

DIVERSIFYING THE DOMAIN NAME GOVERNANCE FRAMEWORK

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ABSTRACT

The Internet gives rise to a number of puzzles about how it should be governed. In particular, international disputes over Internet domain names have become increasingly commonplace as “cybersquatters” buy up domain names evocative of famous entities with the intention of arbitraging them for a profit. In response to this problem, the United States passed the Anticybersquatting Consumer Protection Act (ACPA). The ACPA allows for the extraterritorial application of U.S. trademark law to foreign actors by creating an in rem cause of action against Internet domain names themselves.

This Note discusses the legal and policy-based arguments against the current ACPA regime and suggests several reforms to ameliorate the ACPA’s problems. Legally, the application of the ACPA against foreign registrants violates due process because the minimum contacts requirement is not met and because the registration process does not provide adequate notice to registrants about their exposure to U.S. laws. Furthermore, the ACPA’s definition of multiple situs for a domain name is incoherent and leads to a suboptimal allocation of authority over domain name disputes, both internationally and within the United States. The ACPA regime also disregards foreign trademark regimes and competes unnecessarily with already-existing international dispute resolution mechanisms. This Note proposes that the situs of a domain name be limited to one location and that registrar contracts be revised to provide registrants more notice, solutions which would curtail the worst effects of the ACPA.

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I. INTRODUCTION

The growth of the Internet has raised complex issues regarding its governance. As a virtual system in which users of different nationalities freely interact, the Internet is a medium in which the policies of any one state can have profound consequences for others.¹ The governance of the Domain Name System (DNS) is one such area where unilateral efforts to

1. The debate over Internet jurisdiction is complicated by the fact that the Internet is a system of connected networks and does not have a centralized location or storage point. For further discussion of these issues, see Asaad Siddiqi, *Welcome to the City of Bytes? An Assessment of the Traditional Methods Employed in the International Application of Jurisdiction over Internet Activities—Including a Critique of Suggested Approaches*, 14 N.Y. INT'L L. REV. 43, 49 (2001).

address the problem of domain name disputes and trademark infringement have resulted in a skewed and inconsistent system of governance.²

As websites have become important tools of communication and publicity, the number of disputes over Internet domain names has risen dramatically.³ Cybersquatting—the practice in which speculators buy up domain names evocative of famous entities with the hope of arbitraging them for a profit—has become a problem for businesses,⁴ sports teams,⁵ and politicians⁶ alike. For example, the Brooklyn Nets faced a problem for many years over the fact that they do not own “Nets.com.” The many fans who visited “Nets.com” looking for their team’s website were greeted instead by an image of Mark Cuban sticking out his tongue and a message that read, “Looking for the Brooklyn Nets? They’re not here...but they SHOULD be!”⁷ When interviewed by the *New York Times*, the owner of the domain said she hoped to sell “Nets.com” to the Nets for millions of dollars.⁸ Although the Nets have resisted buying the domain, many businesses cave in to cybersquatters’ demands when faced with the prospect of losing business over online obscurity. The same cybersquatter successfully sold the domain name “Roadrunner.com” to Time Warner for a seven-figure profit.⁹

2. See Natalia Ramirez, *Will the Anticybersquatting Consumer Protection Act Create More Problems Than It Solves?*, 8 WASH. U. J.L. & POL’Y 395, 412–13 (2002) (“The domain name system illustrates a fundamental dichotomy between trademark law and the complexities of Internet technology: while trademark law is territorial, the Internet is universal.”).

3. *Domain Name Wars: Cybersquatting Disputes Reach Record Figures*, UWP GROUP, <http://www.uwpgroup.co.uk/blog/domain-name-wars-cybersquatting-disputes-reach-record-figures/> (last visited Aug. 20, 2017).

4. One of the earliest cybersquatting cases involved McDonald’s. See Sung Yang, *Staking a Claim in Cyberspace: An Overview of Domain Name Disputes*, 36 WILLAMETTE L. REV. 115, 126–27 (2000).

5. Andrew Keh, *Taunting Nets? Family Makes That Its Domain*, N.Y. TIMES (Nov. 11, 2014), <http://www.nytimes.com/2014/11/12/sports/basketball/taunting-nets-family-makes-it-their-domain-.html>.

6. *Running for President? Better Name Your Website Domain Early*, N.Y. TIMES: FIRST DRAFT (May 4, 2015, 11:30 AM), <http://www.nytimes.com/politics/first-draft/2015/05/04/running-for-president-register-your-domain-names-early>. For more on the legal problems associated with registering people’s names as domain names, see generally Benjamin B. Cotton, *Prospecting or Cybersquatting: Registering Your Name Before Someone Else Does*, 35 J. MARSHALL L. REV. 287 (2002).

7. Keh, *supra* note 5.

8. *Id.*

9. *Id.*

In response to the cybersquatting problem, Congress passed the Anticybersquatting Consumer Protection Act of 1999 (ACPA).¹⁰ In part, the ACPA was motivated by the recognition that the anonymity of the Internet made it difficult for trademark holders to take action against domain name owners even when they had legitimate claims of trademark infringement.¹¹ This difficulty arises because many cybersquatters register domain names under aliases or with false information to protect their privacy¹² and to avoid service of process.¹³ To provide relief in cases where the domain name owner cannot be found or is beyond the jurisdiction of U.S. courts, the ACPA allows trademark holders to bring in rem¹⁴ lawsuits against the Internet domain names themselves and have the domain name transferred to them.¹⁵ The ACPA gives jurisdiction over such lawsuits to the U.S. judicial district where the domain name registrar, domain name registry, or

10. See 15 U.S.C. § 1125(d)(2)(A) (2012). The Act amended Section 43 of the Lanham Act.

11. See H.R. REP. NO. 106-412, at 14 (1999).

12. Because each domain name owner's contact information is posted online in the WHOIS database, domain name owners risk a myriad of privacy problems, including spam, identity theft, and loss of data. See Mark V.B. Partridge & Scott T. Lonardo, *Icann Can or Can It? Recent Developments in Internet Governance Involving Cybersquatting, Online Infringement, and Registration Practices*, 1 LANDSLIDE 24, 24 (2009), <http://chicagoipalliance.com/files/2009/11/ABA-Landslide-article-reICANN.pdf>. Likely because of this, it is extremely common for WHOIS information to be false. A study found that over seventy-seven percent of domain registrations contain false, incomplete, or unverifiable information. Kieren McCarthy, *77% of Domain Registrations Stuffed with Rubbish*, REGISTER (Feb. 17, 2010, 7:50 AM), http://www.theregister.co.uk/2010/02/17/domain_name_problems.

13. H.R. REP. NO. 106-412, at 10 (1999) ("A significant problem faced by trademark owners in the fight against cybersquatting is the fact that many cybersquatters register domain names under aliases or otherwise provide false information in their registration applications in order to avoid identification and service of process by the mark owner. The bill, as amended, will alleviate this difficulty. . . .").

14. In rem jurisdiction refers to the power of a court over an item of real or personal property. Bhanu K. Sadasivan, *Jurisprudence Under the In Rem Provision of the Anticybersquatting Consumer Protection Act*, 18 BERKELEY TECH. L.J. 237, 237 n.5 (2003). In rem actions are brought directly against a property interest and often serve to settle claims against both tangible and intangible property. *Id.* The judgment in an in rem decision thus determines the title or status of the property named in the action. See *id.* Examples of common in rem proceedings are those brought to quiet title to land, condemn personal property, or administer a decedent's estate. See P. Wayne Hale, *The Anticybersquatting Consumer Protection Act & Sporty's Farm L.L.C. v. Sportman's Market, Inc.*, 16 BERKELEY TECH. L.J. 205, 223 n.129 (2001) (explaining that suits in rem are brought "against the property itself"). The satisfaction of due process requirements in such cases is based on the notice to all those who may have an interest in the property. See *id.* at 213 (describing the due process requirements for proceeding in rem against a domain name).

15. S. REP. NO. 106-140, at 10 (1999).

“other domain name authority that registered or assigned the domain name is located.”¹⁶

More than a decade and a half after the passage of the ACPA, several factors make the ACPA worth revisiting today. October 2016 marked the historic handover of the Internet management system from the U.S. government to an independent organization called the Internet Corporation for Assigned Names and Numbers (ICANN).¹⁷ Hailed as “the most significant change in the Internet’s functioning for a generation,”¹⁸ the move is the culmination of the past decade’s shift toward a multilateral Internet governance system.¹⁹ In recent years, the transfer had taken on a new sense of urgency after Edward Snowden’s revelations of the U.S. intelligence community’s interception of Internet traffic led to a “global uproar” from countries around the world.²⁰ The October 2016 handover gave ICANN complete independence and ownership over the Internet directory.²¹ The transfer reflects a significant change in U.S. Internet policy,

16. 15 U.S.C. § 1125(d)(2)(A) (2012).

17. Klint Finley, *The Internet Finally Belongs to Everyone*, WIRED (Oct. 3, 2016, 12:09 PM), <https://www.wired.com/2016/10/internet-finally-belongs-everyone>.

18. Kieren McCarthy, *Internet Handover Is Go-Go-Go! ICANN to Take IANA From US Govt*, REGISTER (Sept. 30, 2016, 9:58 PM), http://www.theregister.co.uk/2016/09/30/internet_handover_is_go_go_go.

19. Since its inception, the Internet has long developed under the auspices of the U.S. government. Douglas A. Hass, *The Never-Was-Neutral Net and Why Informed End Users Can End the Net Neutrality Debates*, 22 BERKELEY TECH. L.J. 1565, 1576 (2007). It began as a Department of Defense project, which gave rise to the Internet Assigned Numbers Authority (IANA), the database that stores all Internet domain names. *Id.* at 1577. The Internet Corporation for Assigned Names and Numbers (ICANN) was created in 1998 to manage IANA, which it did under a contract with the Department of Commerce. *Id.* at 1576 n.55; Finley, *supra* note 17. In 2009, the Department of Commerce and ICANN signed an Affirmation of Commitments which declared ICANN to be an independent entity and brought the total transfer into sight. Lawrence E. Strickling & Rod Beckstrom, *Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS (Sept. 30, 2009), <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>. For an analysis of the Affirmation of Commitments and its significance, see A. Michael Froomkin, *Almost Free: An Analysis of ICANN’s ‘Affirmation of Commitments’*, 9 J. TELECOMM. & HIGH TECH. L. 187 (2011).

20. Edward Wyatt, *U.S. to Cede its Oversight of Addresses on Internet*, N.Y. TIMES (Mar. 14, 2014), <http://www.nytimes.com/2014/03/15/technology/us-to-give-up-role-in-internet-domain-names.html>. Brazil in particular strongly criticized U.S. control. *Id.*

21. Finley, *supra* note 17. In the United States, the handover generated renewed political attention and controversy. See, e.g., Cecilia Kang & Jennifer Steinhauer, *Ted Cruz Fights Internet Directory’s Transfer; Techies Say He Just Doesn’t Get It*, N.Y. TIMES (Sept. 15, 2016), <http://www.nytimes.com/2016/09/16/us/politics/ted-cruz-internet-domain-names-funding.html>.

and calls for a reexamination of the ACPA's role as well as its consistency with modern policies.

