

**COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
ACTION NO. 2008-CA-2036**

VICSBINGO.COM, ET AL.

PETITIONERS

v.

HONORABLE THOMAS D. WINGATE

RESPONDENT

AND

COMMONWEALTH OF KENTUCKY,
ex rel. J. Michael Brown, Secretary, Justice
and Public Safety Cabinet

REAL PARTY IN INTEREST

**MOTION OF NETWORK SOLUTIONS LLC FOR LEAVE TO FILE AMICUS
BRIEF IN SUPPORT OF PETITION FOR WRIT**

Network Solutions, LLC , hereby moves the Court, pursuant to Rule 76.12(7) of the Kentucky Rules of Civil Procedure, for permission to file the *amicus curiae* brief tendered with this motion. This brief is timely filed within fifteen days of the October 28, 2008, filing of petitioners' brief.

Nature of Movant's Interest

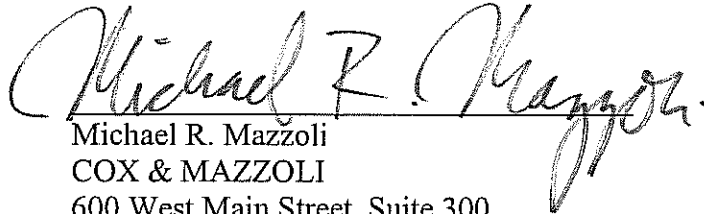
Network Solutions, LLC (NSLLC), is one of the world's largest registrars of domain names. It is the registrar for at least 20 of the 141 domain names seized by Franklin Circuit Court and subject to forfeiture at a hearing scheduled for December 3, 2008. Despite not being named as a party in Franklin Circuit Court, and despite not being served with process, NSLLC is one of the only persons or entities to whom the Franklin Circuit Court's seizure order was directed. See September 18, 2008 Order, at ¶ 4 ("the Domain Names shall be immediately transferred by their respective *registrars* to an account of the Plaintiff ...")*[emphasis added]*.

The Franklin Circuit Court's order purports to require NSLLC to enter into a contractual arrangement with the Commonwealth of Kentucky, whether NSLLC chooses to or not, without regard to NSLLC's existing contractual obligations. NSLLC is vitally interested in protecting its right to contract with persons and entities with whom it chooses to contract and upon such terms as it elects.

Based on constitutional principles, NSLLC does not believe that the Franklin Circuit Court can or should issue orders to NSLLC, or any other registrar located beyond the borders of the Commonwealth of Kentucky, requiring transfer, suspension or forfeiture of lawfully registered Internet domain names.

Relevance to Disposition of Case

NSLLC believes that the pending petition for a writ is the only way to determine whether the Franklin Circuit Court has jurisdiction to issue orders to NSLLC and other registrars or, if the court has jurisdiction, whether Franklin Circuit Court is threatening to inflict irreparable harm on NSLLC and its existing contractual partners by telling NSLLC with whom it can and cannot do business.



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COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
ACTION NO. 2008-CA-2036

BRIEF OF *AMICUS CURIAE* NETWORK SOLUTIONS, LLC
IN SUPPORT OF PETITIONERS

VICSBINGO.COM, ET AL.

PETITIONERS

VS.

HONORABLE THOMAS D. WINGATE,
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REAL PARTY IN INTEREST

THE AMICUS

Amicus curiae Network Solutions, LLC (NSLLC) is one of the world's largest registrars of domain names. It is the registrar for more than 20 of the 141 domain names at issue in this proceeding. NSLLC takes no position on the propriety of gaming, Internet-based or otherwise.

