochan, *Greg Raymer*, ABOUT.COM, http://poker.about.com/od/playerprofiles/p/greg raymer.htm. (last visited Oct. 2, 2010). Order of Seizure of Domain Names, Kentucky v. 141 Domain Names, No. 08-CI-1409

⁽Franklin Cir. Ct., Div. II, Entered Sept. 18, 2008) [hereinafter Kentucky Case District Court Order]; Opinion and Order, Kentucky v. 141 Domain Names, No. 08-CI-1409, (Franklin Cir. Ct., Div. II, Entered Oct. 16, 2008) [hereinafter Kentucky Case District Court Opinion]; Order Granting Petition for Writ of Prohibition, Interactive Media Entertainment and Gaming Association, Inc. v. Wingate, No. 2008-CA-002000-OA, (Ky. Ct. App., Entered Jan. 20, 2009) [hereinafter Kentucky Case Appeal Order]; Kentucky v. Interactive Media Entm't and Gaming Ass'n, Inc., et al., 306 S.W.3d 32 (Ky. 2010) [hereinafter Kentucky Case Supreme Court Opinion].

⁹ U.S. Const. art. I, § 8, cl. 3. There is another legal issue that has yet to be addressed, regarding whether a state can order Internet Service Providers (ISPs) located in its state to prohibit access of its residents to gambling sites. News Release, Minn. Dep't of Pub. Safety, Minnesota Notifies Telecoms to Prohibit Access Between Residents and Gambling Sites (Apr. 29, 2009), available at www.dps.state.mn.us/comm/press/nePRSystem/viewPR.asp? PR_Num=879. This note does not address that issue.

ROGER DUNSTAN, CAL. RESEARCH BUREAU, CRB-97-003, GAMBLING IN CALIFORNIA 6 (1997), available at http://www.library.ca.gov/crb/97/03/chapt2.html.

ing illegal gambling market.¹¹ Nevada's legalization of gambling influenced other states over time to legalize at least some forms of gambling. Today, gambling is legal in forty-eight states. 12

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The first online gambling site was started in August 1995, 13 and the first online poker site launched in 1998. 14 However, it was not until 2003 that online gambling, especially online poker, became mainstream as a result of the World Poker Tour debuting on the Travel Channel and ESPN televising the 2003 WSOP main event final table.¹⁵ These new gambling websites popularized online gambling by teaching users how to play, often for free. 16 Furthermore, stories like Chris Moneymaker's motivate amateur players to gamble online in hopes of winning big and potentially achieving professional and celebrity status.17

The American Gaming Association estimates that there are currently well over 2,000 Internet gambling websites that offer various gambling activities ranging from sports betting to casino games. 18 In 2005, "fifteen to twenty million Americans placed bets online [and] the U.S. online gambling market was estimated at \$6 billion." In 2008, Internet gambling revenue for offshore companies was approximately \$5.9 billion attributed to American gamblers and \$21 billion for gamblers worldwide.²⁰ "Estimates show that seventy percent of all online wagers are U.S.-based," with Americans accounting "for over eighty percent of online poker players and participating in more than fifty five percent of online gambling activities."²¹ Internet gambling is predicted to gross approximately \$25 billion a year by 2010.22

The components of an Internet gambling website are relatively simple. Unlike a casino that requires a casino floor, tables, dealers, actual playing cards, dice, roulette wheels, hotel rooms, and other forms of entertainment for its guests, an Internet gambling website requires only a few things before it can

¹¹ *Id*.

¹² Hawaii and Utah are the only states that ban all forms of gambling. Scott Olson, *Betting* No End to Internet Gambling, 4 J. Tech. L. & Pol'y 2 para. 1 (1999).

¹³ Am. Gaming Ass'n, *Internet Gambling*, Fact Sheet, (2003), http://www.americangaming. org/Industry/factsheets/issues_detail.cfv?id=17.

¹⁴ Online Poker Industry – A Brief History, Learning Poker & About FTR, Online Poker, http://www.online-poker.flopturnriver.com/ (last visited Aug. 17, 2010). ¹⁵ *Id*.

¹⁶ Lisa Boikess, Note, The Unlawful Internet Gambling Enforcement Act of 2006: The Pitfalls of Prohibition, 12 N.Y.U. J. Legis, & Pub. Pol'y 151, 156 (2008) (citing Alan Schmadtke, Are All Bets Off-Line? New Law Makes It Riskier to Wager on the Web, Orlando sentinel (Final Ed.), Nov. 12, 2006, at C9).

¹⁷ *Id.* (citations omitted).

¹⁸ Am. Gaming Ass'n, *supra* note 13.

¹⁹ Gerd Alexander, Note, The U.S. on Tilt: Why the Unlawful Internet Gambling Enforcement Act is a Bad Bet, 2008 Duke L. & Tech. Rev. ¶ 1 (2008), http://www.law.duke.edu/ journals/dltr/articles/2008DLTR0006.html.

²⁰ Am. Gaming Ass'n, *supra* note 13.

²¹ Legality, GamblingPlanet.org, http://www.gamblingplanet.org/legality_main.php (last visited Aug. 17, 2010).

²² I. Nelson Rose & Martin D. Owens, Jr., Internet Gaming Law 393 (2d ed. 2009) (citing estimate by Christiansen Capital Advisers available at http://www.cca-i.com/Primary %20Navigation/Online%20Data%20Store/internet_gambling_data.htm (Oct. 24, 2007)).

start taking bets.²³ First, the website needs to register a domain name. The website must register the domain name from a registrar, an accredited company that has the authority to register domain names to other companies or individuals that would like to own a particular website address.²⁴ At that time, the new website owner becomes the registrant and has the rights to the domain name.²⁵ (The distinction between a domain name owner and a domain name registrar is crucial to the analysis of the *Kentucky Case*.) Accordingly, a domain name owner operates the website, whereas the registrar simply sells the rights to the domain name to the respective domain name owner.

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A domain name is a name that uniquely identifies a website on the Internet.²⁶ Addresses to websites on the Internet are actually numeric IP addresses, so a domain name acts as a user-friendly substitute for IP addresses.²⁷ An IP address "is a code made up of numbers separated by three dots that identifies a particular computer on the Internet. Every computer, whether it be a Web server or the computer [you are] using right now, requires an IP address to connect to the Internet."²⁸

Second, a gambling website requires a server. A server is a computer that stores all of the files necessary to display a website's pages and delivers the information to computers accessing the domain name.²⁹ The more games played and the more players playing, the more server space required. Through either a larger server or multiple servers clustered together, a gambling website will be able to host more tables, more players, and more games; thus, making more money.

Third, a gambling website requires specific software. A website can either license software from third-party developers, ³⁰ or the website owners can write the code themselves. The gambling user then interacts with this software to place his bets. The software is responsible for the layout, interface, and graphic design. ³¹ Variability in the code and software explains why gambling websites do not necessarily operate and look the same.

²³ Charlie Dickstein provided the general information on the following description and process of how to establish an Internet gambling website.

²⁴ Domain Name Registrar, Webopedia.com, http://www.webopedia.com/term/d/domain_name_registrar.html (last visited Aug. 17, 2010); Domain Name Registrar, Businessdictionary.com, http://www.businessdictionary.com/definition/domain-name-registrar.html (last visited Aug. 17, 2010). Domain name registrars include GoDaddy.com, networksolutions.com, eNom.com, Register.com, moniker.com, inter alia.

²⁵ Domain Name Registrant, Webopedia.com, http://www.webopedia.com/term/d/domain_name_registrant.html (last visited Aug. 18, 2010).

²⁶ Domain Name Definition, The LINUX INFO. PROJECT, http://www.linfo.org/domain_name.html (last visited Aug. 18, 2010).
²⁷ Id.

²⁸ *IP Address*, TechTerms.com, http://www.techterms.com/definition/ipaddress (last visited Aug. 18, 2010).

²⁹ How Web Servers Work, Webopedia.com, http://www.webopedia.com/didyouknow/ Internet/2003/howwebserverswork.asp (last visited Aug. 18, 2010).

³⁰ Online gambling software developers include playtech, Microgaming, Proprietary Software, Cryptologic, and PartyGaming. For a more in depth list of gambling software developers, *see Online Casino Software Providers*, GamblingPlanet.org, http://www.gamblingplanet.org/casino_software.php (last visited Aug. 18, 2010).