ICANN's growth also offers new solutions for the problems that Congress attempted to address when it passed the ACPA. For example, in December 1999, ICANN implemented a dispute resolution mechanism called the Uniform Domain–Name Dispute Resolution Policy (UDRP), which offers remedies similar to those of the ACPA in a more internationalized setting.²² Given the availability of the UDRP today and its advantages over the ACPA, the time is ripe to reexamine whether the ACPA is really needed.²³ In light of these changes and other developments in the domain name economy in the past decade,²⁴ this Note examines the legal and policy issues raised by the ACPA's expansion of in rem jurisdiction.

Legally, the ACPA fails to pass constitutional muster for several reasons.²⁵ First, the extraterritorial application of in rem actions to domain names registered abroad by a foreigner violates due process because the minimum contacts requirement established in *Shaffer v. Heitner*²⁶ is not met. Second, under the same circumstances, ACPA's in rem actions offend notions of adequate notice and service of process. Specifically, individuals outside the United States receive no notice that merely registering a domain name might expose their domain names to lawsuits in U.S. courts. Though some commentators have suggested that a domain name buyer would be aware of the nationality of the registrar from which she buys a domain name,²⁷ the growing complexity of the domain name market makes it

22. *Timeline for the Formulation and Implementation of the Uniform Domain-Name Dispute-Resolution Policy*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS (Feb. 25, 2012), <https://www.icann.org/resources/pages/schedule-2012-02-25-en>.

23. See *infra* Part IV.C (identifying concerns that the ACPA not only competes with, but actively interferes with the operation of the UDRP and results in some litigants getting a second bite at the apple in domain name disputes).

24. In addition to the growing number and diversity of accredited registrars, new offerings in the domain name space have complicated its regulation. For example, ICANN's offering of new generic top–level domains (gTLDs) and the rise in registration by proxy both have implications for the ACPA, to be discussed *infra*, in Sections IV.A. and III.B, respectively.

25. Though this Note does not challenge the assumption that the ACPA is a proper exercise of congressional power. See, e.g., Heather A. Forrest, *Drawing a Line in the Constitutional Sand Between Congress and the Foreign Citizen "Cybersquatter"*, 9 WM. & MARY BILL RTS. J. 461, 474 (2001) (arguing that Congress did not have authority under the Commerce Clause to pass the ACPA).

26. 433 U.S. 186 (1977).

27. See Catherine T. Struve & R. Polk Wagner, *Realspace Sovereigns in Cyberspace: Problems with the Anticybersquatting Consumer Protection Act*, 17 BERKELEY TECH. L.J.

difficult for buyers to identify every entity that is involved in the transaction and thus to which countries' laws the buyer's exposure extends. Third, the ACPA's definition of a domain name's situs (or legal location) as any one of multiple locations stretches even the legal fiction of a situs and is inconsistent with the prevailing approach to the situs in relation to other intangible property.

The legal issues with the ACPA reflect the policy failings behind its outdated vision of Internet governance. First, the ACPA's definition of domain name situs promotes a skewed governance structure that artificially places the majority of domain name disputes under the jurisdiction of a single U.S. judicial district. The ACPA defines the situs of a domain name as the location of multiple entities, including the registry (where records of domain ownership are kept) and the registrar (where the owner claimed the domain name).²⁸ Under this definition, the majority of all domains are considered to be located in the United States, and in particular the Eastern District of Virginia, where almost all major registries are located.²⁹ This definition is difficult to reconcile with an equitably and usefully divided governance framework, and will become untenable as Internet penetration abroad continues to increase. Second, the ACPA ignores the fact that trademark law is governed nationally, failing to account for the possibility that there might be legitimate foreign trademarks that would conflict with U.S. trademarks. By giving U.S. trademark holders a right of action in U.S. courts where the foreign interested party may be absent, the ACPA favors U.S. trademarks without attempting to reconcile them with other legitimate trademark claims. Third, continued U.S. reliance on the ACPA regime not only ignores the existence of viable alternatives like the UDRP,³⁰ but also interferes with the operation of those alternatives. As a result, the ACPA stymies efforts to govern Internet domain name disputes multilaterally.

Given the problems with the current ACPA regime, this Note proposes several ameliorative measures. First, it suggests an alternative conceptualization of domain name situs for the purposes of the ACPA's in rem jurisdiction. Rather than defining a website's situs to be the location of both the registrar and the registry, the situs should only be the location of

989, 1001 (2002) ("It seems likely that most registrants will be aware of the nationality of the dealer they use.").

28. 15 U.S.C. § 1125(d)(2)(C) (2012).

29. As discussed below, the Eastern District of Virginia is the judicial district for the registries that contain the records of the most common websites, including ".com" and ".net" websites. *See infra* Section IV.A.

30. *See Uniform Domain Name Dispute Resolution Policy*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, <https://www.icann.org/resources/pages/help/dndr/udrp-en> (last visited Aug. 20, 2017).

the registrar where the purchaser gained ownership of the domain name. Limiting the ACPA's applicability to domain names registered with a U.S. registrar would narrow the ACPA's reach to only foreign registrants who directly made contact with a U.S. entity. This approach would curtail the worst of the ACPA's overreach while preserving the statute's fundamental purpose of protecting U.S. trademark holders by avoiding the types of extraterritorial application that fail to satisfy the minimum contacts standard. Moreover, because registrar locations are distributed much more evenly across the world than registry locations, this method would provide a more equitable international division of authority over domain name disputes. Second, requiring domain name registrars to modify their contracts with purchasers to clarify the reach of different jurisdictions may ameliorate the lack of notice. This would be a good first step toward providing adequate notice to foreign domain name purchasers of their exposure to other countries' laws.

This Note proceeds as follows. Part II provides an overview of the domain name registration process and the ACPA. Part III parses the legal problems with the ACPA, focusing on its failure to meet the requirements of constitutional due process in certain extraterritorial applications, as well as the incoherence of its definition of domain name situs as multiple sites. Part IV examines the ACPA's policy failures in promulgating a U.S.-centric definition of the situs of the domain, disregarding foreign trademark regimes, and interfering with the operation of dispute resolution mechanisms available under a more multilateral effort. Part V offers several proposals to reform the ACPA, and Part VI concludes.

II. DOMAIN NAME GOVERNANCE AND THE ACPA

A. THE DOMAIN REGISTRATION PROCESS

The Internet Domain Name System (DNS) consists of a directory of all domain names and their corresponding computers, which are registered to the domain name owner.³¹ When a person registers the domain name for a website, the domain name becomes associated with the designated computer from which the individual can create a website accessible to all Internet users.³² Although ICANN manages the DNS system, ICANN has

31. *FAQs*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, <https://www.icann.org/resources/pages/faqs-2014-01-21-en> (last visited Aug. 20, 2017).

32. *Id.*

contracted with downstream entities, including registries and registrars, to manage the registration process.³³

An individual begins the registration process at a domain name registrar. Registrars are dealers authorized by ICANN to sell domain name addresses to customers through web-based interfaces³⁴ such as “GoDaddy.com” and “NameCheap.com.” On these dealer websites, the customer can search for a desired domain name and select among the available variations of that name. After selecting a domain name to purchase, the customer must provide personal information, including name, address, and phone number.³⁵ As required by ICANN, this information is registered with the WHOIS database, which contains the information of the registrant, or owner, for every single registered domain in the world.³⁶

Once the purchaser pays for the domain name and provides the required personal information, the registrar submits the technical information to a central directory known as a registry.³⁷ The registry is the master database that contains the records of all registered domain names for a particular top-level domain (TLD).³⁸ Thus, there is one registry containing all domains for the “.com” websites, and another registry for all the “.edu” websites. As the holder of the authoritative set of records for a TLD, each registry provides other computers on the Internet with the information necessary to find the websites registered by domain buyers.³⁹

33. *Id.*

34. *ICANN-Accredited Registrars*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS (Aug. 21, 2017), <https://www.icann.org/registrar-reports/accredited-list.html>.

35. *GoDaddy WHOIS Lookup*, GODADDY, <https://www.godaddy.com/whois> (last visited Aug. 20, 2017); see *History of WHOIS*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, <http://whois.icann.org/en/history-whois> (last updated July 2017). The WHOIS database is required by ICANN; all accredited registrars must publish the registrant’s contact information along with domain creation and expiration dates. Daniel Gervais & Dashiell Renau, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How To Do It*, 28 BERKELEY TECH. L.J. 1459, 1492 n.184 (2013).

36. INTERNET CORP., *supra* note 35. For a more detailed discussion of the WHOIS database and its privacy implications, see Kathryn Elliott, *The Who, What, Where, When, and Why of WHOIS: Privacy and Accuracy Concerns of the WHOIS Database*, 12 SMU SCI. & TECH. L. REV. 141 (2009).

37. INTERNET CORP., *supra* note 31.

38. The TLD is what comes after the period in any website name—for example, “.com” or “.net.” Heather N. Mewes, *Memorandum of Understanding on the Generic Top-Level Domain Name Space of the Internet Domain Name System*, 13 BERKELEY TECH. L.J. 235, 236 (1998).

39. *DNS and WHOIS - How it Works*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, <https://whois.icann.org/en/dns-and-whois-how-it-works> (last updated July

Because the Internet domain name system is globalized, there are few differences between the process that a U.S. domain buyer and a foreign domain buyer go through to purchase a domain name. Foreign registrants, however, are more likely to use foreign-based registrars, whose interface may be customized to its home country's language, customs, and laws. Thus, the foreign registrant would likely purchase the domain from a foreign-based registrar, which would then transfer the information to a registry, which would most likely be located in the United States.

B. THE ACPA

Congress passed the ACPA to protect consumers and businesses, promote online commerce, and prevent abusive cybersquatting behavior.⁴⁰ In fact, the Senate Report for the ACPA shows that Congress intended it to be “carefully and narrowly tailored . . . to extend only to cases where the plaintiff can demonstrate that the defendant registered, trafficked in, or used the offending domain name with bad faith intent to profit from the goodwill of a mark belonging to someone else.”⁴¹ Nevertheless, the in rem solution Congress proscribed has proven to be quite broad.

The ACPA allows a trademark holder to file an in rem action against a domain name if: (1) the domain name violates a mark registered with the Patent and Trademark Office, and (2) the court finds that the owner either is unable to obtain in personam jurisdiction over the would-be defendant, or was unable to find the would-be defendant through due diligence.⁴² This due diligence involves sending notice to the postal and email addresses of the domain registrant and publishing the notice of action as directed by the court.⁴³ Together, the ACPA considers these steps to “constitute service of process.”⁴⁴ The ACPA thus provides an in rem option for plaintiffs to proceed in cases where in personam jurisdiction is unavailable or the owner cannot be found.⁴⁵ The in rem action can be brought in the judicial district where the registrar, registry, or other domain name authority that registered

2017) (“Registries also maintain another vital system, the authoritative name servers, which hold the key to where a website is located.”).

40. See S. REP. NO. 106-140, at 4 (1999).

41. *Id.* at 12–13.

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

43. See *id.*

44. 15 U.S.C. § 1125(d)(2)(B) (2012).