NSLLC and its fellow registrars, despite not being named as parties, and despite not being served with or subject to process, are the only persons or entities to whom the Franklin Circuit Court's initial order below was directed. See September 18, 2008 Order, at ¶ 4 ("the Domain Names shall be immediately transferred by their respective registrars to an account of the Plaintiff . . ."). Further, the Franklin Circuit Court's orders misapprehend and mischaracterize the nature of the services NSLLC and other registrars

provide to their customers, and fundamentally misunderstand what a domain name is and how the domain name system functions. These fundamental errors lead the Court to numerous incorrect rulings, all of which undermine the borderless essence of the Internet. Those rulings would also have an overwhelmingly adverse effect on Internet users, Internet-based commerce, and upon the domain name industry, of which NSLLC is a leader.

Lastly, the Franklin Circuit Court's orders require that NSLLC, and its fellow registrars, enter into contractual arrangements with the Plaintiff, whether they choose to or not. This judicial conscription of businesses, requiring non-parties to enter into contracts with the government, without due process and without compensation, is plainly unlawful and *ultra vires*. NSLLC has a vital interest in protecting its right to contract only with persons and entities with whom it chooses to contract, and upon such terms as it elects. If the writ of prohibition is not granted here, this Court effectively will condone the use of judicial power to require innocent bystanders – those not parties to litigation – to enter into contractual arrangements with the Commonwealth of Kentucky, solely because the Commonwealth desires such services. There is no authority known to NSLLC which would justify such a broad and overreaching use of governmental power. This is conscription.

SUMMARY OF ARGUMENT

NSLLC believes that the Petitioners have adequately addressed many of the issues herein, especially with respect to the Franklin Circuit Court's lack of jurisdiction and the unconstitutional nature of its rulings. However, NSLLC desires to address several additional issues that underpin the constitutional infirmities in the Franklin Circuit Court's orders.

First, the Franklin Circuit Court lacks jurisdiction and authority to order a non-party -- like NSLLC -- to perform an act. Yet that is precisely what the Court did. It ordered the registrars (who are not parties; are not subject to the Court's jurisdiction; and are not alleged to have done anything unlawful) to transfer the subject domain name registrations to the Commonwealth of Kentucky. The Court had and has no authority to do so.

Second, ignoring the plain language of Kentucky statutes, the Court found that a domain name is a "gambling device." This ruling was plainly wrong in that definitionally, a domain name cannot be a gambling device and, in any event, a domain name is not property -- it is a contractual right.

ARGUMENT

I. The Franklin Circuit Court Lacks The Authority To Order Registrars To Transfer Domain Name Registrations To The Commonwealth

The Franklin Circuit Court acted beyond its jurisdiction in the underlying case by ordering the registrars, including NSLLC, to take affirmative actions. Specifically, the Court below ordered that the "Domain Names shall be immediately transferred by their respective registrars to an account of the Plaintiff."

No registrar was a party to the underlying action. Nonetheless, the Franklin Circuit Court entered what amounts to a mandatory injunction against registrars, requiring them to transfer domain name registrations to the Commonwealth.

It is fundamental in the law of Kentucky and elsewhere that "a person should not be bound by an injunction decree until she has had her day in court." *Lewis LP Gas, Inc. v. Lambert*, 113 S.W.3d 171 (Ky. 2003). In *Lewis LP Gas*, the Supreme Court of

Kentucky reversed this Court's denial of a writ of prohibition against a trial court. The trial court had granted an injunction against a non-party to the proceedings before it. The Supreme Court of Kentucky ruled that doing so flouted due process and that the trial court acted without jurisdiction.

This is precisely the situation before the Court here. The domain name registrars, including NSLLC, are the recipients of a mandatory injunction, requiring them to transfer domain name registrations to the Commonwealth. Yet the registrars were not parties to the proceedings, nor are they subject to the Court's jurisdiction. Accordingly, the Franklin Circuit Court was without jurisdiction to enter the orders it entered, and in doing so plainly violated the due process rights of NSLLC and other registrars. *Lewis LP Gas* is dispositive of this issue.

II. A Domain Name Registration Is Neither A Gambling Device, Nor Is It Property That May Be Forfeited

A. A Domain Name Is Not a "Gambling Device"

In the Franklin Circuit Court, the Commonwealth contended that the domain names in issue were "gambling devices." Gambling devices are defined 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; *
* * * ¹

KRS 528.010(4).