³¹ Charlie Dickstein provided the general information how to establish and set up an Internet gambling website.

Finally, a gambling website requires gamblers to have computers with Internet access. Without ever having to enter an actual casino, gamblers can place their bets and make their bluffs from their own home. Placing a bet is as easy as making a purchase online. Generally, the gambling user must register and create an account with the website.³² Then, the user deposits money—by credit card, wire transfer, mailing a check or money order, or transferring though a third-party payor such as PaypalTM—into an account specifically set up to be used to make bets at the gambling website.³³ The user is then able to start making bets simply by logging into his account via the Internet. If the user wins, his account is credited, and the proceeds can be returned to the bettor by the same means that the user deposited money with the gambling website.³⁴

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THE KENTUCKY CASE

Gambling, particularly horse-racing, produces substantial income and is a long-standing tradition in Kentucky,³⁵ with Kentuckians spending an estimated \$170 million on gambling annually.³⁶ As a time-honored tradition and the home of the renowned Kentucky Derby, the industry also provides a significant number of Kentucky's jobs.³⁷ Therefore, Internet gambling poses a threat to Kentucky's prosperous gambling industry.

On September 18, 2008, the Commonwealth of Kentucky issued a Seizure Order for the registrars of 141 domain names to forfeit the domain names to the Commonwealth. 38 The Order alleged that the domain names were being used in violation of Kentucky law³⁹ and gave Kentucky the right to seize control of the 141 listed domain names. Kentucky Governor Steve Beshear and the Public Safety Cabinet brought the action in an effort to protect Kentucky's taxable gambling interests, mainly its horse racing establishments.⁴⁰ In addition, the action supported Governor Beshear's heavy campaigning to bring casino gambling to Kentucky by taxing gambling establishments to "increase overall state revenue and provide enhanced services to some of the areas that need them badly."41 The Commonwealth claimed that the gambling websites operating in Kentucky via the Internet "create[d] a tremendous disadvantage for [Kentucky's legitimate, licensed[,] and taxed gaming interests[.]"42

³² Olson, supra note 12, para. 9.

³³ *Id*.

³⁴ *Id*.

³⁵ Joel Hruska, Kentucky Seizes Two Gambling Domains, Sites Fight Back, ARS TECHNICA (Oct. 9, 2008, 3:30 PM), http://arstechnica.com/old/content/2008/10/kentucky-seizes-twogambling-domains-sites-fight-back.ars.

³⁶ Anthony Kammer, Kentucky Appeals Court Overturns Domain Name Seizure, JOLT DIGEST (Jan. 25, 2009, 1:32 PM), http://jolt.law.harvard.edu/digest/internet/vicsbingocom-vkentucky.

³⁷ Hruska, supra note 35.

³⁸ Kentucky Case District Court Order, supra note 8, at 1.

³⁹ *Id.* For the pertinent text of the statute, see *infra* Part III.C.

Kammer, supra note 36.

⁴¹ Hruska, *supra* note 35.

⁴² Brian Krebs, Kentucky Tests State's Reach Against Online Gambling, WASH. POST, (Oct. 8, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/10/08/AR200810080 2870.html.

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Before the Commonwealth issued the Seizure Order on September 18, 2008, the Franklin District Court, Division II, of the Commonwealth of Kentucky held a hearing.43 The Commonwealth presented evidence that it had assembled a team to ascertain whether Internet gambling was readily available in Kentucky. 44 After "500 man-hours on-line," the Commonwealth presented its evidence to the Court that Internet gambling was available in Kentucky. 45 In addition, the Commonwealth provided an expert on cyber crime who opined that "an Internet domain name is a device or transport device allowing Kentuckians to engage in [I]nternet gambling."46 On the basis of the Commonwealth's presentation at the hearing, the Court issued the September 18 Seizure Order.47

The Seizure Order alleged that the domain names "were and are being used in connection with illegal gambling activity" in violation of Kentucky Revised Statutes ("KRS") Chapter 528.⁴⁸ The Seizure Order stated that the registrars of the respective domain names shall immediately transfer the domain names to an account of the Commonwealth.⁴⁹ The Seizure Order stated that seizure of the domain names in rem "constitute[d] notice to any persons who claim an interest" in the seized property.⁵⁰ Finally, the Seizure Order mandated that any party claiming ownership of the domain names must attend a hearing to determine whether the owner qualifies for return of the property pursuant to the statute.⁵¹ If any owner failed to attend the hearing or to establish that the domain name should be returned to the owner, the Commonwealth would dispose of the domain names.⁵² The 141 domain names subject to forfeiture were listed on Exhibit A of the Seizure Order.⁵³

About a month later, on October 16, 2008, Judge Thomas D. Wingate of the Franklin District Court, Division II, of the Commonwealth of Kentucky rendered the Seizure Order valid.⁵⁴ The Opinion's main focus addressed the pertinent issue of whether the Court has subject matter jurisdiction or in rem jurisdiction over a civil forfeiture action involving Internet domain names.⁵⁵ The Court acknowledged that its power "over the claims of the Commonwealth and over the . . . Domain Names is both constrained by and a function of" the Court's jurisdiction.⁵⁶

The Court further held that "KRS Chapter 528 prohibits gambling" in Kentucky.⁵⁷ According to the Court, the domain names have been and are

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43 Kentucky Case District Court Opinion, supra note 8, at 5.
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⁴⁴ *Id*.

⁴⁵ *Id.* at 5-7.

⁴⁶ *Id.* at 6.

⁴⁷ *Id.* at 7.

⁴⁸ Kentucky Case District Court Order, supra note 8, at 1. For the pertinent text of the statute, see infra Part III.C.

⁴⁹ Kentucky Case District Court Order, supra note 8, at 2.

⁵⁰ *Id*.

⁵¹ *Id*.

⁵² *Id*.

⁵³ Id. at Exhibit A.

⁵⁴ Kentucky Case District Court Opinion, supra note 8, at 40.

⁵⁵ See generally Kentucky Case District Court Opinion, supra note 8.

⁵⁶ *Id.* at 9 (citations omitted).

⁵⁷ *Id.* at 12.

being used in connection with Internet gambling within Kentucky, and KRS 528.100⁵⁸ "authorizes forfeiture actions of gambling devices." Thus, the Court has subject matter jurisdiction to adjudicate the civil forfeiture claim. Moreover, the Court rejected the proposition that domain names are not property—just like telephone numbers are not property—holding that the domain names are property and that the Court has *in rem* jurisdiction to hear the case. The Court found that the Internet gambling websites and "their property, the Internet domain names, are present in Kentucky[]" as a result of their "continuous and systematic" presence, authorizing the Court's jurisdiction over the case. The Court over the case.

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Finally, the Order addressed the crucial question of whether the domain names were "gambling devices" and thus subject to and in violation of KRS Chapter 528.⁶² The Court declared that the "[d]omain [n]ames here were used and are still being used in connection with Internet gambling transactions in violation of the spirit of KRS Chapter 528 [and consequently] fall within the meaning of a gambling device[.]"⁶³ Therefore, the domain names were subject to seizure and forfeiture pursuant to the statute and the Court's jurisdiction.⁶⁴

Judge Wingate's Order amended the Seizure Order in only one way—by allowing any of the 141 Domain Name defendants, within thirty days from entry of the Order, to install "geographic blocking" software⁶⁵ that would block consumers within Kentucky from accessing the Gambling website.⁶⁶ The geographic block would have to be satisfactory to the commonwealth or the court.⁶⁷ If these requirements were met, the court agreed to relinquish its jurisdiction over the domain name.⁶⁸

Although Judge Wingate's Order on October 16 targeted 141 domain names, only six of the domain names targeted accepted the legal challenge and appealed to the Common Wealth of Kentucky Court of Appeals.⁶⁹ On appeal, on January 20, 2009, the court of appeals of Kentucky held that the trial court erred in concluding that the domain names were in violation of Kentucky law and subject to forfeiture.⁷⁰ The court of appeals struck down the district court's order and prohibited the lower court "from enforcing its order seizing the 141 domain names and from conducting a scheduled forfeiture hearing."⁷¹

⁵⁸ For the pertinent text of the statute, see *infra* Part III.C.

