

# No. 02-1112

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In the

## United States Court of Appeals For the Fourth Circuit

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Cable News Network, L.P., LLLP, *et al.*,

*Plaintiffs-Appellees,*

- against -

CNnews.com, an Internet Domain Name (*In Rem*),

*Defendant-Appellant.*

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**Appeal Under 28 U.S.C § 1291 From a Final Judgment of the United States  
District Court for the Eastern District of Virginia**

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Brief of *Amicus Curiae* Electronic Frontier  
Foundation, In Support of Defendant-Appellant's  
Prayer for Reversal of the Judgment Below

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## **CORPORATE DISCLOSURE STATEMENT**

The Electronic Frontier Foundation is a not-for-profit organization, established under the laws of the State of California. It is not a trade association and does not purport to represent the interests of any public or other corporation or any other business entity. The EFF issues no shares and has no shares traded on any public exchange. Aside from the potential extraterritorial effect of a precedent in this case upon literally millions and millions of small businesses, publishers, and entrepreneurs worldwide (a full list of which would be impossible to generate), the EFF is unaware of any entity (not already disclosed by Appellant or Appellees) subject to the disclosure requirements of Local Rule 26.1, that will be directly effected by the outcome of this litigation.

Accordingly, the Electronic Frontier Foundation has no disclosures to make.

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Electronic Frontier Foundation (“EFF”) is a non-profit, public interest civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry and government to support free expression, privacy, fairness, democracy, transparency and openness in the information society. Founded in 1990, EFF is based in San Francisco. EFF has members all over the world and maintains one of the most linked-to Web sites (<http://www.eff.org>) in the world.

Because of its charitable purpose of promoting fairness and the application of the rule of law online, the EFF has a direct and important interest in the matters of Internet governance, extraterritorial jurisdiction, and judicial restraint presented in this case. Moreover, the EFF and the attorneys on this *Amicus* Brief have considerable personal experience and specialized knowledge, that may help this honorable Court understand better the history, larger policy background, and technical processes of Internet Domain Name System (“DNS”) relevant to this appeal. The EFF already has been actively involved, promoting the public interest on a *pro bono publico* basis, in multiple cases<sup>1</sup> (including proceedings before this honorable Court, see 22 Fed. Appx. 344) raising closely related issues.

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<sup>1</sup>A representative sample listing of related representations is set forth separately in our Motion for Leave. As required by Fed.R.App.P. 29(c)(2), the source for authority to file is by way of a Rule 29(b) Motion for Leave.

Consistent with our nonprofit goals, EFF respectfully prays for leave to file this brief for three reasons. First, many issues presented by this appeal have been raised and will be raised in many other cases as the Internet continues to develop. Not all of these issues need be resolved conclusively here and, consistent with time-honored principles of judicial restraint, we respectfully urge that the decision below should be reversed, but this honorable Court should do so on the narrowest grounds presented. Second, we firmly believe, and seek to explain, that the threat and actual institution of lawsuits in faraway jurisdictions (sometimes, from foreign defendants' perspective, in the faraway United States, but with alarming frequency, U.S. citizens and businesses are on the receiving end of such suits) has imposed a disproportionately<sup>2</sup> detrimental impact upon highly desirable Internet activities that should be encouraged and not hampered. These activities include not only protected expression on the Internet, but also worthy commercial activities of *bona fide* small businesses, startups,

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<sup>2</sup>The expressed intention of Congress in passing the ACPA was to secure a remedy against certain types of *arbitrageurs* and opportunists, with no purpose other than a “bad faith intent to profit” from activities such as those typified in the Panavision and Intermatic cases, involving so-called “cybersquatter” Dennis Toepfen. However laudable that objective may have been, based on what we have seen and the reports we receive literally on a daily basis, the worldwide “collateral damage” that continues to be inflicted on legitimate publishers and businesses – clearly outside the scope of the behavior Congress said it wanted to target – far exceeds the level of demonstrable harm shown to Congress by those who sought to have the ACPA introduced into law. The damage inflicted by the “solution” is worse than the “problem” that triggered the legislation, by several orders of magnitude.

and entrepreneurs worldwide.<sup>3</sup> Even more than negative direct impacts, we have observed a pronounced and growing *chilling effect* on people who the law was supposed to leave alone, and who would have made important contributions to society via the Internet – but for the multinational legal minefield the Internet is widely understood to have become. While quantification of the total harm inflicted by this *chilling effect* is difficult to ascertain with scientific certainty, based on the anecdotal evidence available to us, the losses to society far exceed even the disproportionately large direct negative consequences of the developments that prompt us to file.

Third, we believe several of the rationales offered by the trial court are in error. Aspects of the 1999 Anticybersquatting Consumer Protection Act are unconstitutional on their face, i.e. 15 U.S.C. § 1125(d)(2)(A)(ii)(I),<sup>4</sup> and the exercise

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<sup>3</sup>As but one illustration, we respectfully offer Mr. Hans Rekestad, see < <http://www.hansrekestad.com> >, a *pro bono* client of the EFF. See Almar Latour & Scott Miller, *Ford Cracks Down on Use of Volvo Copyright on Web*, THE WALL STREET JOURNAL (Oct. 20, 2000) (Tab A). Ford Motor Company, half-owner of Swedish Volvo Trademark Holding, sued Mr. Rekestad in Detroit for “cybersquatting.” After nearly two years in court, that Mr. Rekestad himself never could have afforded, in February, 2002, Mr. Rekestad prevailed resoundingly.