45. This has drawn criticism from trademark holders and domain name registrants outside the United States, who argue that enforcing judgments from courts that lack personal jurisdiction over would-be defendants upsets the balance between the interests of trademark holders and the interests of the Internet community. See Statement of Policy on the Management of Internet Names and Addresses, 63 Fed. Reg. 31741 (June 10, 1998).

or assigned the domain name is located.⁴⁶ For this purpose, the domain name's situs is defined as the judicial district in which any of these authorities is located. Alternatively, the situs can be defined as the judicial district where "documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court."⁴⁷ Courts have understood registrar certificates to constitute such documents.⁴⁸

The exclusive remedy under in rem actions is a court order for the cancellation of the domain name or its transfer to the owner of the U.S. trademark.⁴⁹ When lawsuits are filed and notifications of the complaints are sent to the relevant domain name registrar, registry, or other domain name authority, the registrar or registry must deposit with the court documents sufficient to establish the court's control and authority over the disposition of the registration and use of the domain name.⁵⁰ In addition, the registrar or registry must freeze the status of the domain name while lawsuits are pending, putting a hold on any transfers, suspensions, or modifications to the domain name except by the order of the court.⁵¹

III. LEGAL ISSUES WITH THE ACPA

The legal problems posed by the ACPA are most acute when a foreigner purchases a domain name from a domain name registrar that operates entirely outside of the United States. Here, the foreign purchaser's interactions while buying and paying for the domain name are all with foreign entities: the purchaser visits a foreign website, agrees to a foreign contract, and pays foreign currency. Any interaction with the United States that might suggest notice occurs during the interaction between the foreign registrar and the U.S. registry, *after* the registrant has completed her part of the process.⁵² In this hypothetical, the foreign buyer is therefore unaware

46. 15 U.S.C. § 1125(d)(2)(A) (2012).

47. 15 U.S.C. § 1125(d)(2)(C)(ii) (2012).

48. *See, e.g.,* *Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293, 296 (2d Cir. 2002) ("Under the ACPA, a registrar's certificate is understood to constitute a 'document[] sufficient to establish [a district court's] control and authority regarding . . . the use of the domain name.'"); *FleetBoston Fin. Corp. v. FleetBostonFinancial.com*, 138 F. Supp. 2d 121, 123 (D. Mass. 2001) (describing plaintiff's arrangement for the registration certificate to be transferred to the court under the procedures established by 15 U.S.C. § 1125(d)(2)(D)).

49. 15 U.S.C. § 1125(d)(2)(D)(i) (2012).

50. 15 U.S.C. § 1125(d)(2)(D)(i)(I) (2012).

51. 15 U.S.C. § 1125(d)(2)(D)(i)(II) (2012).

52. The court in *Mattel* referred to the legislative history for the ACPA to establish that Congress considered the "registry or registrar" to provide a "nexus" for the ACPA's

that her domain name purchase could become an issue in a U.S. court over a U.S. trademark. This type of extraterritorial application of the ACPA offends notions of due process both in the lack of minimum contacts for such foreign registrants and in providing inadequate notice of their exposure to U.S. laws.

It is worth noting the ACPA's requirement of bad faith was intended to provide a safe harbor and offer some protection for foreign domain name registrants act in good faith.⁵³ But this protection is insufficient for at least two reasons. First, the most fundamental legal deficiencies of the ACPA cannot be resolved even by the existence of actual bad faith. The inquiry of whether there was bad faith is a question of merit that can only be reached if the court has personal jurisdiction over the registrant to adjudicate such an issue in the first place. In the absence of such jurisdiction, it does not matter whether a bad faith finding would result. Violations of constitutional due process and adequate notice are procedural violations regardless of the putative bad faith of the domain name registrants.

Second, the ACPA in rem proceeding necessarily favors the plaintiff in making the bad faith determination given that the would-be defendant is absent. These consequences disproportionately affect foreign registrants because the ACPA allows the in rem lawsuits to reach not only evasive and hard-to-find registrants, but also registrants who are known but foreign.⁵⁴ In the latter instance, the resulting in rem suit amounts to an ex parte proceeding that sidesteps the known registrant in favor of one-sided arguments by the plaintiff. Especially given that determinations of bad faith turn on subjective intent, it is striking that this determination is made outside the presence of the person whose intentions are being evaluated.⁵⁵ Despite

in rem jurisdiction, thereby satisfying the principles of due process. *Mattel*, 310 F.3d at 302; see also H.R. REP. NO. 106-412, at 14 (1999). This nexus, however, actually demonstrates the flaws of Congress's approach to due process—not only did it ignore *Shaffer*, but it also never considered registrars and registries separately despite the very large differences in the extent to which each is involved in the registration process.

53. 15 U.S.C. § 1125(d)(1)(B)(ii). This provision prevents the finding of bad faith where “the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful.” *Id.*

54. See, e.g., *Standing Stone Media, Inc. v. Indiancountrytoday.com*, 193 F. Supp. 2d 528, 531 (N.D.N.Y. 2002) (describing how the plaintiff commenced the in rem action after learning that the would-be defendant “resides or claims to reside” in Canada).

55. See Adam Silberlight, *Domain Name Disputes Under the ACPA in the New Millennium: When Is Bad Faith Intent to Profit Really Bad Faith and Has Anything Changed with the ACPA's Inception?*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 269, 274 (2002) (“The mere registration of a domain that may be similar to a famous trademark name is insufficient for a showing of ‘bad faith intent to profit’ as required under the

the language of the safe harbor, which excuses domain name owners who reasonably believed their use was fair,⁵⁶ it is unclear who in the domain name owner's absence would make such a showing.

A. LACK OF MINIMUM CONTACTS FOR FOREIGN REGISTRANTS

The ACPA provides in rem jurisdiction as a method of bypassing the lack of personal jurisdiction.⁵⁷ This approach violates the due process required by the Supreme Court in *Shaffer v. Heitner*, which held that the minimum contacts standard of *International Shoe Co. v. Washington* applies to in rem jurisdiction.⁵⁸

Generally, courts may only exercise power over defendants over whom the court has personal jurisdiction. As the Supreme Court established in *Pennoyer v. Neff*,⁵⁹ traditionally, in personam jurisdiction exists if the defendant is domiciled in the forum, is present in the forum when served with process, or agrees to submit to the jurisdiction of the forum court.⁶⁰ Many decades later, the Court added to these traditional bases of in personam jurisdiction by articulating the minimum contacts test in *International Shoe*.⁶¹ The *International Shoe* Court held that personal jurisdiction is proper if the defendant has “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”⁶² As a corollary, where the defendant lacks minimum contacts with the forum, personal jurisdiction cannot be extended without the consent of the defendant.⁶³

In *Shaffer v. Heitner*, the Court extended the minimum contacts requirement of *International Shoe* to apply to in rem jurisdiction, holding that due process requirements are implicated even when the exercise of

ACPA. Bad faith intent to profit requires that there be a standard used to determine the mental state of the registrant.”).

56. 15 U.S.C. § 1125(d)(1)(B)(ii) (2012).

57. *See* Lucent Techs., Inc. v. LucentSucks.com, 95 F.Supp.2d 528, 534 (E.D. Va. 2000) (holding that the ACPA intends “to provide a last resort where in personam jurisdiction is impossible, because the domain name registrant is foreign or anonymous”).

58. *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

59. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

60. Richard Freer, *American and European Approaches to Personal Jurisdiction Based Upon Internet Activity 2* (Emory Pub. Law Research Paper No. 07-15, 2007), <https://ssrn.com/abstract=1004887>.

61. *Int'l Shoe*, 326 U.S. at 310.

62. *Id.* at 316 (internal quotation marks omitted).

63. Freer, *supra* note 60, at 3 (“[A] relevant contact is *absolutely essential* to a finding of jurisdiction; all the ‘fairness’ in the world will not make up for a lack of such contact between the defendant and the forum.”).

jurisdiction is over a thing rather than a person.⁶⁴ The *Shaffer* Court considered a quasi in rem Type II action,⁶⁵ where the plaintiff brought a shareholders' derivative suit for breach of duty in Delaware Chancery Court for conduct that occurred in Oregon.⁶⁶ The plaintiff filed a motion for the sequestration of the defendants' Delaware property. In response, the defendants entered a special appearance to suppress service of process, protesting that because they lacked sufficient contacts with Delaware, the sequestration order violated due process.⁶⁷

In rejecting the plaintiff's claim of jurisdiction, the Court held that the minimum contacts analysis set out in *International Shoe* extended to in rem actions.⁶⁸ Reasoning that in rem jurisdiction is "a customary elliptical way of referring to jurisdiction over the interests of persons in a thing"⁶⁹ and finding that "an adverse judgment in rem directly affects the property owner by divesting him of his rights in the property,"⁷⁰ the *Shaffer* Court held that extending in rem jurisdiction in the absence of minimum contacts would violate due process.⁷¹ The Court made it clear that the requirement of minimum contacts applied to in rem actions as well as the quasi in rem action at issue, concluding that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."⁷²

Applying *Shaffer* to the ACPA's in rem actions, it follows that minimum contacts are not met in the case of a foreign domain owner who purchased a domain name through a foreign registrar. In such a case, the entirety of the foreign domain owner's activities were conducted abroad and the owner would not have interacted with any U.S. entities because the purchase was

64. *Shaffer*, 433 U.S. at 216.

65. In a quasi in rem action, courts "may only affect a named defendant's interest in a specific named piece of property." *Quasi in rem*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/quasi_in_rem (last visited Aug. 20, 2017). Quasi in rem actions can be conceptualized as a type of action sharing the characteristics of both in personam actions and in rem actions. *Id.* Quasi in rem type I actions involve the plaintiff's pre-existing interest in the named property. *Id.* In contrast, in quasi in rem type II actions, the plaintiff's claim is unrelated to the named property, which is applied to satisfy the plaintiff's claim if the plaintiff wins. *Id.* The action considered in *Shaffer* was quasi in rem type II. *See id.*

66. *Shaffer*, 433 U.S. at 186.

67. *Id.*

68. *Id.* at 216.

69. *Id.* at 207.

70. *Id.* at 206.

71. *Id.* at 216–17.

72. *Id.* at 212. Although this holding includes a reference to state courts, the holding likely applies to federal courts as well. *See Struve & Wagner, supra* note 27, at 1016.

made through a foreign-based registrar, which then transferred the information to a U.S. registry. Even if a foreign registrant had used a U.S. registrar, courts have found that this alone would not constitute minimum contacts.⁷³ Thus, the ACPA's provision of in rem jurisdiction where in personam jurisdiction is unavailable is a nullity: where in personam jurisdiction is unavailable, in rem jurisdiction is also unavailable, given that they both require minimum contacts.⁷⁴

Although no court has yet invalidated the applicability of the ACPA on this ground, some courts have recognized that *Shaffer* does render some provisions of the ACPA null.⁷⁵ In *Ford Motor Co. v. Greatdomains.Com, Inc.*, a Michigan district court relied on *Shaffer* to reject the plaintiff's assertion of jurisdiction under 15 U.S.C. § 1125(d)(2)(C).⁷⁶ In that case, the plaintiff brought an ACPA in rem action in the Eastern District of Michigan, which was not the location of the registry, the registrar, or any other domain name authority. Instead, plaintiffs relied on § 1125(d)(2)(C), which defined the situs of a domain name as the location where "documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court."⁷⁷ Because 15 U.S.C. § 1125(d)(2)(D)(i)(I) provides that, upon the filing of an ACPA complaint, registrars and registries must present documents sufficient to establish the court's control over the registration,⁷⁸ the statutory scheme seems to suggest that the situs of a domain name, and thus jurisdiction, can be granted to *any* court with which the ACPA complaint is filed simply by presenting such documents. The *Ford* court held that *Shaffer*'s constitutional due process requirements precluded such jurisdiction.⁷⁹

73. See *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (holding that registering a domain name, by itself, does not constitute minimum contacts); *Banco Inverlat, S.A. v. www.inverlat.com*, 112 F. Supp. 2d 521, 522 n.1 (E.D. Va. 2000) ("[I]t is established that the mere act of registering a disputed domain name with NSI in Virginia, as done here, is insufficient to subject a defendant to the personal jurisdiction of this Court.").