⁵⁹ Kentucky Case District Court Opinion, supra note 8, at 12.

⁶⁰ *Id.* at 12-15.

⁶¹ *Id.* at 22.

⁶² Id. at 22-25.

⁶³ Id. at 25.

⁶⁴ *Id*.

⁶⁵ This Note does not address the issues regarding whether required "geographic blocking" software is the less restrictive means to accomplish the Kentucky court's goals.

⁶⁶ Kentucky Case District Court Opinion, supra note 8, at 39.

⁶⁷ *Id.* at 39-40.

⁶⁸ Id. at 40.

⁶⁹ Kentucky Case Appeal Order, supra note 8, at 1-2. The domain names that appealed were playersonly.com, sportsbook.com, sportsinteraction.com, mysportsbook.com, lines maker.com, and vicsbingo.com. *Id.*; See generally Hruska, supra note 35.

⁷⁰ Kentucky Case Appeals Order, supra note 8, at 8.

⁷¹ *Id.* at 3.

The court of appeals' reversal was based on its holding that domain names do not fall within the statutory definition of KRS 528.010(4).⁷² The court of appeals reasoned that "it stretches credulity to conclude that a [domain name] can be said to constitute a 'machine or any mechanical or other device . . . designed and manufactured primarily for use in connection with gambling." "73 The court of appeals ruled that the trial court erred in concluding that domain names are gambling devices subject to forfeiture under KRS 528.100,⁷⁴ adding that since domain names are not considered "gambling devices" pursuant to KRS 528.100, the lower court did not have jurisdiction over them.⁷⁵

The court of appeals did not, however, address whether a domain name is considered property and thus subject to in rem jurisdiction nor did it address whether the domain names' accessibility in Kentucky constituted sufficient "presence" in the state to establish Kentucky's jurisdiction over them. Furthermore, it is important to note that neither the trial court nor the appellate court addressed the sensitive issue of whether Kentucky law, when applied to seizure of domain names or the Kentucky gambling statute itself, violated the Commerce Clause of the United States Constitution.

On March 18, 2010, the Supreme Court of Kentucky reversed the court of appeals ruling.⁷⁶ In an opinion by Justice Noble, the court held that many of the arguments presented by the appellees in the court of appeals were "compelling"⁷⁷ and "may have merit."⁷⁸ However, the appellees lacked standing to bring the appeal. In order to have standing, the court requires that the party must have a "judicially recognizable interest." Regarding the domain names themselves, according to the Court, "[t]he domain names are not their own owners or registrants, nor do they claim to be. Thus, [the Commonwealth] lacked standing. . . . "80 Regarding the "gaming associations," they claimed to have an interest in the litigation under the doctrine of "associational standing."81 However, because the associations failed to prove their associational standing by identifying their seized members, they did not achieve associational standing.82

⁷⁴ *Id.* For the pertinent text of the statute, see *infra* Part III.C.

⁷² *Id.* at 8.

⁷³ *Id*.

⁷⁵ Kentucky Case Appeal Order, supra note 8, at 9.

⁷⁶ Kentucky Case Supreme Court Opinion, 306 S.W.3d 32, 34 (Ky., 2010).

⁷⁷ Id. at 35; Matt Zimmerman, Kentucky Supreme Court Reverses Ruling Challenging Domain Name Seizures, Tells Registrants to Try Again, Elec. Frontier Found. (Mar. 18, 2010), http://www.eff.org/deeplinks/2010/03/kentucky-supreme-court-reverses-domainname-ruling.

⁷⁸ Kentucky Case Supreme Court Opinion, 360 S.W.3d at 35; Zimmerman, supra note 77. ⁷⁹ Kentucky Case Supreme Court Opinion, 306 S.W.3d at 37 (citing Schroering v. McKinney, 906 S.W.2d 349, 350 (Ky. 1995)). ⁸⁰ *Id*.

⁸¹ Id.; See also Heidi Feldman, Note, Divided We Fall: Associational Standing and Collective Interest, 87 Mich. L. Rev. 733, 733 (1988) (Standing will be accorded under the doctrine of associational standing if (1) some or all of the association's members have suffered individual injury, or (2) the association, likened to a single person, has suffered an injury comparable to one to which an individual could be vulnerable).

⁸² Kentucky Case Supreme Court Opinion, 306 S.W.3d at 39.

In essence, the Supreme Court of Kentucky eschewed the issue of whether a state has the authority to seize an Internet gambling website's domain name from its respective registrar, leaving the case open for "future relief."83 Instead, it only reversed the Court of Appeals and ruled that the trial court erred in concluding the domain names were in violation of Kentucky law and subject to forfeiture on the grounds that the appellees did not have standing.⁸⁴ However, the Supreme Court explicitly noted that "[i]f a party that can properly establish standing comes forward, the writ petition giving rise to these proceedings could be re-filed with the Court of Appeals."85

This Note addresses the jurisdictional and Commerce Clause issues raised in the Kentucky courts' orders and demonstrates that states do not have the power to seize an Internet gambling website's domain name.⁸⁶

III. INTERNET GAMBLING LAWS

The federal government has consistently deferred to the states to regulate gambling.⁸⁷ Deference is embodied in the Illegal Gambling Business Act, which provides that in order for gambling to be federally illegal, it first must be illegal under the respective state's laws.⁸⁸ There are, however, a few federal statutes that attempt to regulate gambling.

Federal statutes that regulate gambling include the Travel Act, 89 Interstate Transportation of Wagering Paraphernalia Act, 90 Interstate Professional and Amateur Sports Protection Act, 91 and the Organized Crime Control Act. 92 All of these statutes implicate Internet gambling;⁹³ however, this Note only addresses the two most pertinent federal Acts pertaining to whether a state can seize a domain name: The Wire Act and the Unlawful Internet Gambling Enforcement Act.

The Wire Act

As a part of U.S. Attorney General Robert F. Kennedy's "War on Crime,"94 Congress enacted the Interstate Wire Act of 1961 ("Wire Act").95 It is claimed to be the most relevant source of law affecting Internet gambling.⁹⁶ The Wire Act provides that:

⁸³ Id. at 34.

⁸⁴ *Id.* at 40.

⁸⁵ Id.; Zimmerman, supra note 77.

⁸⁶ Another issued raised by the seizure of Internet Gambling website domain names is that seizure violates the owners' First Amendment rights. This Note does not address that issue. 87 15 U.S.C. § 3001(a)(1) (2006); Olson, *supra* note 12, para. 3.

^{88 18} U.S.C. § 1955(b)(1)(i) (2006).

⁸⁹ Id. § 1952 (2006).

⁹⁰ Id. § 1953 (2006).

⁹¹ 28 U.S.C. § 3702 (2006).

^{92 18} U.S.C. § 1955 (2006).

⁹³ Michael P. Kailus, Note, Do Not Bet on Unilateral Prohibition of Internet Gambling to Eliminate Cyber-Casinos, 1999 U. Ill. L. Rev. 1045, 1057-58 (1999).

⁹⁴ Rose & Owens, supra note 22, at 116.

^{95 18} U.S.C. § 1084 (2006).

⁹⁶ See A. Gregory Gibbs, Note, Anchorage: Gaming Capital of the Pacific Rim, 17 ALASKA L. Rev. 343, 349 (2000).

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Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both. ⁹⁷

In general, the Wire Act prohibits a person in the business of betting and wagering from using telephone lines "interstate" to conduct bets and wagers. 98

In order to be "engaged in the business of betting or wagering," courts require that the person be acting in a broker capacity charging a fee⁹⁹ and must do so on a continuous basis.¹⁰⁰ Furthermore, Congress targeted the Wire Act at halting the growth of interstate gambling syndicates,¹⁰¹ so the law does not target the individual bettor or player. Moreover, the statute only prohibits wagering on "any sporting event or contest," thus leaving Internet casino games legal. In fact, Congress has interpreted non-sports betting as being legal under the Wire Act.¹⁰²

The purpose of the Wire Act was to suppress organized gambling activities by "prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce." Furthermore, the Wire Act was intended to prohibit "the use of or the leasing, furnishing, or maintaining of wire communication facilities which are or will be used for the transmission of certain gambling information in interstate and foreign commerce." 104

As previously stated, the Wire Act only prohibits gambling on "any sporting event or contest." The plain language shows Congress' intent to exclude other forms of gambling, including casino style games, in the Wire Act. 105 Furthermore, the enactment of the Organized Crime Control Act of 1970 ("OCCA") 106 demonstrates Congress' intent that the Wire Act excludes all other forms of gambling except sporting events. The OCCA made it a crime to "conduct[], finance[], manage[], supervise[], direct[], or own[] all or part of an illegal gambling business . . ."107 clearly showing Congress' intent for the statute to cover all forms of gambling. Because Congress did not specifically

⁹⁸ Anthony N. Cabot et al., Federal Gambling Law 115 (1999).