<sup>4</sup>Defective aspects of the statute from a constitutional perspective (both Due Process and Federalism) already have been addressed in papers previously filed by EFF in Heathmount A.E. Corp. v. Technodome.com, No. 01-1153 (4<sup>th</sup> Cir. Jan. 10, 2002). We firmly stand by and reiterate each of the arguments made in that prior appeal (which resulted in no decision on the merits). Because this honorable Court

of *in rem* jurisdiction as applied in the instant case clearly violates principles of Due Process. But these constitutional questions need not be reached here because this case prudently should be, and we pray it will be, decided on narrower grounds. Accordingly, the EFF seeks to point out certain key issues, hopefully to the benefit of this honorable Court's analysis.

## **INTRODUCTION**<sup>5</sup>

As Network Solutions, Inc., another *Amicus*, that was granted leave to present not just briefing, but oral argument before this honorable Court, recently observed:

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already has access to all the papers in the Technodome case, we have made an effort to avoid repetition.

<sup>5</sup>This *Amicus Curiae* Brief presupposes basic knowledge of the operation of the DNS, but not necessarily detailed knowledge of how VeriSign (a Delaware corporation, presently headquartered in Mountain View, California) is structured internally, or details of the contractual relationships between VeriSign and ICANN. For more information on the questions “What is a domain name?” and “How does the DNS work?” several resources are available: First, much key information is summarized in the Opening Brief of Appellants, in the Technodome litigation (No. 01-1153). Next, publicly available information (which courts addressing related issues routinely consult – see, e.g., America Online v. Huang, 106 F. Supp. 2d 848 (E.D. Va. 2000)) includes the Fourth Edition of “DNS and Bind” by Paul Albitz & Cricket Liu, recently released by O’Reilly & Associates. Sample chapters are available on the O’Reilly Website. < <http://www.oreilly.com/catalog/dns4/> >; see also < <http://www.howstuffworks.com/dns.htm> >. Finally, the Website of the Open Root Server Consortium contains a wealth of materials relating to all aspects of the Domain Name System, including the many variations on how parts of it are run – not limited to the narrow subset of the DNS that assumes the Legacy Root operated by ICANN is exclusively authoritative. < <http://www.open-rsc.org/> >.

Some very old concepts of *in rem* jurisdiction have come to bear in this [ACPA] statute upon the 21<sup>st</sup> Century phenomenon known as the Internet. Whether they have been interpreted and applied correctly is for this Court's determination. Because of this Court's enormous influence over the Internet, however . . . N[etwork] S[olutions] is more than sensitive to every discussion and even the choice of words used by the Court. NSI simply intends to point out certain key issues, hopefully to the benefit of this Court's analysis.

*Amicus Curiae* Brief of Network Solutions, Inc.<sup>6</sup> (July 25, 2001), in Heathmount A.E. Corp. v. Technodome.com, No. 01-1153. Likewise, the significant and frequently unforeseen impact that this honorable Court's opinions can and do have on the development of the Internet and on the rights of otherwise unrepresented non-parties far beyond the borders of Maryland, the Carolinas, Virginia, and West Virginia, has taught us that even the smallest nuances of language or the most delicate step of logic employed or overlooked in Internet-related appeals can have considerably broader reverberations beyond the parties to the instant dispute – both direct impacts upon the affairs of third-parties, and more-indirect *chilling effects*.

We believe this honorable Court implicitly, and soundly, recognized in its prior, narrow Technodome, 22 Fed. Appx. 344, and Porsche Cars N. Am. v. Porsch.com,

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<sup>6</sup>Notably, the NSI *Amicus* brief was filed long after the merger of VeriSign and NSI. Although Network Solutions is now a wholly-owned subsidiary of Mountain View-based VeriSign, Inc., Network Solutions has for very important reasons retained key aspects of a separate corporate identity.

215 F.3d 1320 (4<sup>th</sup> Cir. 2000), decisions, that the Law of Unintended Consequences – while always a mild concern in every matter it handles – becomes exponentially more important when an Internet case is presented.

The reason the Law of Unintended Consequences is magnified so dramatically in Internet cases is obvious: The Internet is global in scope, whereas the jurisdiction of sovereigns – including the United States – must remain limited by principles of fairness, comity, and Due Process.<sup>7</sup> Particularly when asked to extend jurisdiction extraterritorially, to extinguish the rights of foreign persons or regulate the effects of foreign transactions, U.S. courts have been and must remain especially circumspect about exporting U.S. policy preferences abroad. Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102, 115 (1987) (“Great care and reserve” required before extending U.S. legal system’s reach “into the international field.”).

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<sup>7</sup>“Purposeful availment” is the key test for jurisdiction and Due Process. Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory,” 283 F.3d 208, 213-14 (4<sup>th</sup> Cir. 2002) (“This basic analysis is not altered when the defendant’s property is found in the forum state. The Supreme Court’s decision in Shaffer v. Heitner . . . eliminated all doubt that the minimum contacts standard in International Shoe governs *in rem* and *quasi in rem* actions as well as *in personam* actions.”). We firmly agree with this honorable Court that the “purposeful availment” test equally controls in *in rem* cases as it does in *in personam* cases. Rush v. Savchuk, 444 U.S. 320, 329-30 (1980); Shaffer v. Heitner, 433 U.S. 186, 207-08, 212 & n.39 (1977). Despite different “Latin labels” the Due Process test is one and the same. Id.; Burnham v. Superior Court of Cal., 495 U.S. 604, 621 (1990) (plurality opinion) (“The logic of Shaffer’s holding . . . places **all** suits against absent nonresidents on the same constitutional footing . . .”).