74. *Struve & Wagner, supra* note 27, at 1006.

75. See, e.g., *Ford Motor Co. v. Greatdomains.com, Inc.*, 177 F. Supp. 2d 656, 659 (E.D. Mich. 2001); see also *Cable News Network L.P., v. CNNNews.com*, 162 F. Supp. 2d 484, 491 (E.D. Va. 2001) *aff'd in part, vacated in part sub nom.* *Cable News Network, LP v. CNNNews.com*, 56 F. App'x 599 (4th Cir. 2003) (rejecting the argument that documents which establish control over the domain name are sufficient to vest jurisdiction and noting that "there is no constitutional basis for *in rem* jurisdiction when the adjudicating court merely has possession of the certificate of the domain name. . . .").

76. *Ford*, 177 F. Supp. 2d at 659.

77. 15 U.S.C. § 1125(d)(2)(C) (2012).

78. 15 U.S.C. § 1125(d)(2)(D)(i)(I) (2012).

79. *Ford*, 177 F. Supp. 2d at 659.

Pointing to *Shaffer's* acknowledgment that in rem jurisdiction can be unavailable even in cases where property is related to the underlying claim if the property was brought into the forum “without the consent of the owner,” the court held that an exercise of jurisdiction would violate due process.⁸⁰ It is not so difficult to imagine that *Shaffer* similarly affects other aspects of the ACPA, particularly its application to foreign registrants, in ways that the ACPA’s drafters did not seem to recognize.⁸¹

Courts, however, have resisted applying *Shaffer* to the ACPA’s in rem provision. *Cable News Network L.P. v. CNNNews.com*⁸² in the Eastern District of Virginia, and *Mattel, Inc. v. Barbie-Club.com*⁸³ in the Second Circuit are two such notable cases. These decisions offer three arguments justifying *Shaffer's* inapplicability: (1) that *Shaffer's* minimum contact requirements are limited by Justice Scalia’s opinion in *Burnham v. Superior Court*;⁸⁴ (2) that *Shaffer* only requires minimum contacts for in rem actions that are unrelated to the property in question; and (3) that *Shaffer's* language about in rem actions is dicta and the holding only applies to quasi in rem type II actions.⁸⁵ None of these arguments withstand scrutiny.

The first argument is that Justice Scalia’s opinion in *Burnham* limited the scope of *Shaffer* to only quasi in rem type II actions.⁸⁶ In *Cable News Network L.P. v. CNNNews.com*, a Virginia district court rejected a challenge to ACPA jurisdiction by relying on *Burnham* and a series of lower court cases as “the greater weight of (and more persuasive) authority” that trumps *Shaffer*.⁸⁷ However, *Burnham* stands for a much narrower proposition than

80. *Id.*

81. *Shaffer* was decided before the passage of the ACPA, so the drafters of the ACPA had the opportunity to consider the constraints imposed by *Shaffer*, but they appear not to have done so. Relying on reasoning that directly contradicts the analysis in *Shaffer*, the House Committee report stated that the ACPA’s in rem jurisdiction does not offend due process “since the property and only the property is the subject of the jurisdiction, not other substantive personal rights of any individual defendant.” H.R. REP. NO. 106-412, at 14 (1999).

82. *Cable News Network*, 162 F. Supp. 2d at 491.

83. *Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293 (2d Cir. 2002).

84. *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990).

85. Struve & Wagner, *supra* note 27, at 1011–12.

86. A related argument that reaches the same result from a different path is that *Shaffer* only applies to quasi in rem type II actions because the other parts of *Shaffer* were dicta and need not be followed. That argument is addressed paragraphs below. *See supra* notes 105–11 and accompanying text.

87. *Cable News Network*, 162 F. Supp. 2d at 491.

Shaffer and its holding is not at odds with *Shaffer*—something that *Burnham* explicitly states several times.⁸⁸

Burnham concerned personal jurisdiction over a defendant—a New Jersey resident—who was served with a court summons and divorce petition while he was physically present in California but otherwise lacked connections to the state.⁸⁹ Justice Scalia’s opinion rejected the petitioner’s argument that personal jurisdiction could not be extended to him in a suit unrelated to his activities in the state absent “continuous and systematic” contacts with California as required by *International Shoe*.⁹⁰ The opinion appears to take issue with *Shaffer*’s requirement that “all assertions of state-court jurisdiction must be evaluated according to” the standards of *International Shoe*, stating *Shaffer*’s holding narrowly as a requirement that “quasi in rem jurisdiction . . . must satisfy the litigation-relatedness requirement of *International Shoe*.”⁹¹ When read in context, it is apparent that this statement is meant only to carve out an exception for tag jurisdiction where the defendant *physically appears* in the forum.⁹² The next sentence continues, “[t]he logic of *Shaffer*’s holding . . . does not compel the conclusion that physically present defendants must be treated identically to absent ones. . . . *International Shoe* confined its ‘minimum contacts’ requirement to situations in which the defendant ‘be not present within the territory of the forum,’ and nothing in *Shaffer* expands that requirement beyond that.”⁹³ In short, to the extent that *Burnham* can be read to reject *Shaffer*, it does so only on the narrow ground of rejecting its applicability to tag jurisdiction, and *Burnham* otherwise leaves *Shaffer* untouched. Indeed, Justice Scalia is careful to state, several times, that “our holding today does not contradict *Shaffer*”⁹⁴ and that the court is “in no way receding from or casting doubt upon the holding of *Shaffer* or any other case.”⁹⁵ Thus, the *CNN* court’s rejection of *Shaffer*’s applicability to the ACPA based on *Burnham* is itself based on a misunderstanding of *Burnham*’s relationship to *Shaffer*.

In fact, Justice Scalia’s reasoning in *Burnham* supports the idea that *International Shoe*’s minimum contact analysis must be met for the ACPA’s

88. See *Burnham*, 495 U.S. at 622 (stating that the Court is “in no way receding from or casting doubt upon the holding of *Shaffer* or any other case”).

89. *Id.* at 607–08.

90. *Id.* at 616–19.

91. *Id.* at 620–21.

92. See Struve & Wagner, *supra* note 27, at 1014.

93. *Burnham*, 495 U.S. at 621 (internal citations omitted).

94. *Id.*

95. *Id.* at 622.

in rem actions.⁹⁶ *Burnham* turned on the idea that tag jurisdiction is an age-old tradition that *Shaffer* was not meant to disturb.⁹⁷ *Burnham* recognized that “[f]or new procedures, hitherto unknown, the Due Process Clause requires analysis to determine whether ‘traditional notions of fair play and substantial justice’ have been offended.”⁹⁸ Although in rem jurisdiction itself has a historical basis,⁹⁹ in rem jurisdiction over domain names constitutes an entirely novel procedure created by Congress, complete with a new conception of a domain name’s situs. This is precisely the type of “hitherto unknown” procedure for which *Burnham* would require *International Shoe*’s minimum contacts analysis.¹⁰⁰

A second argument against the applicability of *Shaffer* to the ACPA is that *Shaffer* does not require minimum contacts for actions that are related to the property in question. The Eastern District of Virginia¹⁰¹ and the Second Circuit¹⁰² have both relied on this reasoning to find that minimum contacts are not required for the ACPA’s in rem proceedings. This also seems to have been the rationale of the ACPA drafters, who believed that the ACPA’s in rem action would not offend due process because it would only affect the property in question.¹⁰³ In *Mattel*, the Second Circuit relied on *Shaffer*’s observation that, where claims to the property are the source of the controversy at issue, “it would be unusual for the State where the

96. Struve & Wagner, *supra* note 27, at 1014.

97. See *Burnham*, 495 U.S. at 622 (“But a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.”).

98. *Id.*

99. See Morris E. Cohn, *Jurisdiction in Actions In Rem and In Personam*, 14 ST. LOUIS L. REV. 170, 175 (1929) (“The generally accepted view is that actions *in rem* started in Roman Law and were taken over into the common law from jurisprudence.”).

100. Struve & Wagner, *supra* note 27, at 1014.

101. See *Caesars World, Inc. v. Caesars-Palace.com*, 112 F. Supp. 2d 502 (E.D. Va. 2000).

102. See *Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293 (2d Cir. 2002).

103. The House Committee report stated that the ACPA’s in rem jurisdiction does not offend due process “since the property and only the property is the subject of the jurisdiction, not other substantive personal rights of any individual defendant.” H.R. REP. NO. 106–412, at 14 (1999). Indeed, the *Mattel* court relies on this legislative history to suggest that, because Congress conceived the ACPA’s in rem jurisdiction as requiring “few if any due process concerns,” it must be true that in rem actions do not pose any due process issues. *Mattel*, 310 F.3d at 302–03. However, Congress does not have the power to declare that a judicial process comports with due process requirements simply by fiat. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (“[I]t is emphatically the province and duty of the judicial department to say what the law is”).

property is located not to have jurisdiction.”¹⁰⁴ The *Shaffer* Court suggests that in such cases, “the defendant’s claim to the property located in the State would normally indicate that he expected to benefit from the State’s protection of his interest,” thus establishing the necessary sufficient contacts.¹⁰⁵

Mattel’s reliance on this observation, however, ignores *Shaffer*’s explicit limitation. In a footnote, the *Shaffer* Court recognizes that there are certain circumstances in which “the presence of property in the forum State will not support the inference suggested in text,” including if the property was brought into the state by fraud, or for the purposes of litigation, or without the consent of the owner.¹⁰⁶ This is exactly the case with the ACPA’s extraterritorial application. Arguably, the domain name is “taken to” the U.S. registry from a foreign registrar without the domain name owner’s knowledge or consent. Thus, in these circumstances, the domain name’s presence in the forum does not mean that the domain name owner intended to benefit from the forum state’s protection. There can be no intention to benefit from the laws of the United States on the part of a foreign domain name buyer who does not even know that the registry for her domain name is located there.¹⁰⁷ The ACPA as applied to foreign registrants is exactly the “unusual” circumstance recognized by *Shaffer* where minimum contacts do not exist even though the foreign registrant’s property, the domain name, is deemed to have its situs in the forum.

Third is the argument that *Shaffer*’s language about in rem actions is dicta¹⁰⁸ and thus non-binding. The *CNN* court took this approach, finding

104. *Mattel*, 310 F.3d at 302–03 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977)).

105. *Shaffer*, 433 U.S. at 207–08.

106. *Id.* at 208 n.25 (citing comments in the Second Restatement of the Conflict of Laws noting several situations in which a forum may not exercise jurisdiction over chattels present in its jurisdiction); see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 60(c)–(d) (AM. LAW INST. 1971).

107. This is where the *Caesars World* court errs by deciding—without providing support—that domain registration is sufficient to satisfy the constitutional requirement of minimum contacts. See *Caesars World, Inc. v. Caesars-Palace.com*, 112 F. Supp. 2d 502, 504 (E.D. Va. 2000). But see *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (holding that “simply registering someone else’s trademark as a domain name,” by itself, does not constitute minimum contacts); *Banco Inverlat, S.A. v. www.inverlat.com*, 112 F. Supp. 2d 521, 522 n.1 (E.D. Va. 2000) (“[I]t is established that the mere act of registering a disputed domain name with NSI in Virginia, as done here, is insufficient to subject a defendant to the personal jurisdiction of this Court.”).