¹⁰⁵ See generally 18 U.S.C. § 1084 (2006).

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^{97 18} U.S.C. § 1084(a) (2006).

⁹⁹ United States v. Baborian, 528 F. Supp. 324, 329 (D.R.I. 1981), rev'd on other grounds, 700 F.2d 1 (1st Cir. 1983).

¹⁰⁰ United States v. Scavo, 593 F.2d 837, 842 (8th Cir. 1979).

¹⁰¹ United States v. Calamaro, 354 U.S. 351, 358 (1957) (citing United States v. Kahriger, 345 U.S. 22, 27 n.3 (1953)).

¹⁰² S.B. 474, 105th Cong. (1997).

¹⁰³ H.R. Rep. No. 87-967, at 2631 (1961).

¹⁰⁴ Id. at 2633.

 $^{^{106}\,}$ S.B. 30, 91st Cong., Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended in scattered sections of 18 U.S.C.).

¹⁰⁷ 18 U.S.C. § 1955(a) (2006). Gambling included "pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, Bolita or number games, or selling chances therein."

address these other forms of gambling in the Wire Act, it is likely that Congress did not intend the statute to cover all forms of gambling.

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In In re Mastercard Int'l Inc., a federal district court addressed the legislative history of the Wire Act. 108 The court acknowledged that the plain language of the statute "clearly require[d] that . . . the gambling be a sporting event or contest." The court further noted that recently proposed amendments to the Wire Act and additional Internet gambling statutes sought to expand the Wire Act's coverage to forms of gambling beyond sports-betting thus including all forms of gambling. 110 The court deemed "this as a Congressional admission that the Wire Act was indeed limited in scope."111

Because the Wire Act was "[p]assed well before the advent of the Internet . . . the statutory language is grounded in the technologies of the time, and the application of the Wire Act to Internet gambling is fraught with ambiguity."112 One commentator argued that because Internet gambling takes place in the "ethereal jurisdiction" of the Internet, it "may not involve a 'wire communication' for the conveyance of bets."113

The Unlawful Internet Gambling Enforcement Act of 2006

On October 23, 2006, President George W. Bush signed into law the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"). 114 The UIGEA was a last-minute attachment to the Safe Port Act. 115 In fact, no one on the Senate-House Conference Committee had even seen the final language of the bill. Among the bill's supporters were Representatives James Leach, Peter King, John Boehner, and Senator Bill Frist. In juxtaposition were lobbying groups for casinos, horseracing tracks, state attorneys general, and religious groups. 117 Moreover, social conservatives that supported the passage of the UIGEA posited that online gambling "compromises family values and exacerbates underage gambling and addiction by gamblers of all ages."118

The UIGEA provides that:

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling credit . . . electronic fund transfers . . . any check, draft or similar instrument . . . or

¹⁰⁸ 132 F. Supp. 2d 468 (E.D. L.A. 2001), aff'd, 313 F.3d 257 (5th Cir. 2002).

¹⁰⁹ *Id.* at 480.

¹¹⁰ Id. at 480-81. See also Alexander, supra note 19, ¶ 14 (citing In re MasterCard Int'l, 132 F. Supp. 2d 468, 479-81 (E.D. La. 2001)).

¹¹¹ Alexander, supra note 19, ¶ 14 (citing In re MasterCard Int'1, 132 F. Supp. 2d at 480-81).

¹¹² Gibbs, *supra* note 96, at 349.

¹¹³ Id. at 349-50 (citing H.R. Rep. No. 87-967, at 1 (1961)).

¹¹⁴ 31 U.S.C. §§ 5361-5367 (2006).

^{115 152} Cong. Rec. H8026-04, H8036 (daily ed. Sept. 29, 2006) (statement of Rep. Lobiondo).

¹¹⁶ I. Nelson Rose, Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed, 10 GAM. L. REV. 537, 537 (2006).

¹¹⁷ 152 Cong. Rec. H8026-04, H8029, H8037-H8038 (daily ed. Sept. 29, 2006). It is a rare occasion that casino and horseracing track lobbyists support the same legislation as state attorneys general and religious group lobbyists.

¹¹⁸ Boikess, *supra* note 16, at 176 (citing 152 Cong. Rec. H8026-04, H8029 (daily ed. Sept.

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the proceeds of any other form of financial transaction which involves a financial institution $[.]^{119}$

In effect, the UIEGA bans American financial institutions from processing the payments of domestic and overseas payment processors, thus targeting the funding ¹²⁰ of Internet gambling. ¹²¹ Like the Wire Act, the UIGEA does not cover players, but rather seeks to prohibit Internet gambling through another avenue: the financial system.

Although legislative history demonstrates congressional efforts to amend the Wire Act to regulate Internet gambling, 122 the UIGEA of 2006 neither strengthens nor weakens the Wire Act. 123 As opposed to targeting individual gamblers, the Act regulates financial transactions and payment systems to cut off the flow of funds to Internet gambling website accounts. 124 Congress attacked Internet gambling on the financial payment side in response to multiple prior failures at regulating it conventionally.

The Act "eliminates the possibility of charging financial institutions and computer hosts under a theory of aiding and abetting, since it explicitly states . . . that being in the business of gambling does not include a 'financial transaction provider,' or an ISP." Under the same rationale, it is likely that the Act eliminates the possibility of charging a domain name registrar for aiding and abetting.

Notwithstanding the UIGEA, Professor I. Nelson Rose posits that "online gambling should be regarded as perfectly legal." Professor Rose reasons that "no United States federal statute or regulation explicitly prohibits online gambling, either domestically or abroad." ¹²⁷

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling—

- (1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);
- (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;
- (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or
- (4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.
- 120 Id. Funding by way of personal credit cards, wire transfers, and payment system instruments.
- ¹²¹ Boikess, *supra* note 16, at 171 (citations omitted).
- ¹²² See e.g., Internet Gambling Prohibition Act, H.R. 4777, 109th Cong. (2006).
- ¹²³ Boikess, *supra* note 16, at 170-71.
- 124 31 U.S.C. § 5363 (2006).
- ¹²⁵ Rose, *supra* note 116, at 539.
- ¹²⁶ GamblingPlanet.org, supra note 21.
- ¹²⁷ *Id*.

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¹¹⁹ 31 U.S.C. § 5363(1)-(4) (2006). Section 5363 in its entirety states:

C. Kentucky Law on Gambling

Kentucky enacted its gambling laws in 1974. The gambling statute used to seize the domain names in the *Kentucky Case* was KRS 528.100.¹²⁹ The statute provides that:

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Any gambling device or gambling record possessed or used in violation of this chapter is forfeited to the state, and shall be disposed of in accordance with KRS 500.090, except that the provisions of this section shall not apply to charitable gaming activity defined by KRS 528.010(1).130

The statute defines "gambling device" as:

- (a) Any so-called slot machine or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and which when operated may deliver, as a result of the application of an element of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
- (b) Any other machine or any mechanical or other device, including but not limited to roulette wheels, gambling tables and similar devices, designed and manufactured primarily for use in connection with gambling and which when operated may deliver, as the result of the application of an element of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property. ¹³¹

The statute is unambiguous. It is intended to cover physical, tangible gambling devices that are "designed or manufactured," such as slot machines or gambling tables. It does not include other types of nonphysical, intangible property, such as domain names.