The identical concerns about Due Process always trump any conflicting statute and always apply in every case, no matter which Latin label may be attached to it. Rush v. Savchuk, 444 U.S. 320, 329-30 (1980); Shaffer v. Heitner, 433 U.S. 186, 212 & n.39 (1977); Base Metal Trading, Ltd., 283 F.3d. at 213-14; Pittsburgh Terminal Corp. v. Mid Allegheny Corp., 831 F.2d 522, 526 & n.4 (4<sup>th</sup> Cir. 1987). When courts are asked to exercise judicial power “with extensive extraterritorial effects,” they must take extraordinary care “adequately [to] consider [U.S. courts’] power to do so.” Sterling Drug, Inc. v. Bayer A.G., 14 F.3d 733, 746 (2<sup>nd</sup> Cir. 1994); see also Asahi, at 115; Base Metal Trading, *supra*, note 7.

The Supreme Court said it best: “We cannot have trade and commerce in world markets . . . exclusively on our terms, governed by our laws, and resolved in our courts.” M/S Bremen v. Zapata Offshore Co., 407 U.S. 1, 9 (1972). This Circuit, too, has long rejected such “parochial” notions. Allen v. Lloyd’s of London, 94 F.3d 923, 928 (4<sup>th</sup> Cir. 1996).

This case presents an important choice. Is the United States (the country that most stands to gain from the robust growth of the Internet, yet has the most to lose from unintended consequences) going to set an important and prudent example of self-restraint and thoughtful moderation, or is the United States going to plant itself firmly in the vanguard of jurisdictions that decision-by-decision are collectively subjecting

all publishers worldwide simultaneously to the conflicting laws and policy preferences of over 100 separate countries<sup>8</sup> (along with provinces and subunits), with predictable resulting effects upon the benefits promised by the Internet's continued growth?

The rationale for moderation is persuasive, and deserves consideration. See Yahoo!, Inc. v. La Ligue Internationale Conra le Racisme et l'Antisémitisme, 145 F. Supp. 2d 1168 (N.D. Cal. 2001); Cyberspace Communications, Inc. v. Engler, 142 F. Supp. 2d 827, 830-31 (E.D. Mi. 2001) (enjoining Michigan statute due to extraterritoriality issues); American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 174-77 (S.D.N.Y. 1997) (same; New York statute).

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<sup>8</sup>E.g., Bharti Tele-Ventures, Ltd. v. Bharti, No. 2570/2001 (Delhi High Ct., New Delhi filed Dec. 19, 2001) (selected papers attached at Tab B). Mr. Vijay Bharti, a United States citizen in the State of Washington, has owned the address <Bharti.com> (his **own** personal name) since 1997. He used it continuously to promote his small business in Washington, and never sought to do business in India. His friends and customers came to rely on that address not only to reach his Website, but to send email. However, a corporation in India, named Bharti Televentures, launched an Initial Public Offering of stock in 2001. Bharti had never attempted to engage in *arbitrage* with the Indian telecom company, and had no intention of selling his established addressing rights. The attached court papers (Tab B) tell much of the rest of the story – unfortunately, far too common. Bharti may have fared better if he had actually been sued someplace with a truly legitimate claim of jurisdiction. See Avery-Dennison v. Sumpton, 189 F.3d 868 (9<sup>th</sup> Cir. 1999); Hasbro v. Clue Computing, 66 F. Supp. 2d 117 (D. Mass. 1999), *affd*, 232 F.3d 1 (1<sup>st</sup> Cir. 2000); HQM, Ltd. v. Hatfield, 71 F. Supp. 2d 500 (D. Md. 1999); Strick Corp. v. Strickland, 162 F. Supp. 2d 372 (E.D. Pa. Aug. 27, 2001). But like every publisher worldwide, Mr. Bharti does not control where plaintiffs arbitrarily file suit, but can only seek jurisdictional dismissal. Like everyone else, he must depend on courts to restrain themselves.

Ultimately, this case is not just a dispute involving the single “dot-com” Domain Name < CNnews.com >, but rather the resolution of one or more issues setting precedent that potentially impacts the similarly-situated registrants of approximately 23,198,677<sup>9</sup> SLD Internet addresses ending in the gTLD<sup>10</sup> “.com” – roughly half of which (at present) belong to persons outside the United States. Eleven million domain names belonging to millions of foreign holders represents a **lot** of interested parties worldwide with good reason to be concerned about this honorable Court’s decision. For **each and every** of the 23 million-odd “.com” addresses registered in the world, the “registry” (emphatically **not** the entity that either “registered” or “assigned” any addresses)<sup>11</sup> happens to be headquartered in Mountain

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<sup>9</sup> As of December 11, 2001 (source: < <http://www.zooknic.com/Domains/counts.html> >). Contemporaneously, the combined total of all addresses in “.com,” “.org,” “.net” and “.edu” combined (gTLDs only – without any ccTLDs) was 30,322,200.

<sup>10</sup>For an explanation of the difference between “global” Top Level Domains like “.com” and “country code” Top-Level Domains (“ccTLDs”) like “.us,” “.jp” or “.tv,” please see Appellants’ Opening Brief from the Technodome case, which addresses these issues.