108. Although there is no precise definition of what dictum is, Black’s Law Dictionary defines it as “[a] judicial comment made while delivering a judicial opinion, but one that

that *Shaffer*'s position on true in rem and quasi in rem type I "was unnecessary to the holding and is therefore non-binding dicta."¹⁰⁹ This, however, is incorrect. *Shaffer* stands not only for the result it reaches but also the reasoning it applies to reach that result.¹¹⁰ In *Shaffer*, that includes the reasoning that jurisdiction over property is really jurisdiction over the interest of persons in the property.¹¹¹ Analytically, this reasoning applies to all types of in rem actions, and *Shaffer* itself makes no distinction between the different types of in rem actions. The bar for a lower court to dismiss a higher court's reasoning as mere dicta is extremely high,¹¹² and the *CNN* court's decision does not even approach it.¹¹³ Moreover, even if the requirements were dicta, many courts believe that the Supreme Court's dicta nevertheless "must be respected."¹¹⁴ Thus, the *CNN* court's dismissal of *Shaffer*'s position on in rem actions as dicta is without merit. Given the applicability of *Shaffer*, the ACPA is unconstitutional as applied to certain types of foreign registrants.

is unnecessary to the decision in the case and therefore not precedential." *Dictum*, BLACK'S LAW DICTIONARY 1102 (8th ed. 2004).

109. *Cable News Network L.P. v. CNNNews.com*, 162 F. Supp. 2d 484, 491 (E.D. Va. 2001), *aff'd in part, vacated in part sub nom.* *Cable News Network, LP v. CNNNews.com*, 56 F. App'x 599 (4th Cir. 2003). The court stated that "despite the *Shaffer* decision, it remains generally accepted that" courts routinely exercise jurisdiction when the property is within the forum state without conducting a minimum contacts analysis. *Id.* (citing only to a law review article for supporting authority). Finally, the court rejected *Shaffer*'s application of minimum contacts to all in rem cases as "counter to historical practice and common sense" without explaining why the court believed a Supreme Court decision would not be able to change historical practice. *Id.*

110. This is particularly true for the Supreme Court, which scholars have recognized has a function to decide cases that "involve[] principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court." William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2-3 (1925).

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

112. The bar is so high that federal courts of appeals invoke the distinction meaningfully in approximately 1 in 4000 cases, while federal district courts do so in approximately 1 in 2000 cases. David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021 (2013).

113. *See* Struve & Wagner, *supra* note 27, at 1013 ("When the Supreme Court articulates a general principle of constitutional doctrine, and especially when the Court takes pains, as it did in *Shaffer*, to assess the implications of that principle for contexts other than that of the case at hand, lower courts should be slow to brush the principle aside as mere 'dictum.'").

114. *See, e.g., Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 836 (7th Cir. 2014) ("Still, the Supreme Court's dicta must be respected.").

B. INADEQUATE NOTICE TO FOREIGN REGISTRANTS

The ACPA's interpretation of what "constitute[s] service of process"¹¹⁵ fails to provide adequate notice, particularly for foreign registrants. Although the ACPA's in rem action is technically a claim against the domain name itself and not against any person, it nevertheless affects the domain name owner's interest in the domain name.¹¹⁶ Recognizing this, *Shaffer* affirmed that "property cannot be subjected to a court's judgment unless reasonable and appropriate efforts have been made to give the property owners actual notice of the action."¹¹⁷ Given that a successful ACPA in rem action essentially takes away the registrant's property, some amount of notice is required.

Notice under the ACPA is limited for unknown registrants and nonexistent for known foreign registrants. The ACPA provides "[t]he actions under subparagraph (A)(ii) shall constitute service of process."¹¹⁸ Subparagraph (A)(ii) is divided into two parts, (A)(ii)(I) and (A)(ii)(II). Part (A)(ii)(I) governs situations where personal jurisdiction is not available over the domain name owner and does not specify any action to provide notice. Part (A)(ii)(II) governs situations where the plaintiff is unable to locate the owner and provides instructions to send notice to the email and postal addresses provided in the WHOIS database, and to publish a notice of the action as directed by the court.¹¹⁹ The separation of the subparagraphs into two distinct scenarios, each with its own necessary actions, suggests that in the case of foreign domain name owners over whom no personal jurisdiction exists, the ACPA does not require any action to constitute service of process. In the case of the missing domain owner, attempts to make contact through the email and postal addresses provided by the registrar constitute service of process.¹²⁰ Courts have suggested that the minimum waiting period before filing an in rem action can be as short as

115. 15 U.S.C. § 1125(d)(2)(B) (2012).

116. *See Shaffer*, 433 U.S. at 207–08.

117. *Id.* at 206; *see also* *CompuServ, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996) (holding that due process requires potential defendants be able to "structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit.") (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

118. 15 U.S.C. § 1125(d)(2)(B) (2012).

119. 15 U.S.C. § 1125(d)(2)(A)(ii)(II) (2012).

120. *Id.*

ten days.¹²¹ Notice by publication is permitted at the discretion of the court,¹²² but it is not likely to be helpful if the missing owner is a foreign registrant. Especially given the growing popularity of private and proxy registration services, where a third-party business listing shields the true domain name holder on WHOIS,¹²³ the ACPA's conception of notice is even less adequate today than when it was enacted.

C. INCOHERENT DEFINITION OF MULTIPLE DOMAIN NAME SITUSES

The ACPA defines a domain name's situs as the location of its registrar, registry, or other domain name authority.¹²⁴ This formulation is inconsistent with the treatment of other intangible property because the registry has no effective control over domain names. In addition, the ACPA's allowance for multiple definitions of situs for one domain name is incoherent given that the registrar and the registry are often located in entirely different locations.

A domain name can be thought of as a piece of data or code that represents a piece of property in cyberspace.¹²⁵ Thus, a domain name may

121. *Lucent Techs., Inc. v. LucentSucks.com*, 95 F.Supp.2d 528, 533 (E.D. Va. 2000) (suggesting that a waiting period of eight days was not enough to demonstrate due diligence, but that ten days may be the appropriate minimum length).

122. For example, in *Banco Inverlat, S.A. v. www.inverlat.com*, the court exercised its discretion to waive service by publication. 112 F. Supp. 2d 521, 523 (E.D. Va. 2000); see also Andrew J. Grotto, *Due Process and In Rem Jurisdiction Under the Anti-Cybersquatting Consumer Protection Act*, 2 COLUM. SCI. & TECH. L. REV. 1, 19 (2001).

123. See, e.g., *Public vs. Private*, DOMAINS BY PROXY, <https://www.domainsbyproxy.com/PublicVsPrivate.aspx> (last visited Aug. 20, 2017). In fact, the contract for Domains by Proxy provides for the registrant to authorize Domains by Proxy to either resolve third-party claims or to cancel the service when a legal issue arises out of the domain name. *Domain Name Proxy Agreement*, DOMAINS BY PROXY, https://www.domainsbyproxy.com/policy/ShowDoc.aspx?pageid=domain_nameproxy (last revised June 28, 2017).

124. The phrase "other domain name authority" is undefined and otherwise unclear. ROBERT A. BADGLEY, *DOMAIN NAME DISPUTES* § 4.05, 4-26.3 (2002). For the purposes of this discussion, this Note only considers registrars and registries as potential situs. Courts have debated whether ICANN can be a "domain name authority," which would potentially pull all ACPA in rem actions to California, where ICANN is located. See, e.g., Patrick M. Phelan, *District Court: ICANN Not a Domain Name Authority for In Rem Jurisdiction Under the ACPA*, INSIDE TECH MEDIA (Sept. 14, 2012) <https://www.insidetechnmedia.com/2012/09/14/district-court-icann-not-a-domain-name-authority-for-in-rem-jurisdiction-under-the-acpa>.

125. There is some debate about whether a domain name may count as property at all; some argue that a domain name is merely a contractual right. See Ned Snow, *The Constitutional Failing of the Anticybersquatting Act*, 41 WILLAMETTE L. REV. 1, 47-48 (2005); see also David Post, *Are Internet Domain Names "Property"?*, WASH. POST: VOLOKH CONSPIRACY (Aug. 1, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/01/are-internet-domain-names-property>. Consistent with the

be considered a piece of intangible property.¹²⁶ There are several approaches to locating intangible property. One approach is the domicile–based approach. For some intangible property, such as corporate stock,¹²⁷ the general rule is that its situs is located where its owner is domiciled.¹²⁸ The ACPA clearly does not comport with this approach: the registrar and the registry have no consistent connection to the location where the owner of the domain name is domiciled.¹²⁹ The domicile–based approach does not make sense for domain names given that they are neither portable nor dependent on the location of their owners; in fact, domain names may not undergo any changes even when their ownership changes.

Another approach to locating intangible property is the control–based approach, which forms the “overarching principle”¹³⁰ dominating Supreme Court and lower court cases. Under this approach, the situs is the location of the entity that has control and dominion over the intangible property. This appears to be the ACPA’s conception of situs. The ACPA locates the situs in the judicial district of the entity “that registered or assigned the domain name,”¹³¹ which suggests that control over the domain name is the idea at play.¹³² The other situs defined by the ACPA is even more explicit about control: the judicial district of the court where “documents sufficient to establish control and authority regarding the disposition of the registration

ACPA’s construction of domain names and the majority of courts who have considered the question following the passage of the ACPA, this Note treats domain names as property. See Sadasivan, *supra* note 14, at 241.

126. See *Kremen v. Cohen*, 337 F.3d 1024, 1029 (9th Cir. 2003) (finding that domain names are intangible property); see also Daniel Hancock, *You Can Have It, But Can You Hold It?: Treating Domain Names as Tangible Property*, 99 KY. L.J. 185, 186 (2011).

127. 84 C.J.S. *Taxation* § 170 (2016) (“Thus, the situs of shares of stock is ordinarily at the domicile of the owner or the corporation.”).

128. See *GP Credit Co. v. Orlando Residence, Ltd.*, 349 F.3d 976, 979 (7th Cir. 2003) (“The general rule is that [situs of] intangible personal property is ‘located’ in its owner’s domicile.”); see also *In re Lambert*, 179 F.3d 281, 285 (5th Cir. 1999) (same).

129. One of the more attractive features of defining the situs as the registrar rather than the registry, however, is that there is a better chance that the location of the registrar is the location of the registrant’s domicile.

130. Thomas R. Lee, *In Rem Jurisdiction in Cyberspace*, 75 WASH. L. REV. 97, 126–27 (2000).

131. 15 U.S.C. § 1125(d)(2)(C)(i) (2012).

132. In fact, this is consistent with the conventional way of defining the situs of intangibles like copyright, trademarks, and patents as the location where they are registered.

and use of the domain name are deposited.”¹³³ Thus, the ACPA appears to espouse the control-based approach to intangible property.