As previously explained, a domain name is a name that uniquely identifies a website on the Internet that serves as a user-friendly substitute for an IP address, the numeric address of a specific computer on the Internet. 132 It is the state legislature's obligation, not the Kentucky courts', to include domain names within the definition of gambling devices if it wants the statute to cover them.

IV. THE IMPLICATIONS OF JURISDICTION AND THE COMMERCE CLAUSE ON DOMAIN NAMES

This Note addresses whether Kentucky has the authority to seize a gambling website's domain name from two different angles. First, this Note analyzes and concludes that Kentucky did not have personal jurisdiction over the domain name registrars to even have authority to seize them. Second, regardless of whether Kentucky had jurisdiction over the domain names, this Note analyzes and determines that the Kentucky statute, on its face, is unconstitutional as it violates the Commerce Clause.

¹³¹ Id. § 528.010(4) (West 1994).

¹³² The Linux Info. Project, *supra* note 26.

¹²⁸ See Ky. Rev. Stat. Ann. § 528.100 (West 1980). See also Kentucky Case Appeal Order, supra note 8, at 13.

¹²⁹ Kentucky Case District Court Order, supra note 8, at 1.

¹³⁰ Ky. Rev. Stat. Ann. § 528.100 (West 1980).

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A. Kentucky Lacks Personal Jurisdiction Over the Domain Name Registrars

The Fourteenth Amendment of the United States Constitution precludes a state from "depriv[ing] any person of life, liberty or property without due process of law." A state violates the Due Process Clause if its courts enter judgments against defendants over whom they did not have personal jurisdiction. Therefore, plaintiffs do not have the right to bring a suit wherever they choose.

Within the last quarter of a century, the advent of the pervasive Internet has posed new challenges to courts' personal jurisdictional reach. Not even the Supreme Court has addressed the extent of a court's jurisdiction over business conducted and contacts made from and through the Internet. Thus, the district courts have been left with the task of determining personal jurisdiction over a defendant based on its Internet activity. Although the application of personal jurisdiction will inevitably evolve as new technology progresses, it has "remained clear that technology cannot eviscerate the constitutional limits on a State's power to exercise jurisdiction over a defendant."

The determination of whether a court has jurisdiction over a case or controversy starts with the 1877 landmark Supreme Court case, *Pennoyer v. Neff.*¹³⁷ Justice Field articulated that a *person* must be *physically present* in a state in order to be subject to that state court's jurisdiction. Furthermore, the Court held that in order for a judgment determining claims against a property to be valid, the *property* must be *physically present* in the state. The requirement of physical presence in a state in order to have jurisdiction predates the advent of advanced forms of transportation, technology, and a borderless economy.

It is not surprising that the law governing jurisdiction has evolved since 1877. In the seminal case, *International Shoe Co. v. Washington*, ¹⁴⁰ the Supreme Court held that the Due Process Clause of the Fourteenth Amendment and *Pennoyer*'s "presence" requirement can be satisfied if "minimum contacts" are made with the state as long as the state's jurisdiction does not offend "traditional notions of fair play and substantial justice." ¹⁴¹ Jurisdiction will depend

A. Benjamin Spencer, Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts, 2006 U. Ill. L. Rev. 71, 73 (2006) (citing Gator Com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1077 (9th Cir. 2003) and ALS Scan Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 713 (4th Cir. 2002)).

¹³³ U.S. Const. amend. XIV, § 1.

 ¹³⁵ Compare Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 451, 455 (3d Cir. 2003)
 and ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 709 (4th Cir. 2002) with
 Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 415 (9th Cir. 1997) and Zippo Mfg. Co. v.
 Zippo Dot Com, Inc., 952 F. Supp. 1119, 1125-26 (W.D. Pa. 1997) and Inset Sys. v. Instruction Set, Inc., 937 F. Supp. 161, 162 (D. Conn. 1996).

¹³⁶ ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 711 (4th Cir. 2002).

¹³⁷ 95 U.S. 714 (1877).

¹³⁸ Id. at 722 (emphasis added).

¹³⁹ *Id.* at 722-23.

¹⁴⁰ 326 U.S. 310 (1945).

¹⁴¹ *Id.* at 316 (citations omitted).

on the "quality and nature" 142 of the contacts with the state. The Court stated that "casual" or "isolated" contacts in a state will not suffice to authorize jurisdiction, but "systematic and continuous" contacts with the state will authorize the state's jurisdiction. 143

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Not surprisingly, the "minimum contacts" standard set out in *International* Shoe has been modernized. 144 The Supreme Court has concluded that there must be some act by which the defendant "purposefully avails itself of the privilege of conducting activities within" the state that is trying to exercise its jurisdictional control. 145 Thus, a defendant that conducts activities in a state invokes the benefits and protections of that state's laws and, likewise, is subject to those laws. 146 However, the mere introduction of a product into the stream of commerce does not establish sufficient contact to establish jurisdiction in that state. 147 Contacts with the eventual state must be foreseeable in order for a defendant to be under that state's jurisdiction. 148

The Supreme Court in Shaffer v. Heitner extended International Shoe's "minimum contacts" standard to also apply to in rem jurisdiction. 149 Therefore, "as the law stands on state court jurisdiction, the requirement of 'presence' is seen through the proverbial lens of 'minimum contacts' for both in rem and in personam actions." 150 Shaffer also stated that courts generally cannot exercise in rem jurisdiction unless the Due Process Clause would have permitted in personam jurisdiction. 151

Applying the International Shoe standard and its progeny to the context of the Internet, the United States District Court for the Western District of Pennsylvania in Zippo Manufacturing Co. v. Zippo Dot Com, Inc. 152 established a sliding-scale test for determining whether a website has purposefully availed itself of a specific state's jurisdiction. In Zippo Manufacturing, Zippo Manufacturing brought suit in federal court in Pennsylvania against Zippo Dot Com for violating a trademark. 153 Zippo Manufacturing claimed that Zippo Dot Com's use of its registered domain names—zippo.com, zippo.net, and zippo news.com—infringed on its "Zippo" trademark. 154

The Court held that the "likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate[, on a sliding-scale basis,] to the

¹⁴³ Id. at 317 (citations omitted).

¹⁴² *Id.* at 319.

¹⁴⁴ Kentucky Case District Court Opinion, supra note 8, at 17.

¹⁴⁵ Hanson v. Denckla, 357 U.S. 235, 253 (1958) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

¹⁴⁷ World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (citations omitted).

¹⁴⁸ *Id.* at 297.

¹⁴⁹ 433 U.S. 186, 205 (1977).

¹⁵⁰ Kentucky Case District Court Opinion, supra note 8, at 18.

¹⁵¹ Shaffer v. Heitner, 433 U.S. 186, 207 (1977) ("Although in rem proceedings purport to affect nothing more than the disposition of property, they necessarily affect the interests of persons as well.").

¹⁵² 952 F. Supp. 1119 (W.D. Pa. 1997).

¹⁵³ *Id.* at 1121.

¹⁵⁴ *Id*.

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nature and quality of commercial activity" conducted on the Internet. 155 On one end of the scale a defendant clearly conducted business over the Internet, such as forming contracts or making sales. 156 On the other end of the scale a defendant is "passively" present on the Internet. 157 "A passive [website] that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction." 158 Applying the new sliding-scale test, the court in Zippo Manufacturing held that Zippo Dot Com's websites were highly active¹⁵⁹—contracting with over 3,000 individuals in Pennsylvania—and thus purposefully availing themselves of the privilege of doing business in Pennsylvania. 160 Therefore, Zippo Dot Com was subject to personal jurisdiction in Pennsylvania.

Adding to Zippo Manufacturing's sliding-scale test, the Fourth Circuit effectuated its own application of personal jurisdiction over Internet-based contacts in ALS Scan, Inc. v. Digital Service Consultants, Inc. 161 In ALS Scan, an owner of copyrighted photographs brought suit in federal district court in the District of Maryland against an Internet Service Provider (ISP) based in Georgia. The issue was whether the defendant infringed on copyrighted material by enabling a website owner to publish photographs on its website. 162

The court held that the United States District Court for the District of Maryland, having the same jurisdictional reach as the state of Maryland, did not have personal jurisdiction over the defendant. 163 The court stated that a state may exercise personal jurisdiction

over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. 164

The Court concluded that the defendant ISP's activity on the Internet was, at most, passive. 165 Accordingly, even though electronic information passed between the defendant and Maryland, the defendant was not subject to the Maryland courts. The court further reasoned that personal jurisdiction reach may only be based on "an out-of-state person's Internet activity directed at [the respective state] and causing injury that gives rise to a potential claim cognizable in [that state]."166

The Minnesota Court of Appeals applied the personal jurisdiction standards set forth in International Shoe and its progeny, in Humphrey v. Granite Gate Resorts, Inc. 167 The court concluded that a company operating an

156 Id. (citations omitted).

¹⁵⁵ Id. at 1124.