<sup>11</sup>Verisign Global Registry Services (“VeriSign GRS”) is forbidden from participating in either of those functions – rather, it is entity charged with the task of maintaining the copy of the “.com Zone File” from which all other copies are propagated, and of taking and processing instructions from *registrars* through the Shared Registration System.

View, California (not in Virginia).<sup>12</sup> After the Shared Registration System went on line,<sup>13</sup> and “dot-com” registrants were first offered a choice among registrars, millions of them elected purposefully to avail themselves of jurisdictions other than Virginia and selected *registrars* located elsewhere.

In light of the vast number of “.com” registrations worldwide, and the diversity of situations among different registrants, if the trial court’s reasoning is approved, the likelihood of unintended consequences – sooner or later– is staggering.

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<sup>12</sup>VeriSign Global Registry Services exists as one subpart of VeriSign, Inc., which is located in Mountain View, California. It is not clear from corporate filings with the SEC, annual reports, and other sources, whether VeriSign GRS has a separate existence as a corporate entity, or whether it is a division of VeriSign, Inc. The important point is that VeriSign GRS was formed after the VeriSign / Network Solutions merger, and assumed certain functions and business operations that used to be performed within the corporation called Network Solutions.

<sup>13</sup>As the trial court noted, on the question whether pre-SRS “registration agreements” with Network Solutions, standing alone, might support jurisdiction in Virginia over subscribers’ rights, courts addressing this exact issue in this Circuit have repeatedly decided that such a contract, which is analogous to a “magazine subscription” does not constitute “purposeful availment” by the domain name registrant of the benefits and protections of the forum, and does not (standing alone) establish “minimum contacts” such that the exercise of jurisdiction would comport with Due Process. See Cable News Network, L.L.P., LLLP, 162 F. Supp. 2d 484, 489 n.16 (E.D. Va. 2001); Heathmount A.E. Corp. v. Technodome.com, 106 F. Supp. 2d 860, 866-67 (E.D. Va. 2000) (“domain name registrations “creat[e] no ongoing relationship of substance, any more than a magazine subscription creates an ongoing relationship between the publisher and subscriber.”) (citing America Online, Inc. v. Huang, 106 F. Supp. 2d 848, 855-60 (E.D. Va. 2000)).

## ARGUMENT

I. **THE ASSIGNMENT OF “DOT-COM” INTERNET ADDRESSES:  
ONLY ICANN-APPROVED *REGISTRARS* MAY REGISTER OR ASSIGN “DOT-COM” (AS OPPOSED TO CCTLD) INTERNET DOMAIN NAMES BECAUSE  
VERISIGN GLOBAL REGISTRY SERVICES IS FORBIDDEN FROM ASSIGNING  
ANY ADDRESSES TO CUSTOMERS.**

The key to the legal arguments in this case rests on a few undisputed facts (all matters of public record) about the manner in which Internet addresses within the “Dot-Com” top-level domain, are assigned. Continuously from the spring of 1999 through the present (*i.e.*, at all times relevant to this case), the “Shared Registration System” has been in place.<sup>14</sup> The ICANN Website explains:

The Shared Registration System ("SRS") is a domain name registration system for competitive registrars in the .com, .net, and .org top-level domains. The SRS was created in the spring of 1999 through the initiative of the United States Department of Commerce under an amendment to its cooperative agreement with Network Solutions, Inc. Under this domain name registration system, competing ICANN-accredited registrars register domain names utilizing one shared, central registry operated and maintained by NSI.

ICANN, Registrar Accreditation Overview (Dec. 6, 1999), *at* <  
<http://www.icann.org/registrars/accreditation-overview.htm>>.

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<sup>14</sup>See U.S. DoC, NTIA, *A Proposal to Improve Technical Management of Internet Names and Addresses*, 63 Fed. Reg. 8825, 8829-30 (Feb. 20, 1998) (“Green Paper”); U.S. DoC, NTIA, *Statement of Policy: Management of Internet Names and Addresses*, 63 Fed. Reg. 31,741, 31,746-47 (June 10, 1998) (“White Paper”).

The players in the SRS, in addition to ICANN, include approximately 180 “registrars” worldwide, each accredited by ICANN, that have cryptologically-secured access to the SRS. These entities assign domain names to customers.

In addition to the *registrars* and ICANN, for the “.com” Top-Level Domain, the SRS employs a singular *registry*. The registry is responsible for processing orders from registrars, but itself cannot compete with them (nor may it in any way give any advantage to any registrar). The registry does not register or assign domain names. *Registrars* do. And when they do, they submit the instructions through the SRS software, which instructions the registry automatically processes and enters in a shared computer database,<sup>15</sup> according to the rules set forth in the software (for example, one registrar may activate settings that forbid any other registrar from making changes to a record). The registry keeps the database, periodically propagates it, and makes sure the software runs correctly. But it is not actually permitted to tamper with or edit entries in the database. Its role is ministerial.