However, the ACPA’s definition of a domain name’s situs fails to follow through with the control-based approach. Given that the situs of a domain name should be the location of the entity exercising control over it, the situs should exclusively be the location of the registrar, which has effective control over the domain name. Under ICANN’s structure, changes to domain name ownership, including cancellations and transfers, are handled by the registrars, as provided in their accreditation contract with ICANN.¹³⁴

The registry, on the other hand, has no control over domain names because it is only a database that contains records of all domain names. Some argue that the registry has control over domain names because it “holds” them in the same sense that “an issuing corporation holds stock, an insurance company holds an insurance policy, or a financial institution holds an account or fund.”¹³⁵ However, this argument muddles the distinction between “holding” something and having effective control over the issuance of the property. Corporations, insurance companies, and financial institutions are all entities responsible for issuing and managing the intangible property they hold. In contrast, registries are merely holders of lists. Indeed, courts appear to turn exclusively to registrars to effectuate their orders regarding domain names. Even if the registrar is foreign, courts request enforcement of their ACPA decisions with the foreign registrar rather than the U.S. registry.¹³⁶ In addition, rogue registrars have been able to prevent enforcement of domain name decisions by refusing to implement the ordered transfers.¹³⁷ This demonstrates that registry control over domain names is largely theoretical; in practice, the registrars control the domain

133. 15 U.S.C. § 1125(d)(2)(C)(ii) (2012). Courts have consistently interpreted the ACPA narrowly to disallow jurisdiction stemming solely from the relevant documents having been deposited in a particular jurisdiction. *See Sadasivan, supra* note 14, at 245.

134. *See* INTERNET CORP., *supra* note 30.

135. *Lee, supra* note 130, at 130.

136. For example, in *CNN* the U.S. District Court for the Eastern District of Virginia requested that the Chinese registrar of the domain name at issue transfer the domain name certificate to the court, despite the fact that the domain name was a “.com” domain and the registry was also based in the Eastern District of Virginia. *Cable News Network L.P. v. CNNNews.com*, 162 F. Supp. 2d 484, 492 (E.D. Va. 2001), *aff’d in part, vacated in part sub nom. Cable News Network, LP v. CNNNews.com*, 56 F. App’x 599 (4th Cir. 2003).

137. *See* Sarah B. Deutsch & David E. Weslow, *UDRP Hijacking Revisited: A Domain Name Registrar’s Actions Raise Concerns*, INT’L TRADEMARK ASS’N BULL. (Oct. 1, 2011), <http://www.inta.org/INTABulletin/Pages/UDRPHijackingRevisitedADomainNameRegistrar%E2%80%99sActionsRaiseConcerns.aspx>.

names. Furthermore, it is the registrar that possesses the certificate establishing the domain name registration,¹³⁸ which places the registrar squarely within the ACPA's second definition of a situs—the location of “documents sufficient to establish control and authority regarding the disposition of the registration.”¹³⁹ Accordingly, the appropriate situs for domain names should only be the location of the registrar, and not the registry.

Moreover, the ACPA's practice of allowing multiple situs for each individual domain name is conceptually incoherent. The locations of the registry and the registrar are often different,¹⁴⁰ and it is not clear which would be the domain name's true situs in such cases.¹⁴¹ It is possible that the drafters of the ACPA wanted to provide an expansive allowance so that if any of these locations are in the United States, then the ACPA can apply to the domain name. However, locating a piece of intangible property in multiple locations is untenable in the context of disputes in other areas that may arise over domain names, for which the specific location of their situs may become important.

IV. POLICY ISSUES WITH THE ACPA

The ACPA reflects an outdated vision of the Internet as a space governable by the unilateral actions of individual states. In the early days of the Internet, the Department of Commerce set out plans to facilitate global participation in its management.¹⁴² However, in bringing the majority of authority over the domain name space to one judicial district within the United States, the ACPA does not facilitate a practical or equitable distribution of domain names. Especially given the October 2016 handover to ICANN, such a system is not only undesirable as a matter of policy but

138. *See, e.g.,* *Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293, 296 (2d Cir. 2002) (describing the registrar's submission of the registrar's certificates to the court).

139. 15 U.S.C. § 1125(d)(2)(C)(ii) (2012).

140. *See* INTERNET CORP., *supra* note 34.

141. As an analogy, it has long been considered a puzzle of personal jurisdiction that the Internet allows a person to be found in multiple locations; for example, whether a user's location should be considered where the user's computer resides, or where the computer directly linking to the Internet is located. *See* Siddiqi, *supra* note 1, at 50.

142. *See* U.S. PATENT & TRADEMARK OFFICE, U.S. DEP'T OF COMMERCE, REPORT TO CONGRESS: THE ANTICYBERSQUATTING CONSUMER PROTECTION ACT OF 1999, SECTION 3006 CONCERNING THE ABUSIVE REGISTRATION OF DOMAIN NAMES (2001), <http://www.uspto.gov/web/offices/dcom/olia/tmcybpiracy/repcongress.pdf> [hereinafter REPORT TO CONGRESS].

also likely to become untenable as more countries seek to exert influence over the Internet.

A. CONCENTRATED ALLOCATION OF DOMAIN NAME DISPUTES TO ONE COURT

The ACPA’s definition of domain situs funnels a disproportionate number of domain name disputes into the Eastern District of Virginia. The ACPA sets a domain’s situs at the location of either the registrar or the registry. Almost all of the major registries are located in the United States. As shown in Table 1, the registries for most of the classic top-level domains (TLDs)—which dominate the Internet—are located in U.S. jurisdictions. At the close of the second quarter of 2016, there were a total of 334.6 million domain names registered across all TLDs.¹⁴³ Of these, “.com” names accounted for 127.5 million, while “.net” names accounted for 15.8 million.¹⁴⁴ In addition, “.org” domain names numbered 10.5 million as of October 2015.¹⁴⁵ Together, these three TLDs account for about forty-six percent of all domain names, and these registries are all located in the Eastern District of Virginia. In addition to the sheer number of domains they possess, “.com” and “.org” are disproportionately likely to be the subjects of domain name disputes because they are also the most often used,¹⁴⁶ making it even more disproportionately likely that any given domain name dispute will have to be brought in the Eastern District of Virginia.

Table 1. Distribution of Major Registries

Top-level domain	Registry	Judicial District	Percent of total domain names ¹⁴⁷
.com	Verisign ¹⁴⁸	E.D. Va.	38.1%

143. *Domain Name Industry Brief*, VERISIGN, Sept. 2016, at 2, <http://www.verisign.com/assets/domain-name-report-sept2016.pdf>.

144. *Id.*

145. Press Release, Your Public Interest Registry, Report: Nonprofit Domains Gain Traction Worldwide (Oct. 14, 2015), <http://pir.org/report-nonprofit-domains-gain-traction-worldwide>.

146. Both are the TLDs with the most and second most page results in Google, respectively. Bill Slawski, *Google’s Most Popular and Least Popular Top Level Domains*, SEO BY THE SEA (Jan. 13, 2006), <http://www.seobythesea.com/2006/01/googles-most-popular-and-least-popular-top-level-domains>.

147. These are approximate percentages calculated by dividing the total number of domain names by the number of domain names of a certain TLD. They are approximate because the dates for the numbers do not match up perfectly, with different registries releasing information about their domain name numbers at slightly different times.

148. VERISIGN, <http://www.verisign.com> (last visited Aug. 20, 2017).

.net	Verisign	E.D. Va.	4.7%
.org	Public Interest Registry ¹⁴⁹	E.D. Va.	3.1%

In contrast, registrars are much more numerous and spread out all over the world. As of October 2016, there were 2144 registrars accredited by ICANN.¹⁵⁰ Based on my analysis of ICANN's accredited registrars list, 69 countries had an accredited registrar. In addition, as shown in Table 2, the distribution of registrars in non-U.S. countries is a more accurate reflection of the populations and economies of countries than the distribution of registry locations.

Table 2. Distribution of Registrars ¹⁵¹

Country	Number of Registrars
United States	1653
China	83
India	64
Hong Kong	35
Germany	27
United Kingdom	24
Canada	21
Australia	18
France	18
Japan	18
South Korea	16
Netherlands	14
Spain	13
Russia	9
Italy	8
Sweden	8
Turkey	8

149. YOUR PUBLIC INTEREST REGISTRY, <http://pir.org> (last visited Aug. 20, 2017).

150. The total is based on an analysis of the list of registrars on the ICANN website. See INTERNET CORP., *supra* note 34. The number of accredited registrars continues to grow rather dramatically; as of November 2014, there had been only 1,160 registrars on the list. *Id.*

151. *Id.*

Vietnam	6
Ireland	5
Panama	5
Switzerland	5
United Arab Emirates	5
Other (47 countries) ¹⁵²	81
Total	2144

There are both equitable and practical reasons to spread geographical jurisdiction over domain names. Equitably, it does not necessarily make sense for domain name disputes to end up primarily in the United States, nor for the Eastern District of Virginia to be made “the global tribunal,” adjudicating the substantive rights of foreign registrants who have no contact with the district.¹⁵³ Confining so many domain name disputes to one district may be inconvenient not only for the would-be defendant but also the plaintiff in a given dispute, neither of whom are likely to reside in the Eastern District of Virginia. As a practical matter, as the volume of disputes over domain names increases,¹⁵⁴ the Eastern District of Virginia may be overwhelmed by the number of cases.

One potential argument in defense of concentrating domain name cases in one court is that it could lead to gains in efficiency and consistency that result from such specialization; for example, the Federal Circuit is tasked with patent appeals to promote uniformity in patent law. The comparison with specialized courts, however, is inapt for two reasons. First, the concentration of domain name cases in the Eastern District of Virginia was not planned, but inadvertent. As a result, any subject matter specialization is incomplete. The Eastern District is not a specialized court. The occasional case might still end up in other districts, undermining the goal of promoting consistency by creating outlier cases decided by a different court than the rest. Second, the concentration of cases within a single district court implicates international concerns that are simply not present in the case of specialized domestic courts like the Federal Circuit. These considerations

152. The breakdown is as follows: four countries with four registrars, seven countries with three registrars, eight countries with two registrars, and twenty-eight countries with one registrar.

153. See Xuan-Thao N. Nguyen, *The Digital Trademark Right: A Troubling New Extraterritorial Reach of United States Law*, 81 N.C. L. REV. 483, 534 (2003).

154. See *Domain Name Wars*, *supra* note 3.

outweigh any potential efficiencies of the current system. Cases should instead be distributed more evenly, both within the United States as well as globally.

Furthermore, ICANN's new program to expand generic top-level domains (gTLDs) could exacerbate the concentration problem. Whereas ICANN previously allowed only a limited number of TLDs,¹⁵⁵ it recently began a program that grants new gTLDs.¹⁵⁶ For example, New York City has proposed and developed the new ".nyc" gTLD, to be used by people and businesses located in New York City.¹⁵⁷ It remains an open question whether the ACPA could be used for disputes over the names of the gTLDs: for example, if Macy's wanted to challenge the registration of a gTLD of ".macys" by another party, could it do so under the ACPA? And if it can, because ICANN is the body that directly oversees the acceptance of new TLDs,¹⁵⁸ at least one court has contemplated that ICANN would be the "other domain name authority that registered or assigned the domain name"¹⁵⁹ where the domain name's situs would be assigned.¹⁶⁰ Because no registrars or registries are involved in the TLD process, the location of ICANN would be the only possible situs for the TLD.¹⁶¹ If ICANN is recognized as a domain name authority, then the Central District of California would become the sole site of all disputes arising out of TLD names under the ACPA and any other laws that follow its definition of domain name situs.¹⁶² Moreover, unlike the current situation with registrar and registries, both of which increase in number every year, there is only

155. Daniela Michele Spencer, *Much Ado About Nothing: ICANN's New GTLDs*, 29 BERKELEY TECH. L.J. 865, 869 (2014).

156. *About the Program*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, <http://newgtlds.icann.org/en/about/program> (last visited Aug. 20, 2017). For a more detailed examination of gTLDs and a critique of their potentially anticompetitive effects, see Spencer, *supra* note 155. For an analysis of the application process, see Nafees Uddin, *Stymieing Controversy Over Generic Top-Level Domains (gTLDs) and Other Internet Governance Decisions with Content Neutrality*, 11 SEATTLE J. FOR SOC. JUST. 813, 826 (2013).