¹⁵⁷ *Id*.

¹⁵⁸ Id. (citations omitted).

¹⁵⁹ *Id.* at 1125-26.

¹⁶⁰ Id. at 1121-22, 1126.

¹⁶¹ 293 F.3d 707 (4th Cir. 2002).

¹⁶³ *Id.*; see also Fed. R. Civ. P. 4(k)(1)(A).

ALS Scan, 293 F.3d at 714.

¹⁶⁵ *Id*.

¹⁶⁷ 568 N.W.2d 715 (Minn. Ct. App. 1997).

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Internet website that advertised a new on-line wagering site was subject to personal jurisdiction in Minnesota "because, through [its] Internet activities, [it] purposefully availed [itself] of the privilege of doing business in Minnesota to the extent that maintenance of an action . . . does not offend traditional notions of fair play and substantial justice."168

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In Granite Gate Resorts, the defendant was a Nevada corporation that operated a tourist information website. 169 The defendant advertised on the tourist website for its new on-line wagering service website that was soon to be available. The advertisement stated that the on-line wagering service "will provide sports fans with a *legal way* to bet [online]."¹⁷¹ The website invited Internet users to add themselves to a mailing list to receive more information regarding the new on-line wagering site and provided a toll-free number to get more information.¹⁷² Subsequently, the Minnesota Attorney General brought suit alleging "deceptive trade practices, false advertising, and consumer fraud by advertising in Minnesota that gambling on the Internet is lawful."¹⁷³ The district court denied defendant's motion to dismiss for lack of personal jurisdiction, 174 and on appeal the Court of Appeals of Minnesota affirmed the district court's holding. 175

Zippo Manufacturing, ALS Scan, and Granite Gate Resorts are highly distinguishable from the Kentucky Case in that the former cases held that the respective state had jurisdiction over the domain name owner or defendant website operator, ¹⁷⁶ whereas in the *Kentucky Case* the state claims it has jurisdiction over the domain name registrars—the third party companies that have the authority to register the rights to domain names to other companies or individuals. Thus, the difficult jurisdictional issue posed to Kentucky is not whether the courts have jurisdiction over the domain name or their respective owners, but whether the state's courts have jurisdiction over the domain name registrars. In the Kentucky Case, the business that the domain name registrars conducted in Kentucky by way of the Internet, if any, is the sale of domain names to website operators. These acts or "contacts" with Kentucky necessarily do not give rise to a violation of Kentucky's gambling laws.

For purposes of *in rem* jurisdiction, domain name registrars do not own the domain names that they register; rather, they merely have the authority to sell the rights to the domain names for specified time periods. Hence, the Kentucky courts necessarily do not have in rem jurisdiction over the registrars since

¹⁶⁹ *Id.* at 717.

171 Id. (emphasis added).

¹⁷³ *Id*.

174 Id. at 718.

176 Id. at 721.

¹⁶⁸ *Id.* at 721.

¹⁷⁰ *Id*.

¹⁷² *Id*.

¹⁷⁵ Id. at 717. The Court of Appeals of Minnesota reasoned that five factors must be considered in determining that a defendant established "minimum contacts" with the forum state to warrant the state's personal jurisdiction over the defendant. The five factors are (1) the quantity of the defendant's contacts, (2) the nature and quality of the defendant's contacts, (3) the connection between the cause of action and the defendant's contacts, (4) the state's interest in providing the forum, and (5) the convenience of the parties. Id. at 718.

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no property interest ever existed. Moreover, under *Shaffer*, Kentucky would have to prove it had *in personam* jurisdiction over the registrars before it could exercise its *in rem* jurisdiction. In addition to the court's lack of *in rem* jurisdiction, the Communications Decency Act of 1996 indemnifies any domain name registrar from being liable for the criminal acts of its registrant customers. ¹⁷⁷ In effect, the Act preempts any state law that seeks to hold a registrar liable, or even named as a defendant or codefendant, for its registrant's alleged criminal activities.

It is arguable that the domain name registrars at issue in the *Kentucky Case* have made some sort of "minimum contacts" with the state of Kentucky. However, mere introduction of a product into the stream of commerce—selling the rights to domain names from the registrar's own website—does not establish sufficient contact to establish jurisdiction. The registrars' contacts with the eventual state must be "foreseeable" for Kentucky to have jurisdiction. Moreover, Kentucky's claim over the domain name registrars must arise out of the registrars' actions or contacts with the state.

Even acceding that the Kentucky courts do have jurisdiction over the 141 domain name owners,¹⁷⁸ the courts do not have jurisdiction over the domain name registrars. Kentucky's claim for personal jurisdiction is nebulous in that it does not evince that the registrars' contacts with the state are "foreseeable." In fact, the district court in Kentucky "never opined on any minimum contacts with the registrars themselves, the entities who received the court's Order to transfer the domain names," 179 not to mention the foreseeability of the contacts.

The foreseeability that is required to establish a state court's jurisdiction "is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."180 The availability and accessibility of the Internet is ubiquitous. A particular website, regardless of the location of its registrar or owner, is readily available to anyone worldwide who has an Internet connection. Likewise, a domain name registrar's website, where it sells the rights to domain names, can be accessed—and the rights to a domain name purchased—by anyone anywhere in the world. That being said, the registrars did not purposefully avail themselves of any and all jurisdictions with residents that have Internet access. Rather, the registrars only availed themselves of the indiscernible jurisdiction of the Internet. As pervasive as the Internet is, it is not foreseeable. It is unconscionable that domain name registrars can be subject to jurisdiction wherever the Internet is available. Permitting such an all-encompassing jurisdiction is a violation of due process. Likewise, it is even less foreseeable that registrars

¹⁸⁰ World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

¹⁷⁷ 47 U.S.C. § 230(c)(1) (2006) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."). *See also* Kathleen R. v. City of Livermore, 87 Cal. App. 4th 684, 693 (2001).

¹⁷⁸ This Note does not address the legal issues regarding whether the Kentucky courts have jurisdiction over the 141 Domain Names or their owners.

¹⁷⁹ Brief for The Elec. Frontier Found., et al., as Amici Curiae Supporting Petitioners at 13, Vicsbingo.com and Interactive Gaming Council v. Kentucky No. 2008-CA-2036, (Ky. Ct. App. Nov. 12, 2008) [hereinafter *Kentucky Case Appeals Court Amicus Brief*].

will vicariously be subject to the jurisdictions of which its domain name registrants¹⁸¹ have purposefully availed themselves.

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Furthermore, in order for Kentucky to have jurisdiction, the state's legislature "must affirmatively grant that authority." ¹⁸² Kentucky's long-arm statute does not permit the state to exercise jurisdiction to the extent that the United States Constitution permits jurisdiction under the Due Process clause. Rather, it only permits its courts to assert jurisdiction over a person or his or her agent as to "claim[s] arising from the person's . . . [t]ransacting any business" in the Commonwealth of Kentucky. 183

The plain language of Kentucky's long-arm statute only allows a claim to be brought against the person transacting the business. In the Kentucky Case, the only persons conducting business in the Commonwealth of Kentucky that the claim is based on are the domain names and their owners, not their respective registrars. Consequently, the long-arm statute prohibits Kentucky from bringing a cause of action against the domain name registrars. It is reasonable to conclude that the Kentucky long-arm statute reaches both Internet gambling domain names and their owners that directly or indirectly conduct business in the state. However, the Due Process Clause of the Fourteenth Amendment and Kentucky's long-arm statute limit Kentucky's personal jurisdiction reach. Therefore, absent the fact that any domain name registrar transacts any business in Kentucky in relation to the Kentucky Case claim, it is unreasonable that Kentucky's long-arm statute reaches domain name registrars.