It is helpful to think of the SRS as analogous to the docket and records

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<sup>15</sup>The trial court was wrong to call this the “root zone file.” The “root zone file” is the master file at the top of each DNS hierarchy (there are several). Entries into a “root zone file” actually create each of the top-level domains of that “root.” In the case of the ICANN root, the entries in this file actually create the global TLDs and the country-code TLDs such as “.info,” “.com,” “.net” “.edu,” “.us,” “.jp,” etc. Each of these TLDs individually then has its own “TLD zone file.” So the file where new domain names (SLDs) are added to “.com” would be the “.com’ TLD zone file.”

maintained by a Clerk of Court. Court records are not separately maintained by the different chambers of each sitting judge, but are kept in a central clerk's office. The SRS *registry*, like the Clerk, is charged with the ministerial task of keeping the records accurately in a central location. The *registrars* are the entities who actually perform all functions of substance. It is true, of course, that a clerk of court is "in possession" of that particular court's records. But the clerk's purely ministerial possession does not authorize the clerk unilaterally to reverse or amend a final judgment entered by an Article III judge simply by altering documents or adding papers to courthouse records. Rather, the clerk may only do so when specifically directed by one of the judges.

The activities of the ".com" registry have principally been governed by two agreements. The first<sup>16</sup> was dated November 10, 1999, between Network Solutions<sup>17</sup>

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<sup>16</sup>< <http://www.icann.org/nsi/nsi-registry-agreement-04nov99.htm> >. The agreement defines "registry services" as "operation of the registry for the Registry TLDs [including] receipt of data concerning registrations and nameservers from registrars, provision of status information to registrars, operation of the registry TLD zone servers, and dissemination of TLD zone files." It conspicuously does not contemplate the registry assigning or reassigning any addresses, except at the behest of an authorized **registrar**.

<sup>17</sup>It is absolutely essential to understand: (1) that NSI and its parent, VeriSign, Inc., remain completely separate corporations, although one is now 100% owned by the other, (2) that prior to the NSI's acquisition by VeriSign, Inc., no entity called VeriSign Global Registry Services even existed, (3) that prior to the VeriSign acquisition, Network Solutions already had physically and institutionally separated its "registrar" and "registry" functions, and had agreed contractually with ICANN never to permit the "registry" to perform "registrar" functions, and (4) subsequent to

and ICANN. NSI, at that time, already had developed software to implement the “Shared Registry System,” and already was strictly obligated to maintain a very rigorous institutional separation between the “.com” registry and any business that NSI operated as a registrar. Subsequently, on or about April 16, 2001, VeriSign, Inc. (binding VeriSign, GRS, to the contract, presumably) (see note 17, *supra*), after negotiations, entered a new contract with ICANN.<sup>18</sup>

The key point for purposes of this appeal is this – the “registry” (VeriSign GRS, which is distinct from VeriSign, Inc.,<sup>19</sup> and which came into existence after the merger between VeriSign, Inc., and Network Solutions) does not actually “register or assign” any addresses. Nor does it have the authority, posited by the trial court, to go in and make changes to the database. Rather, the registrar (in this case Eastcom) linked to that particular database record, is the singular entity “that registered or assigned the domain name” and that would be the entity to re-assign it if so ordered by a court of

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the VeriSign merger, and at the behest of ICANN, VeriSign instituted a further institutional separation of the registry (which was removed from the NSI corporation and made a subpart – now called VeriSign GRS – of VeriSign, Inc.). The Network Solutions registrar remains within the Network Solutions corporate entity. The documents concerning all these important matters are public records – most of which can be obtained via the ICANN Website.

<sup>18</sup>See < <http://www.icann.org/tlds/agreements/verisign/registry-agmt-com-16apr01.htm> >.

<sup>19</sup>See notes 6, 11, 12, 17, *supra*.

competent jurisdiction.

The trial court's opinion, 162 F. Supp. 2d 484, at 486-94 & nn. 4, 5, 10,<sup>20</sup> 11,<sup>21</sup> contains a number of subtle – and yet **highly critical** mis-statements about how authority to “register and assign” “.com” Domain names<sup>22</sup> is distributed. The trial court has overlooked both (1) the limitations imposed on VeriSign, Inc., and likewise VeriSign GRS, because of specific agreements VeriSign, Inc., has entered into with

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<sup>20</sup>The WHOIS “database,” if it can be called that, actually consists of several different databases, maintained separately, that are not affiliated with VeriSign. For example, conducting a “Whois” search under current circumstances might require one to go separately to Network Solutions, to Open SRS, see < <http://www.opensrs.org/whois/index.shtml> >, to ARIN, < <http://www.arin.net/whois/arinwhois.html> >, to Register.com, to InterNIC, < <http://www.internic.net> >, and/or to several other sources of information that do not possess duplicates of the data possessed by all the others.

<sup>21</sup>The trial court's suppositions in footnote 11 are just plain wrong.

<sup>22</sup>This discussion is directed only to the “.com” address at issue in this case. Not all TLDs employ VeriSign, Inc.'s sub-entity division called Verisign Global Registry Services as their *registry*. Many other TLDs fall in the following three categories: (1) TLDs (such as “.eco” “.800” and “.euro”) that are included in the “root zone files” of “INCLUSIVE ROOTS” (like the Open Root Server Consortium root – see < <ftp://dns.vrx.net/pub/db.root> > (the ORSC Root Zone file itself)), but that ICANN has not included in the “root zone file” of the Legacy Root, which is under the control of the U.S. Department of Commerce, and some aspects of which are governed through delegation to ICANN; (2) ccTLDs, which are included in both the Legacy Root and all or most Inclusive Roots, but generally employ registries other than Verisign GRS, and (3) additional gTLDs – such as “.info” “.aero” and “.museum” which have been added to the Legacy Root by ICANN, following a selection process that concluded on November 16, 2000, but that employ registries other than Verisign GRS. TLDs in each of these three categories operate according to rules that are specific to each of these hundreds of TLDs.