157. See .NYC, <http://www.ownit.nyc> (last visited Aug. 20, 2017).

158. See INTERNET CORP., *supra* note 156 (describing ICANN's approval process for new gTLDs); *Del Monte Int'l GmbH v. Del Monte Corp.*, 995 F. Supp. 2d 1107, 1120 (C.D. Cal. 2014) (recognizing that ICANN acts in a "hands-on" manner with respect to assigning new gTLDs).

159. 15 U.S.C. § 1125(d)(2)(A) (2012).

160. See *Vizer v. VIZERNEWS.COM*, 869 F. Supp. 2d 75, 77 (D.D.C. 2012) (quoting 15 U.S.C. § 1125(d)(2)(A)).

161. However, not all courts agree. In *Del Monte*, the court rejected the idea that a TLD can be a domain name, and ICANN a domain name authority, within the meaning of the ACPA. *Del Monte*, 995 F. Supp. 2d at 1120.

162. *Id.* at 1120, 1124.

one ICANN, and there would be no possibility that jurisdiction would expand over time to a greater number of courts. Thus, any potential expansion of the ACPA to cover TLDs would further exacerbate preexisting inequalities in the distribution of domain name authority.

B. UNRESOLVED CONFLICT BETWEEN U.S. TRADEMARKS AND FOREIGN TRADEMARKS

The ACPA fails to recognize foreign trademarks in a manner consistent with international comity. Trademark law remains an area governed nationally¹⁶³ under vastly different regulatory regimes.¹⁶⁴ Whereas trademark law allows identical marks to operate in non-competing markets, the domain name system in effect allows only one of those trademark holders to lay a legitimate claim over the associated domain name.¹⁶⁵

Within such a system, the ACPA privileges U.S. trademarks over those of other nations and “establish[es] U.S. trademark law as the law of the Internet.”¹⁶⁶ Trademarks registered in other countries are not enforceable under the ACPA,¹⁶⁷ and the ACPA does not provide for the possibility that a legitimate claim by a U.S. trademark holder over a particular domain name may conflict with a legitimate claim by a foreign trademark holder over the same domain name.¹⁶⁸ The ACPA thus privileges the claims of U.S.

163. Trademark rights in general are granted in a specific geographical area and are not enforceable beyond that area. Thus, they are not enforceable internationally unless the party obtains protection in other countries as well. Ramirez, *supra* note 2, at 416.

164. Sadasivan, *supra* note 14, at 255. Unlike the United States, which has a system in which the first to *use* the mark in a particular geographical area obtains rights, most other countries employ a system in which the first to *register* the mark obtains rights. *Id.* Although the Madrid System for international registration of trademarks allows for the filing of trademarks simultaneously, it is not a substantive harmonization treaty but is rather an efficient way for trademarks to be filed in different countries with one application. *Madrid Protocol*, U.S. PAT. & TRADEMARK OFF., <http://www.uspto.gov/trademark/laws-regulations/madrid-protocol> (last visited Aug. 20, 2017).

165. Ramirez, *supra* note 2, at 415.

166. *See* Statement of Policy on the Management of Internet Names and Addresses, 63 Fed. Reg. 31741 (June 10, 1998) (noting that commentators criticized the regulation on this basis).

167. *See* H.R. REP. NO. 106-412, at 14 (1999) (acknowledging that the Act does not provide for in rem jurisdiction over domain names registered outside of the United States).

168. The question of whether the defendant has any other intellectual property rights in the domain name is a factor that may be considered in the context of the bad faith showing under paragraph (1)(B)(i)(I), but as discussed below, this is difficult in in rem cases where the domain name holder is not even a party to the proceedings. 15 U.S.C. § 1125(d)(1)(B)(i)(I) (2012).

trademark holders without attempting to reconcile them with the rights of foreign trademark holders.¹⁶⁹

There have been cases in which legitimate foreign trademarks were challenged under the ACPA for overlapping with U.S. trademarks. For example, in *Hartog & Co. AS v. Swix.com*, the plaintiff, a Norwegian company that owned the mark “SWIX” in the United States, brought suit against two domain names owned by a Swiss company called Swix Internet, which possessed the mark “SWIX” in Switzerland.¹⁷⁰ Although that suit ultimately did not succeed because no brand dilution could be proven and the defendants had not acted in bad faith,¹⁷¹ it was a case where the two companies had been involved in the dispute for some time and the defendant was aware of the lawsuit. It is difficult to assess how the results may have come out if the defending party was truly unaware of the lawsuit, as is possible with ACPA in rem actions where no notice is required to be given to foreign registrants.

Although the ACPA provides a safe harbor for defendants who “believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful,”¹⁷² it is difficult to say if this would protect the absent defendant in a truly ex parte proceeding involving only the domain name in an in rem action. If the defendant is absent, and indeed does not know that the case is taking place, how accurate would an assessment of the defendant’s intent be, and indeed, who would even make the defense?¹⁷³ Although the safe harbor provision may have been meant to exclude from liability the use of a domain name by, for example, a

169. See Nguyen, *supra* note 153, at 557 (“[T]he ACPA’s digital trademark right appears to have been enacted solely for the purpose of protecting United States trademark owners at the expense of legitimate domain name and trademark owners outside the nation’s physical boundaries.”). Scholars have argued that this is a violation of the Paris Convention, which requires each signatory’s national law to be limited to territorial application. *Id.* at 542–44.

170. *Hartog & Co. AS v. Swix.com*, 136 F. Supp. 2d 531 (E.D. Va. 2001).

171. The ACPA outlines nine factors to be considered in assessing the bad faith of the registrant. 15 U.S.C. § 1125(d)(1)(B)(i). For further discussion of these factors, see Matthew Edward Searing, Note, “*What’s in a Domain Name?*” *A Critical Analysis of the National and International Impact on Domain Name Cybersquatting*, 40 WASHBURN L.J. 110, 120 (2000).

172. 15 U.S.C. § 1125(d)(2)(B)(ii).

173. This issue is exacerbated by the fact that, unlike in other trademark infringement cases, liability under the ACPA turns on intent rather than conduct; it does not require any “commercial use” of the domain name, only the defendant’s bad faith intent with respect to the domain name. Snow, *supra* note 125, at 39–40. This places even more importance on the ability to accurately assess the registrant’s intent, a task made more difficult by the registrant’s absence.

legitimate foreign business, it is difficult to see how much protection such a provision would offer in an in rem proceeding. By allowing trademarks of different countries to be pitted against each other on terms designed to protect only U.S. trademarks, the ACPA fails to comport with the principles of international comity.

C. FAILURE TO UTILIZE INTERNATIONALIZED DISPUTE RESOLUTION

Another policy consideration against the ACPA is that continued reliance on it today interferes with the more internationalized domain name dispute resolution system run by ICANN. Roughly around the same time that the ACPA was passed, ICANN developed and implemented the Uniform Domain–Name Dispute Resolution Policy (UDRP), which all ICANN–approved registrars follow.¹⁷⁴ Under the UDRP, disputes over domain names and cybersquatting claims can be addressed in expedited administrative proceedings at the request of the trademark holder, who can file a complaint with a dispute resolution service.¹⁷⁵ In the complaint, the complainant must specify the trademarks on which the complaint is based and provide reasons that (1) the domain name is identical or confusingly similar to the trademark; (2) why the current domain name holder has no rights or legitimate interests in the domain name; and (3) why the domain name should be considered to have been registered in bad faith.¹⁷⁶ These are strikingly similar to the ACPA’s requirements. The remedy under the UDRP is also the same as that under the ACPA: the cancellation of the domain name or the transfer of the domain name to the complainant.¹⁷⁷ An independent panel of either a single member or three members hears the case.¹⁷⁸

The UDRP has several key advantages over the ACPA. It is a fast and cost-effective alternative that is readily accessible, and it poses no jurisdictional issues because it relies on contractual agreements.¹⁷⁹ Compared to the

174. See INTERNET CORP., *supra* note 30.

175. See *id.*

176. See *Rules for Uniform Domain Name Dispute Resolution Policy*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS (Sept. 28, 2013), <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en>.

177. INTERNET CORP., *supra* note 30.

178. INTERNET CORP., *supra* note 176.

179. Connie L. Ellerbach, *UDRP Versus ACPA: Choosing the Right Tool to Challenge Cybersquatting*, FENWICK & WEST LLP 1 (Sept. 29, 2003), <https://www.fenwick.com/publications/pages/udrp-versus-acpa-choosing-the-right-tool-to-challenge-cybersquatting.aspx>. The major advantage of the ACPA over the UDRP is that U.S. courts are better equipped than a dispute resolution panel to adjudicate complex, fact-intensive claims (e.g., if a claim of bad faith is circumstantial). *Id.* Otherwise, the ACPA is attractive in large part

ACPA, the UDRP better meets the demands of international comity.¹⁸⁰ It is run by ICANN, a non-profit organization which has been functionally independent since 2009.¹⁸¹ The handover in October 2016 gave ICANN complete independence.¹⁸² ICANN conceives of itself as serving a “global community supporting the vision of ‘one world, one Internet.’”¹⁸³ Although some have worried whether ICANN would be sufficiently internationalized as an independent rather than intergovernmental organization,¹⁸⁴ others have praised ICANN’s multilateral, stakeholder-led structure.¹⁸⁵ Governments stay involved with ICANN through the Governmental Advisory Committee (GAC), which can force ICANN’s board to vote on an issue but must do so by consensus, ensuring that no one country can

because it gives litigants a second bite at the apple if their UDRP claim fails, as discussed below. *See id.*

180. However, the U.S. Department of Commerce has long stated that it would not accept a proposal that ceded control to an intergovernmental organization. Wyatt, *supra* note 20. For a time, some speculated that the United Nations would take control over ICANN if the United States missed the October 1 handover deadline, a possibility that was met with concern. L. Gordon Crovitz, *An Internet Giveaway to the U.N.*, WALL ST. J. (Aug. 28, 2016, 5:52 PM), <http://www.wsj.com/articles/an-internet-giveaway-to-the-u-n-1472421165>. Others have also worried that the United States will continue to exert influence over ICANN, which, despite its independence, remains a U.S. entity subject to U.S. law, unlike organizations such as the Red Cross, which operate under international law. Kieren McCarthy, *French Scream Sacré Bleu! as US Govt Gives up the Internet to ICANN*, REGISTER (Mar. 24, 2016, 9:25 PM), http://www.theregister.co.uk/2016/03/24/france_slams_us_govt_internet_transition.

181. ICANN is not without its problems and has been criticized for its lack of accountability. *See, e.g.*, Olivier Sylvain, *Legitimacy and Expertise in Global Internet Governance*, 13 COLO. TECH. L.J. 31 (2015); Rolf H. Weber & Shawn Gunnarson, *A Constitutional Solution for Internet Governance*, 14 COLUM. SCI. & TECH. L. REV. 1 (2013). However, companies such as Facebook and Google, as well as advocacy groups like Public Knowledge and Access Now, have supported the transfer to ICANN. Finley, *supra* note 17. An alliance of companies including Facebook and Google has called the transfer “imperative,” arguing that “a global, interoperable and stable Internet is essential for our economic and national security.” Shelby Carpenter, *Google, Facebook Say It’s ‘Imperative’ That U.S. Hand Over Control of Internet*, FORBES (Sept. 13, 2016, 1:01 PM), <http://www.forbes.com/sites/shelbycarpenter/2016/09/13/google-facebook-say-its-imperative-u-s-hand-over-control-of-internet>.