The Commerce Clause and its Kicker, the Dormant Commerce Clause

Among the enumerated powers given to Congress, the Commerce Clause of the United States Constitution states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States . . . "184 In addition, the Supremacy Clause provides that "when a state law conflicts with a federal law enacted by Congress pursuant to its Commerce Clause power, the federal law stands and the state law falls."185

The Commerce Clause prohibits individual States from regulating "[c]ommerce with foreign Nations, and among the several States[.]" Thus, "Congress has exclusive domain over those aspects of interstate commerce that are so national in character to demand uniform treatment." 187 Since Gibbons v.

¹⁸² Kentucky Case Appeals Court Amicus Brief, supra note 179, at 14 (citing Davis H. Elliot Co. v. Caribbean Utilities Co., 513 F.2d 1176, 1179 (6th Cir. 1975)).

¹⁸⁵ U.S. Const. art. VI, cl. 2; Kristen Adams, Comment, Interstate Gambling—Can States Stop the Run for the Border?, 44 Emory L.J. 1025, 1037 (1995) (citing John E. Nowak et AL., CONSTITUTIONAL LAW 292 (2d ed. 1983)).

¹⁸¹ See Webopedia.com, supra note 25.

¹⁸³ Ky. Rev. Stat. Ann. § 454.210(2)(a)(1) (West 2002).

¹⁸⁴ U.S. Const. art. I, § 8, cl. 3.

¹⁸⁶ Brief for The Elec. Frontier Found., et al. as Amici Curiae Opposing Appellants at 5-6, Kentucky v. Interactive Media Entm't & Gaming Ass'n, Inc. No. 2009-SC-000043, (Ky. Apr. 17, 2009) (quoting U.S. Const. art. I, § 8, cl. 3).

¹⁸⁷ H. Joseph Hameline & William Miles, The Dormant Commerce Clause Meets the Internet, 41 B.B.J., Sept.-Oct. 1997, at 8, 9.

Ogden, ¹⁸⁸ the Supreme Court has recognized Congress' implied power to strike down state and federal regulations interfering with interstate commerce. ¹⁸⁹

In order for the Commerce Clause to apply, "interstate commerce" must be at issue. A state statute that prohibits online gambling in its state is broad enough to hinder online gambling by citizens of other states; 190 thus, the law affects "interstate" commerce. The statute would also permit prosecution of out-of-state defendants. 191 The nature of the Internet does not allow an Internet gambling website, without undue costs, to disallow access to certain states. 192 Finally, the Internet—often referred to as the "information superhighway" that transports digitized goods—is analogous to highways and railroads; 193 therefore, the Internet, and subsequently online gambling, is an instrumentality in interstate commerce.

Congress has legislated as to the regulation of Internet gambling through the UIGEA. 194 The federal statute did not give the states supreme authority to regulate Internet gambling. 195 Accordingly, the Commerce Clause is effective in that the UIGEA is a federal statute that regulates Internet gambling, showing that Congress views Internet gambling as national and "interstate" in nature, and thus state laws affecting Internet gambling are preempted.

Moreover, "[i]n areas of the law in which Congress has not exercised its Commerce Clause power, its 'Dormant Commerce Clause' power acts as a barrier" to a state's acts that affect other states and even other countries. The Dormant Commerce Clause is relevant to the *Kentucky Case* in that, even if the UIGEA does not specifically trump a state's gambling laws, regulation of the Internet—and thus Internet gambling—is national in scope; therefore, it is reserved to the federal government, not the states. Specifically, Dormant Commerce Clause issues arise when "Congress has not spoken clearly on a particular issue. This is the case with Internet gambling." Because some states will opt to legalize Internet gambling and some will prohibit it, regulation of Internet gambling will be inconsistent in the common market and thus would violate the Dormant Commerce Clause.

¹⁸⁸ 22 U.S. (9 Wheat.) 1 (1824).

¹⁸⁹ Brief for Appellee Interactive Media Entm't & Gaming Ass'n, Inc. at 44, Brown v. Interactive Media Entm't & Gaming Ass'n, Inc., No. 2009-SC-000043 (Ky. May 27, 2009) (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

¹⁹⁰ Olson, supra note 12, at para. 32 (citing Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 177 (S.D.N.Y. 1997).

¹⁹¹ *Id.* at para. 30.

¹⁹² *Id*.

¹⁹³ *Id*.

¹⁹⁴ 31 U.S.C. § 5361-5367 (2006). For the pertinent text of the statute, see *supra* Part III.B. In addition, the Wire Act of 1961 arguably may effectuate the Commerce Clause regarding Internet gambling.

 $^{^{195}}$ 31 U.S.C. §§ 5361(b), 5262(10)(D)(ii) (2006). "[N]either extending nor preempting state laws."

¹⁹⁶ Adams, *supra* note 185, at 1037. The Clause is referred to as the "Dormant Commerce Clause" because states are prohibited from enacting regulations even if Congress has not acted if the regulation discriminates against commerce or unduly burdens interstate commerce. C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 401 (1994).

¹⁹⁷ Kailus, *supra* note 93, at 1075-76.

¹⁹⁸ *Id.* at 1076.

Had the trial court's order in the Kentucky Case prevailed, Kentucky would be authorized to seize from domain name registrars any Internet website deemed to violate Kentucky law. 199 Moreover, the state would be able to impose its laws on the other forty-nine states and even on "the rest of the world."200 By authorizing the seizure of domain names, the state of Kentucky is essentially attempting to regulate interstate and foreign commerce.²⁰¹ Kentucky's law not only imposes on other states, but it fails to even attempt to meet the requirement that states pursue their legitimate interests "by means imposing the least restrictive effects on interstate commerce."202

The prominent case addressing a state's regulation of the Internet and its violation of the Commerce Clause is American Libraries Association v. Pataki. 203 In Pataki, a New York law made it unlawful to use a computer communications system to transfer sexually explicit material to minors.²⁰⁴ The United States District Court for the Southern District of New York held that the New York statute was unconstitutional for violating the Commerce Clause. 205 The court concluded that the New York law is an "unconstitutional projection of New York law into conduct that occurs outside New York" and that "the burdens on interstate commerce resulting from the Act clearly exceed[ed] any local benefit derived from it."206

Central to the court's decision was the perception that the Internet is "one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent" regulation across the states that can "paralyze development of the Internet altogether."²⁰⁷ The display of web pages and the flow of finances cannot reasonably be limited to citizens of one particular state or made unavailable to citizens of one particular state, so the Internet is indeed national in scope.²⁰⁸ Inconsistent regulations "would prevent the establishment of an Internet gambling business in a state where such activity might be legal. . . . Such a prohibition resulting from inconsistent state laws is the precise result which the [D]ormant Commerce Clause is designed to prevent."²⁰⁹

The Kentucky statute that outlaws Internet gambling violates the Commerce Clause for the same reasons laid out in Pataki. First, the Kentucky law affects conduct occurring outside of Kentucky. By seizing a domain name of an Internet gambling site, Kentucky will shut down access of those sites to citizens outside of Kentucky, such as someone in Las Vegas, Nevada or even

²⁰⁷ *Id*.

¹⁹⁹ Kentucky Case Appeals Court Amicus Brief, supra note 179, at 10.

²⁰⁰ Id. at 10-11. As Professor Tribe notes, the Supreme Court has stated that "a state law is invalid per se under the Commerce Clause if it 'has the "practical effect" of regulating commerce occurring wholly outside that State's borders." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1031 (2000) (quoting Healy v. Beer Institute, Inc., 491 U.S. 324, 332 (1989)).

²⁰¹ Kentucky Case Appeals Court Amicus Brief, supra note 179, at 11.

²⁰² John E. Nowak & Ronald D. Rotunda, Constitutional Law 350 (7th ed. 2004).

²⁰³ 969 F. Supp. 160 (S.D.N.Y. 1997).

²⁰⁴ Id. at 163-64.

²⁰⁵ Id. at 183-84.

²⁰⁶ *Id*.

²⁰⁹ Olson, *supra* note 12, at para. 39.