ICANN, and (2) limitations placed on VeriSign GRS by specialized software (the “SRS API”) that is the mechanism by which the registrars and the registry communicate. The trial court also seems to have overlooked the special care that is taken by VeriSign to maintain a physical and institutional separation between Network Solutions and VeriSign GRS.<sup>23</sup>

Most importantly, the trial court’s key mistake is in footnote 11 of its opinion, where it contends (wrongly) that “Verisign controls the entries in the root zone file for the “.com” top-level domain, it has the ability to change the IP number matched with a particular domain name in the “.com” top-level domain.” The reality is quite different. The reality is that “control” is shared among all the *registrars* for “.com” addresses collectively, and for < CNnews.com > specifically, “control” lies with Eastcom – the *registrar* servicing this particular customer contract. In contrast, the

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<sup>23</sup>The 10-K report for 2000 submitted by VeriSign, Inc., to the Securities and Exchange Commission, specifically recognizes many of the limitations to which VeriSign GRS (the entity that serves as the registry) is subject:

We are contractually obligated to provide equivalent access to the shared registration system to all ICANN- accredited registrars and to ensure that the revenues and assets of the registry are not utilized to advantage our registrar to the detriment of other registrars. We have agreed to and implemented an organizational conflict of interest compliance plan that includes organizational, physical and procedural safeguards in connection with these obligations.”

The key method by which the neutrality of Verisign GRS is implemented and control over the entries in the “.com Zone file” is put in the hands of the **registrars** is through the SRS software. But this is backed up with audits and other safeguards.

role of VeriSign SRS is ministerial and consists of following *registrars*' directives.

So it is rather too facile to say “the property is right here in Virginia,” because the so-called “property” consists of data, it exists within the dynamic setting of an active database, that dozens of editors are changing minute-by-minute, while revision-access for specific records quite often resides offshore and is beyond the power of VeriSign GRS. A more accurate description of the “place” where the database is located is a “place” located within a distributed worldwide network of computers, thousands upon thousands of which are all hosting different parts of the vast and distributed DNS database, integrated by the software called BIND.<sup>24</sup> And the registry itself has almost no control whatsoever over the contents of the “.com Zone file” – **precisely because** the system was designed to remove that control from the registry and place it with the registrars. Thus, “control” over the database, which is distributed globally, is almost non-existent where VeriSign GRS computers just happen to be.

**II. All Claims Must Be Dismissed on Statutory Interpretation Grounds Because the Singular Entity (the “Registrar”) That Registered Or Assigned the Domain Name Is Not Located In Virginia, and *In Rem* Jurisdiction under 15 U.S.C. § 1125(d)(2)(A) Is Forbidden.**\_\_\_\_\_

This dispute between Cable News Network and the publisher of the CNnews.com Website should and must be dismissed – not only because the Due

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<sup>24</sup>See Appellants’ Opening Brief in Technodome (describing BIND and describing to some degree the importance of the SRS software).

Process Clauses of the Constitution (which prohibit excessive extraterritoriality) forbid the exercise of jurisdiction, but also because the plain and unambiguous meaning of the statutory language – 15 U.S.C. § 1125(d)(2)(A) – makes it clear that the prerequisites of the 1999 Cybersquatting Act are not met.

Any analysis involving statutory construction must begin with the plain meaning of the statute itself. Chris v. Tenet, 221 F.3d 648, 651-52 (4<sup>th</sup> Cir. 2000). The trial court mistakenly read the words “that registered or assigned the domain name” out of the statutory text. And it improperly replaced the singular article “**the**” with the substitute article “an” or “any” – which words simply do not appear in the statutory text. The statutory text specifically states that:

- (A) The owner of a mark may file an in rem civil action against a domain name in the judicial district in which **the** domain name registrar, domain name registry, or other domain name authority **that registered or assigned the domain name** is located if . . .

15 U.S.C. § 1125(d)(2)(A). As explained above, some domain names (but absolutely **no** dot-com addresses, according to the current rules) hypothetically can be assigned by a registry. Dot-com addresses, in contrast, are “registered or assigned” by registrars and the registry is forbidden from doing so.

For each domain name, the statutory text clearly contemplates that **only one** entity – “the [entity] **that registered or assigned the domain name**” will serve

as the guidepost to which courts must look for the judicial district (if any) in which to prosecute an *in rem* claim.<sup>25</sup> The trial court's approach of treating Verisign GRS as a substitute for Eastcom impermissibly re-writes the statutory text:

- (A) The owner of a mark may file an *in rem* civil action against a domain name in one of the judicial districts in which ~~the~~ any one or more of the domain name registrar(s), domain name registryies, or other domain name authorityies that processed or assisted in any way the registeredration or assignedment of the domain name is locatedhas a place of business if . . .

See 162 F. Supp. 2d at 489 & n. 13. Simply put, the trial court is not at liberty to impose such an amendment on the previously clear and unambiguous statutory text.