The Circuit Court construed this statute with enormous breadth, relying upon repealed statutes and standing established rules of construction on their head to conclude that domain names – alphanumeric character strings – are “gambling devices.”

KRS 528.010 is a criminal statute. “Penal statutes are not to be extended by construction, but must be limited to cases clearly within the language used.” *Woods v. Commonwealth*, 793 S.W.2d 809, 814 (Ky. 1990). “[L]aws penal in nature are to be strictly construed.” *Kentucky Registry of Election Finance v. Blevins*, 57 S.W.3d 289, 292 (Ky. 2001).

“Criminal statutes are not cunningly and darkly framed to catch the unwary, and they are not extended for this purpose beyond the fair and natural meaning of the words used.” *Hause v. Commonwealth*, 83 S.W.3d 1, 7 (Ky. App. 2002) (quoting *Commonwealth v. Adams Express Co.*, 123 Ky. 720, 97 S.W. 386, 387 (1906)). “In the construction of statutes, simple words must be given their ordinary meaning and cannot be given a

¹ To the extent this language is not clear on its face as to what constitutes a “gambling device, the Kentucky Crime Comm’n / Legis. Research Commentary (1974) provides: “The definition of ‘gambling device’ in subsection (4) limits the application of the term to mechanical items used only for the purpose of gambling such as slot machines and roulette wheels. Devices used to dispense tickets at licensed race tracks and certain pinball machines are expressly excepted from the definition.” (Underscore added).

strained interpretation for the purpose of effecting a result not contemplated by the members of the assembly which framed the provisions under consideration.” *Id.* (quoting *Inter-County Rural Elec. Coop. Corp. v. Reeves*, 171 S.W.2d 978, 981 (Ky. 1943)).

Application of the correct standard of construction unquestionably leads to the conclusion that a domain name is not a gambling device. A domain name is not a machine or mechanical device. It cannot be “operated,” nor can it deliver money or property. It is not manufactured. No reasonable interpretation of the statute can yield the result reached by the Franklin Circuit Court. A domain name is not, and under no circumstances can be found to be, a “gambling device.”

B. *A Domain Name Is Not Property That May Be Forfeited*

A priori, only property may be seized or forfeited. The Franklin Circuit Court, citing California cases which are in the distinct minority, found that domain names are property. However, the Court virtually ignored the overwhelming weight of authority holding that a domain name is not property.

For instance, in *Dorer v. Arel*, 60 F. Supp. 2d 558 (E.D. Va. 1999), the Court found that “A domain name, unlike a patent, is essentially an address; it derives its value chiefly from its manner of use, typically as a tradename or trademark. In other words, a domain name, in most instances, is valueless apart from the content or goodwill to which it is attached Second, a domain name that is not a trademark arguably entails only contract, not property rights. Thus, a domain name registration is the product of a contract for services between the registrar and registrant.” *Id.* at 560, n.9.

Similarly, in *Network Solutions, Inc. v. Umbro Int’l, Inc.*, 529 S.E.2d 80 (Va. 2000), the Court held:

Irrespective of how a domain name is classified, we agree with Umbro that a domain name registrant acquires the contractual right to use a unique domain name for a specified period of time. However, that contractual right is inextricably bound to the domain name services that NSI provides. In other words, whatever contractual rights the judgment debtor has in the domain names at issue in this appeal, those rights do not exist separate and apart from NSI's services that make the domain names operational Internet addresses. Therefore, we conclude that "a domain name registration is the product of a contract for services between the registrar and registrant." *Dorer*, 60 F. Supp. 2d at 561.

* * *

We are cognizant of the similarities between a telephone number and an Internet domain name and consider both to be products of contracts for services.²

Id. at 86-87.