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London, England trying to gamble online. Moreover, out-of-state businesses will be subject to the risk that a person in Kentucky accesses its gambling website, thereby making the business vulnerable to prosecution in Kentucky. Therefore, Kentucky's law prohibiting Internet gambling is "an imposition of its law on the businesses [and citizens] in other states where Internet gambling may be legal." 211

Second, the burdens that the Kentucky statute places on interstate commerce clearly exceed the benefits derived from it. As previously stated, the Kentucky statute was implemented to gain more control over its local gambling operations in an effort to generate more tax revenue for the state. However, the burden imposed on the rest of the forty-nine states and the world at large—preventing citizens of states that have legalized internet gambling or requiring a website to prohibit citizens of the states in which Internet gambling is prohibited—far exceeds the benefit Kentucky will derive from the additional tax revenue. "A government that is obligated to let in goods and services of other jurisdictions must let in outside legal gambling, unless it can show that the exclusion is to protect its residents. Laws that merely protect the local gambling operations from outside competition are invalid." 212

"Regulation by any single state can only result in *chaos*."²¹³ Internet gambling is a function of the Internet, and must be left to federal regulation to prevent inconsistent regulations across the states. It can be argued that gambling has historically been regulated by the states, and thus Internet gambling is not necessarily national in scope. However, the Internet has been deemed the contrary—national in scope. Online gambling's very existence relies on the boundary-less nature of the Internet and thus should only be regulated at the federal level.

V. States Lack Authority to Seize Internet Gambling Websites' Domain Names

States lack the necessary authority to seize an Internet gambling website's domain name from their respective domain name registrar. Although Internet gambling is considered mainstream today, it is a rather new form of gambling, and accordingly, legislatures and courts have been indecisive on how to treat it. Moreover, the Internet in general is still considered young and is continuously changing, making it a challenging area for regulation. Accordingly, the Internet is such a pervasive domain that regulation, if not drafted diligently, will be largely, if not absolutely, ineffective.

For the most part, Congress has made a conscientious effort to hold back from regulating the Internet. "[T]he Internet's growth and success as a tool for expanded commerce and the free flow of ideas can be attributed in large part to [Congress'] relative resistance thus far to erect government mandated road-

²¹² Rose & Owens, supra note 22, at 247.

²¹⁰ *Id.* at para. 33.

²¹¹ Id.

²¹³ Pataki, 969 F. Supp. at 181 (emphasis added).

blocks."²¹⁴ Despite Congress' effort up to this point to leave the Internet relatively free from regulation, the Internet still has a long way to go before it reaches its full potential, and government regulation now would cripple that vast potential.²¹⁵

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Congress should take the same approach regarding Internet gambling. Although the federal government historically has left gambling up to the respective states to regulate, 216 state regulation should not be the case for Internet gambling. There is a much more prevalent factor: the nature of the Internet. A state does not have the authority to seize an Internet gambling website's domain name from its respective domain name registrar for allegedly violating that state's laws because the state necessarily lacks personal jurisdiction and violates the Commerce Clause.

Kentucky lacks personal jurisdiction over the domain name registrars.²¹⁷ First and foremost, the federal Communications Decency Act preempts Kentucky's gambling laws from having effect on and jurisdiction over domain name registrars.²¹⁸ That is, the Act indemnifies a domain name registrar from being held liable or accountable, or even named as a party to the action, for the alleged criminal activities of its registrants.

Additionally, in order to be in violation of Kentucky's gambling laws, domain names must fall within the statutory definition of "gambling device" and must also be construed as property for the purposes of in rem jurisdiction. Domain names do not fall within Kentucky's gambling law's definition of "gambling device." Looking at the plain language of the statute as a whole, it is evident that Kentucky's legislature intended for the statute, describing a gambling device that was "designed or manufactured," to cover only physical, tangible gambling devices. Accordingly, the courts of Kentucky must not expand the definition of "gambling device," for it is the legislature's responsibility to define "gambling device" as being either physical or nonphysical, or both, so that it includes domain names.

²¹⁴ Press Release, Jeffrey Mazzella, President, Ctr. for Individual Freedom, Congress Must Not Steer Regulation of the Internet (Jan. 19, 2006), http://www.cfif.org/htdocs/legislative_ issues/federal issues/hot issues in congress/technology/CFIF Warns Congress Against Net_Neutrality_Legislation.htm.

²¹⁵ *Id*.

²¹⁶ Olson, *supra* note 12, para. 3; 15 U.S.C. § 3001(a)(1) (2006).

²¹⁷ As stated previously, this Note does not address whether Kentucky has personal jurisdiction over the domain names and their owners.

²¹⁸ 47 U.S.C. § 230(b) (2006). Congress declared that

It is the policy of the United States

⁽¹⁾ to promote the continued development of the Internet and other interactive computer services and other interactive media;

⁽²⁾ to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

⁽³⁾ to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; [and]

⁽⁴⁾ to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material;

²¹⁹ Ky. Rev. Stat. Ann. § 528.010(4)(a)-(b) (West 1994).

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Based on the function and purpose of a registrar, it is clear that domain names are not property. Registrars are in the business of selling only the rights to the domain name to a website operator; they are not selling the domain names themselves. Regardless of whether Kentucky even has jurisdiction over the domain names and their owners, it is not foreseeable to a domain name registrar that he would be subject to a state's jurisdiction for its registrant's activities. Because the Internet is a domain that stretches across the fifty states and the entire globe, it would be unconscionable for any court to hold that domain name registrars could foresee being hailed into essentially any and every state or country's courts.

Kentucky's gambling laws, when applied to Internet gambling, violate the Commerce Clause. The Commerce Clause of the United States Constitution prohibits a state from regulating commerce among the states.²²⁰ The Clause gives Congress the exclusive sovereignty over interstate commerce that is so national, or even international, in character to demand uniform treatment.

In the Kentucky Case, the interstate commerce at issue is Internet gambling. Internet gambling is considered a piece of interstate commerce because a state statute that prohibits online gambling affects Internet gambling—its cost and availability—for citizens of other states and other countries. In addition to affecting out-of-state gamblers, an anti-Internet gambling law in Kentucky also permits prosecution of out-of-state Internet gambling website operators. Both the Wire Act of 1961 and the Unlawful Internet Gambling Enforcement Act of 2006, inter alia, 221 cover the regulation of Internet gambling at the federal level. These federal laws show Congress' intent to regulate Internet gambling at the federal level, thus prohibiting states from enacting their own Internet gambling prohibition laws.

In the event that the Wire Act and the UIGEA are found not to give Congress the exclusive authority to regulate Internet gambling, the Dormant Commerce Clause steps in and retains regulation at the federal level. Theoretically, the Dormant Commerce Clause reserves regulatory power to the federal government of any commerce so national in scope that if anyone is going to regulate it, the federal government will. To prevent the hindrance of the development of the Internet, regulation of it shall be reserved to Congress, as the Internet is an area of commerce that must be protected from inconsistent regulation across the states.

If the Kentucky anti-Internet gambling laws were held to not violate the Commerce Clause, the Kentucky courts would effectively shut down access to the 141 domain names to anyone worldwide, would subject any Internet gambling website to prosecution in Kentucky, and would impose Kentucky's Internet gambling laws on citizens and businesses of states where gambling is lawful. The burdens of Kentucky's gambling laws on interstate commerce far exceed their benefits; that is, the burden placed on the citizens of the rest of the forty-nine states and the rest of the world—preventing access to an activity in a state in which it is lawful or requiring a website to block a certain geographic

²²⁰ U.S. Const. art. I, § 8, cl. 3. See also Kentucky Case Appeals Court Amicus Brief, supra note 179, at 11.
²²¹ For additional federal statutes regarding Internet gambling, see list in *infra*, Part III.

area, if at all possible, from accessing the website—far exceeds Kentucky's additional tax revenue benefit. Thus, the Dormant Commerce Clause gives Congress, not the states, the exclusive authority to regulate Internet gambling. Accordingly, Kentucky's anti-Internet gambling laws violate the Commerce Clause.

In analyzing the Kentucky Case, a state does not have the authority to seize an Internet gambling website's domain name from their respective registrar for violating that state's laws. Regulation by individual states will only result in "chaos." The unique dynamics of the Internet and Internet gambling require that any regulation must be uniform across the states, and so must take place at the federal level.