It is perfectly clear that the only possible interpretation that does not abuse the statutory text as written is the approach that treats the location of Eastcom as the only place in the world (if any) in which such a proceeding is authorized. Indeed, this interpretation is entirely consistent with Mattel, Inc. v. Barbie-Club.com, 2001 WL 436207 (S.D.N.Y. 2001), in which Judge Cote processed certain *in rem* claims in New York City (where Register.com is located), but as for names that were not “registered or assigned” by any New York registrar (i.e., Barbie-Club.com was assigned by

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<sup>25</sup>The legislative history of the ACPA shows that an earlier version of H.R.3028 contemplated that the named defendant in an *in rem* proceeding would be the registrar or registry that assigned the Domain Name. See FleetBoston Fin. Corp. v. FleetBostonFinancial.com, 138 F. Supp. 2d 121, 127 n.3 (D. Mass. 2001).

Bulkregister.com, located in Baltimore, Maryland), Judge Cote concluded that she probably lacked subject-matter jurisdiction, and not only dismissed New York proceedings against Barbie-Club.com itself (so they could be refiled in **Maryland**, not Virginia or New York), she also issued a *sua sponte* show-cause order concerning other domain names that were not “registered or assigned” by any New York registrar. Judge Cote’s sound analysis has subsequently been followed, in large measure, by Judge Cleland of the Eastern District of Michigan, in Ford v. Great Domains, 177 F. Supp. 2d 656, 658, 660 (E.D. Mi. 2001). See also Standing Stone Media v. IndianCountryToday.com, 2002 WL 449062, \_\_ F. Supp. 2d \_\_ (N.D.N.Y. 2002).

A. United States Courts Must Not Reach Out Gratuitously To Address Difficult Constitutional Issues In Cases That Reasonably Can Be Resolved Through Statutory Interpretation.

As mentioned previously, and as several courts have recognized, *e.g.*, FleetBoston Fin. Co., 138 F. Supp. 2d at 128-35; Mattel, Inc. v. Barbie-Club.com, 2001 WL 436207 (S.D.N.Y. 2001), courts should not decide constitutional questions when a narrower resolution is possible. See Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-49 (1936) (Brandeis, J., concurring). Indeed, as the FleetBoston court recognized, if a statute is capable of two interpretations, only one of which necessitates the resolution of a constitutional question, then the court must adopt the interpretation that does not raise such issues. FleetBoston, at 129, 135.

This line of precedent is important for two reasons. First of all, contrary to the trial court’s faulty citation of FleetBoston and Barbie-Club as “consistent” with Virginia *in rem* jurisdiction, see 162 F. Supp. 2d at 491, neither of those cases even touched on the issue of Virginia jurisdiction. Both of these decisions, as well as the decision of Judge Cleland in Ford v. Great Domains, can only be read as strictly **agnostic** on the question of whether *in rem* jurisdiction in Virginia does or does not comport with Due Process. Rather, each of those courts – none of which sits in Virginia and none of which was ever confronted with the issue – prudently elected not to resolve the hypothetical question.

Second, in this case, Judge Ellis correctly recognized – see 162 F. Supp. 2d at 491 n.21 – that the conflict between the Cybersquatting Act and the Due Process Clauses of the Constitution is inevitable. Some case, eventually, will inevitably bring the issue of Due Process and the facial invalidity of section 1125(d)(2)(A)(ii)(I) before this Court for resolution. But this case does not require that analysis to be performed.

In this case, the issue of statutory interpretation (i.e., the statute is only triggered if the singular entity “that registered or assigned the domain name” is in Virginia) means that the case can be dismissed simply because the registrar, Eastcom, that “registered or assigned the domain name” is **not** and never has been located in

Virginia.<sup>26</sup> Since dismissal on this limited and narrow ground conclusively resolves the case, it is unnecessary (and contrary to time-honored principles of judicial restraint) to reach any constitutional issue that can be reserved for a later case.

Moreover, this honorable Court is **obligated** to resolve this case on statutory grounds because the correct interpretation of the statute supports a resolution without confronting difficult questions of constitutional law – whereas the trial court’s wrong interpretation necessarily thrusts this court into serious constitutional matters that must be avoided if possible. FleetBoston, 138 F. Supp. 2d at 129 (“The principle is old and deeply embedded in our jurisprudence that [courts] will construe a statute in a manner that requires decision of serious constitutional questions only of the statutory language leaves no reasonable alternative.”) (citing United States v. Five Gambling Devices, 346 U.S. 441, 448 (1953)); Ashwander, *supra* (Brandeis, J., concurring).

Although, in the long run, serious constitutional questions (namely, the **facial** invalidity of 15 U.S.C. § 1125(d)(2)(A)(ii)(I) – see 162 F. Supp. 2d at 491 n.21, noting that provision has no application except those that are facially unconstitutional)<sup>27</sup> may be inevitable in some other case filed in the future, for present

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<sup>26</sup>And even if the location of the “registry” entity were relevant here (it is not), by every indication, that corporate entity is “located” in Mountain View, California.

<sup>27</sup>If a statute and the Due Process Clauses inevitably conflict on their face, then obviously, the Constitution prevails. The answer to the “footnote 21” conundrum is

purposes, this Court is duty-bound to construe the statute so as not to confront constitutional questions that need not necessarily be decided in this case. Id.

**B. The Plain Language of 15 U.S.C. § 1125(d)(2)(A) Makes It Absolutely Clear That Jurisdiction Is Impossible When the Singular Business Entity That Registered Or Assigned CNnews.com, Is Located In Hong Kong and Not Virginia.**

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The only reasonable reading of the statutory language (that does not omit or add words) is to (1) identify the business entity “that registered or assigned the domain name,” and (2) identify where the assignment entity “is located.” Even if the words “is located” are not self-defining, this Court need not define them here. Without dispute, Eastcom is located in Hong Kong. Thus, applying the statute according to its express terms (as this Court must), jurisdiction in Virginia is impossible.