The logic of these cases was followed in *Zurakov v. Register.com*, Index No. 600703/01 (Sup. Ct. N.Y. 2001), where the Court held:

This court finds the courts' reasoning in *Dorer, supra.* and *Network, supra.* persuasive and holds that, in this case, the domain name "Laborzionist.org" is a product of Zurakov's service contract with Register. "Laborzionist.org" is not a registered patent or registered trademark. Accordingly, Zurakov has a contract right, not a property right, in the domain name "Laborzionist.org" and his service agreement with Register exclusively governs his rights regarding his use of that domain name.

² In the Court below, the Commonwealth misstated that in *Umbro*, Network Solutions conceded that a domain name is property. To the contrary, Network Solutions conceded only that the right to use a domain name can be a form of intangible property (like a trademark). 529 S.E.2d at 88. This is an important distinction.

The treatment of domain names as contract – not property – rights, enjoys international approval. In *Easthaven, Ltd. v. Tucows Inc.*, Docket 00-CV-202854 (Ont. Can. Super. Ct. Aug. 15, 2001), the Court stated “I am inclined to agree with Nutrisystem.com Inc. on this point. It does seem to me to be difficult to characterize a domain name as property.”

A domain name does not come into existence until there is a registration agreement. It ceases to exist when the registration agreement terminates or otherwise so provides. It has none of the usual attributes of property – it is solely the product of the registration agreement. It cannot be seized or forfeited.

Thus, the Franklin Circuit Court reached its determination that a domain name is property in reliance upon a few outlying California authorities. It ignored the overwhelming weight of well-reasoned decisions, in which Courts have acknowledged that but for the existence of a contract -- the registration agreement between a registrar and a registrant -- a domain name does not exist. Accordingly, a domain name is nothing but a contract right. It is not property.

III. A Domain Name Registration Agreement Is Not Assignable And A Registrar May Not Be Required To Transfer The Registration

Lastly, the Franklin Circuit Court ordered NSLLC and other non-party registrars to transfer the domain name registrations into the name of the Commonwealth – effectively requiring that the registrars enter into contractual relations with the Commonwealth. The Court lacked any basis for doing so, as (a) a contract for services is not assignable, and (b) NSLLC’s domain name

registration agreements are expressly not assignable.

Domain name registration agreements are contracts for personal services. *See Network Solutions, Inc. v. Umbro Int'l, Inc.*, 529 S.E.2d at 86. Such agreements are not assignable. *See, e.g., Haag v. Reichart*, 142 Ky. 298, 301 (Ky. App. 1911). Even if a domain name registration agreement were not a contract for personal services, NSLLC's domain name registration agreement provides, in pertinent part, that "Except as otherwise set forth herein, your rights under this Agreement are not assignable or transferable." <http://www.networksolutions.com/legal/static-service-agreement.jsp>.

Notwithstanding the non-assignability of NSLLC's registration agreement, the Franklin Circuit Court's order purports to require NSLLC and other registrars to permit an assignment of the registration from the current registrant to the Commonwealth. It is contractually impermissible and legally improper for the Court to force NSLLC, a non-party to the litigation, to enter into contractual relations with the Commonwealth of Kentucky. Such an order violates both the law governing assignability and the express non-assignment clause in NSLLC's registration agreements. This is judicial conscription, whereby a Court has taken it upon itself to require registrars, like NSLLC, to do business with the Commonwealth. NSLLC cannot, and should not, be forced to contract with any person or entity with whom it may not choose to contract. The Franklin Circuit Court's orders, however, ignore this fundamental principal. This Court should not condone such a plainly incorrect ruling.

CONCLUSION

The trial court's Orders purporting to seize the domain names were, quite simply, outside of the Court's jurisdiction and were incorrect. *Amicus* strongly urges that the Franklin Circuit Court should be ordered to dismiss the case for lack of jurisdiction, and directed to take those steps necessary to return the parties, and the domain names, to the status quo, prior to the trial court litigation.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion and attached Brief were served by first-class mail this 12th day of November, 2008 upon:

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