**C. The Legislative History of the 1999 “Cybersquatting Act” Also Makes Clear That *In Rem* Jurisdiction Was Intended By Congress To Be Unavailable When the Entity That Performed the Act of Registration or Assignment Is Located Abroad**

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As Judge Woodlock observed, after scrutinizing the ACPA’s legislative history with care, the documentation of what Congress really meant to accomplish (if they even understood what the statute was about) is less than ideal or transparent, includes

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simply to strike down the specific provision as facially unconstitutional and to leave the remainder of the statute standing. The trial court’s approach – attempting to re-interpret and adjust the Constitution to accommodate an unconstitutional statute, instead of adjusting the statute to conform to the dictates of the Constitution -- is contrary to established principles of law.

“puzzling gaps” and is “relatively complicated.”<sup>28</sup> See FleetBoston, 138 F. Supp. 2d at 126. The hastily-assembled legislative history is hardly a model of good drafting: Among other sloppiness, the committee staff evidently used the words “registry” and “registrar” interchangeably without any attention to (or apparent understanding of) the difference between these concepts. But one thing is clear – Congress thought about what happens if a domain name assignment authority is located overseas. And the intent of Congress was clear that a U.S. “nexus” is required “that would not offend international comity.” 106 Cong. Rec. H10826 (Oct. 26, 1999). This same page of the history makes clear that the idea was to exempt assignment authorities “located outside the United States” and not to “preclude the movement” of such entities “to outside the United States.” Id. Again, while the legislative history is far less

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<sup>28</sup>We think it is interesting – and telling – that the legislative history originally supposed that these kinds of actions would be brought against Register.com for names assigned by that entity in New York, against BulkRegister.com for names assigned by that entity in Maryland, and against Network Solutions for names assigned by NSI in Virginia. See FleetBoston, 127 n.3. Such a procedure (for the very the same reasons the trial court’s surrogate-litigation procedure is defective) obviously violates Rush v. Savchuk, 444 U.S. at 329-30. The notion of suing the *registrar* or “assignment authority” *in lieu* of a person who is not subject to jurisdiction (and limiting recovery to the “name itself”) is **just the same thing** as suing an insurance company in-state when the policyholder cannot be reached, and limiting recovery to the policy limits. The Supreme Court squarely rejected exactly such a proxy strategy in Rush.

comprehensive and more convoluted<sup>29</sup> than might be desired, it is clear that Congress intended to enable people to order their affairs in such a way that they could purposefully choose **not** to avail themselves of U.S. jurisdiction – by securing their addressing rights from assignment authorities located overseas.

It is clear that Maya in this case, by choosing Eastcom<sup>30</sup> “opted out” of the United States and purposefully chose **not** to have any contractual relationships or any other jurisdictional contacts with any entity in Virginia. Thus, the exercise of jurisdiction over Maya’s rights by any U.S. court would be grossly unfair.

### **CONCLUSION**

For the foregoing reasons, *Amicus Curiae* the Electronic Frontier Foundation respectfully prays that the decision of the trial court be reversed, that the reversal be based on the narrowest possible grounds, and that the matter be remanded to the trial court with instructions to dismiss for lack of jurisdiction. In the event that this Court reaches the Due Process issues presented in this case, the EFF respectfully refers to its prior briefing in the Technodome matter, No. 01-1153, and urges that dismissal is

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<sup>29</sup>See FleetBoston, at 128 n.5 (chronicling the bizarre trajectory this statute took through Congress).

<sup>30</sup>At the time < CNnews.com > was initially secured, the SRS was not fully operational. It appears that Maya prudently “opted out” of the United States as soon as a Hong Kong registrar entered operation and could take over the registration or assignment of this address.

necessary because the *in rem* provisions of the ACPA violate Due Process, both facially and as applied in this case, along with principles of federalism. EFF respectfully prays for such other and further relief that this Court deems just and proper.

Respectfully submitted,

THE ELECTRONIC  
FRONTIER FOUNDATION,  
*As Amicus Curiae.*

By counsel,

April 8, 2002

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**CERTIFICATE OF COMPLIANCE**

## CERTIFICATE OF SERVICE

I certify that one (1) original and eight (8) copies of the foregoing Brief of Amicus Curiae Electronic Frontier Foundation, In Support of Defendant-Appellant's Prayer for Reversal of the Judgment Below, accompanied by one (1) original and three (3) copies of the EFF's Motion for Leave, on April 8, 2002, was filed with the clerk of court by first class mail or more expeditious means of transmission, postage prepaid, by sending them to the following address:

Clerk of Court  
U.S. Court of Appeals 4th Circuit  
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Richmond VA 23219-3538

I certify that two (2) copies per addressee of the foregoing Reply Brief of Appellants, and one (1) copy each of the Motion for Leave, on April 8, 2002, were served on each of the following counsel by first class mail or more expeditious means of transmission, postage prepaid, as well as by facsimile and/or electronic mail on or before April 9, 2002:

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I declare under penalty of perjury, under 28 U.S.C. § 1746, that the foregoing is true and correct.

Dated: April 8, 2002

\_\_\_\_\_  
Eric C. Grimm