182. Finley, *supra* note 17.

183. *Welcome to ICANN!*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, <https://www.icann.org/resources/pages/welcome-2012-02-25-en> (last visited Aug. 20, 2017). Despite ICANN’s stance, however, there have also been more radical calls for the internationalization of the Internet by having ICANN’s powers transferred to the International Telecommunication Union, which is controlled by the United Nations. *See, e.g.*, Uddin, *supra* note 156, at 844.

184. *See, e.g.*, McCarthy, *supra* note 180.

185. Finley, *supra* note 17.

unilaterally push an action through.¹⁸⁶ Furthermore, the UDRP dispute resolution service providers are spread out across geographical areas: in addition to U.S.–based services, there are also dispute resolution services based in Europe, Asia, and the Middle East.¹⁸⁷

Aside from issues of comity, continued use of the ACPA also raises issues of fairness and equity because some U.S. complainants use the ACPA to get a second bite at the apple after receiving an adverse ruling from UDRP. Filing an ACPA action prevents any adverse decision in a UDRP decision from being implemented,¹⁸⁸ and the decision of a U.S. court on the ACPA claim can also reverse the UDRP ruling.¹⁸⁹ Thus, the ACPA not only competes with the UDRP but interferes with the finality of the UDRP's decisions, overriding them for U.S. trademark holders. Such a practice runs counter to the interests of efficiency, comity, and finality. Of course, the UDRP is not a perfect system, and given how new it is, is a work in progress.¹⁹⁰ However, the perpetual prospect of having its determinations halted and overturned by U.S. courts also does little to inspire faith in the UDRP process or to motivate stakeholders to invest in improving it.

Even worse, the ACPA sets a bad example, emboldening other localities to pursue their own remedies in Internet cases and further balkanizing Internet governance. In 2008, a Kentucky court ordered the seizure of 141 domain names in an in rem action because they hosted Internet gambling websites illegal under Kentucky law.¹⁹¹ The court reasoned that the ACPA did not foreclose any uses of the domain as a basis for jurisdiction in other

186. *Id.* For more detailed analysis and criticism of the GAC's role in ICANN, see Sylvain, *supra* note 181.

187. *List of Approved Dispute Resolution Service Providers*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en> (last visited Aug. 20, 2017).

188. INTERNET CORP., *supra* note 30.

189. Ellerbach, *supra* note 179, at 2.

190. For criticisms of the UDRP and suggestions for its reform, see Julia Hörnle, *The Uniform Domain Name Dispute Resolution Procedure: Is Too Much of a Good Thing a Bad Thing?*, 11 SMU SCI. & TECH. L. REV. 253 (2008); A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy"—Causes and (Partial) Cures*, 67 BROOK. L. REV. 605 (2002); Patrick D. Kelley, Note, *Emerging Patterns in Arbitration Under the Uniform Domain-Name Dispute-Resolution Policy*, 17 BERKELEY TECH. L.J. 181 (2002).

191. See *Commonwealth v. 141 Internet Domain Names*, No. 08-CI-1409, 2008 WL 5261775 (Ky. Cir. Ct. 2008) (citing 15 U.S.C. § 1125(d)(2)(D)(4)). For discussions of the case, see Kirk D. Homeyer, Note, *Can a State Seize an Internet Gambling Website's Domain Name? An Analysis of the Kentucky Case*, 2 UNLV GAMING L.J. 107 (2011); Jack Mellynn, Note, *"Reach Out and Touch Someone": The Growing Use of Domain Name Seizure as a Vehicle for the Extraterritorial Enforcement of U.S. Law*, 42 GEO. J. INT'L L. 1241, 1252 (2011).

Internet-related cases¹⁹² and essentially attempted to enforce its own version of the ACPA, except enforcement was not of U.S. trademarks but of Kentucky state law. Such attempts by individual jurisdictions to enforce their own laws on the Internet will only generate further chaos.

Congress passed the ACPA to help U.S. trademark holders combat cybersquatting, a serious problem for which there was little other recourse at the time of passage.¹⁹³ Now that there is an internationalized alternative for pursuing cybersquatting, it makes little sense for the United States to insist on a unilateral course of action. With the handover in October 2016, the United States gave oversight authority over the Internet to ICANN, taking a step toward internationalizing the governance of the Internet.¹⁹⁴ The continuing use of the ACPA to pull domain name disputes into the Eastern District of Virginia contravenes the spirit of these policies that support the internationalization of the Internet based on a multilateral approach.

V. PROPOSALS FOR REFORM

Despite the ACPA's problems, a complete judicial overhaul of the ACPA is improbable given that courts have been unwilling to find the ACPA unconstitutional.¹⁹⁵ However, several adjustments to the ACPA regime may ameliorate the problems of lack of notice and due process without impeding the fundamental goals of the ACPA. Furthermore, legislation that sets requirements for how domain registrars interact with their buyers may help provide some notice to foreign registrants of their potential exposure under the ACPA.

A. REDEFINE DOMAIN NAME SITUS AS THE REGISTRAR LOCATION

Limiting the situs of a domain name to only the location of the registrar, and not the locations of the registry or any other domain name authority, should be the first step in developing a more equitable and legally coherent

192. *Commonwealth*, 2008 WL 5261775.

193. REPORT TO CONGRESS, *supra* note 142.

194. See Steve Dent, *ICANN Reveals Plan for Ending America's Control of the Internet*, ENGADGET (Aug. 4, 2015), <http://www.engadget.com/2015/08/04/icann-us-transition-proposal>.

195. See *Cable News Network L.P. v. CNNNews.com*, 162 F. Supp. 2d 484, 491 (E.D. Va. 2001), *aff'd in part, vacated in part sub nom.* *Cable News Network, LP, v. CNNNews.com*, 56 F. App'x 599 (4th Cir. 2003); see also *Caesars World, Inc. v. Caesars-Palace.com*, 112 F. Supp. 2d 502, 505 (E.D. Va. 2000). Courts have appeared to be more willing to reject on constitutional precedent than to allow any challenges to the ACPA's grant of jurisdiction. See discussion *supra* Section III.A.

ACPA regime. This one minor change comes with a number of substantial advantages.

First, disallowing in rem suits based solely on the location of the registry ameliorates the due process issues with the ACPA. For in rem suits based on the location of the domain name's registry, it is difficult to make a convincing case that a foreign registrant possesses minimum contacts with the United States merely because the information of the domain name she purchased from a foreign registrar was subsequently stored in the U.S. registry. However, the argument that minimum contacts exists is much more palatable for foreign registrants who interact with a U.S. registrar to purchase the domain name. For similar reasons, this change ameliorates issues related to lack of notice because foreign registrants who use U.S. registrars are more fairly on notice that their domain name purchase subjects them to U.S. laws compared to counterparts who use a foreign registrar.

Second, such a change would remove the legal and logical incoherence of having multiple situs for domain names. This change would bring the ACPA in line with existing schools of legal thought on where the situs for intangible property ought to be located.

Third, limiting the ACPA to domain names registered with U.S. registrars would lead to a more equitable distribution of domain name dispute cases within the judiciary. This restriction would change the status quo where the United States, and specifically the Eastern District of Virginia, asserts jurisdiction over the majority of domain name disputes. There would be space for the number of registrars in different countries to grow and ebb over time, and also for new countries to be awarded a portion of authority over domain name disputes as registrars develop there. Thus, limiting the domain name situs to the location of the registrar rectifies the worst overreaches of the ACPA without requiring substantial changes to the statute.

B. REVAMP REGISTRAR CONTRACTS TO PROVIDE NOTICE

Reforming registrar contracts is another important step toward giving domain name buyers fair notice of their exposure to U.S. law. If the ACPA regime is here to stay, the next best thing is for foreign registrants to be made aware of it so that they do not purchase domain names without the knowledge that doing so exposes them to U.S. law. Such a modification can be made not only through congressional action but also regulatory action by ICANN, which possesses the power to direct registrars to include certain terms in their contracts with registrants.¹⁹⁶

196. Froomkin, *supra* note 19, at 214.

The domain name market is complex, and it is difficult for foreign registrants to have notice that their domain names are subject to U.S. laws for three reasons. First, not only do foreign buyers only interact with their foreign registrar and not the relevant registry, but there could also be another intermediary layer of resellers which offer registration services on behalf of registrars,¹⁹⁷ making the connection to the U.S. registry even more attenuated. Many registrars offer registration through affiliated resellers.¹⁹⁸ This means that a German citizen in Germany may purchase a domain name with a German reseller, which in fact serves a French registrar, which ultimately connects to a U.S. registry—such that there are multiple layers of entities between a registrant and the U.S. registry which have different national affiliations.

Second, registry–registrar connections are cross–cutting; that is, each registrar often serves multiple registries, selling domain names with many different TLDs. For example, a registrar may sell “.com” and “.bar” domain names at the same time. This practice makes it difficult for domain name buyers to determine what registry is behind the particular registrar they use, because the corresponding registry also depends on which domain name they purchase. It is unrealistic for all “.com” registrants to intuit that choosing the “.com” ending makes them vulnerable to U.S. laws since the registry for “.com” is based in the United States, but that choosing the “.bar” ending does not, since its registry is located in Mexico.

Third, the registrant’s contract with the registrar often includes forum selection clauses which name the jurisdiction of the registrar’s location as the exclusive forum for disputes related to the domain name, giving the impression that the domain name can only be litigated there. These make it especially confusing for consumers to understand which laws govern their domain name purchase. For example, the registration agreement provided by the registrar DomainRegistry.com states:

Choice of Law and Venue: This Agreement and all rights hereunder shall be governed by the laws of the State of New York. Any judicial action relating to this Agreement or to your use of the DomainRegistry site shall be brought exclusively in the federal or state courts of Pennsylvania, in the United States of America,

197. *Domain Name Registration Process*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, <https://whois.icann.org/en/domain-name-registration-process> (last updated July 2017).

198. *See, e.g.*, ENOM, <http://www.enom.com/resellers/benefits-domains.aspx> (last visited Aug. 20, 2017).

subject to any exceptions provided elsewhere in this greement [sic].¹⁹⁹

From this text, it would be reasonable for a lay domain name purchaser—even one savvy enough to seek out and read the forum selection clause in a long contract—to conclude that she should only expect interactions with Pennsylvania courts. Yet if she purchased a domain name ending in “.com,” “.net,” or “.org” from DomainRegistry.com, the situs of her domain name would be in the Eastern District of Virginia under the ACPA, and her domain name would be subject to suit there.²⁰⁰

Several modest changes can help resolve these issues. First, the contract should set out where the registry of the domain name in question is located, in addition to where the registrar itself is located. This change would not represent a drastic departure from how such contracts currently read, as many registrar contracts already contain provisions that separate out different registries. For example, the registrar Network Solutions contains, for a dozen or so TLDs, additional legal conditions in the form, “Additional Terms Applicable to Services In Connection With .Biz TLD.”²⁰¹ Similarly, the domain name registration contract maintained by Integrity Technology Services already provides legal notices and disclaimers specific to different TLDs.²⁰² For a “.tw” TLD, for example, the contract states, “With regards to .TW domain names only, this Agreement will be interpreted and governed by the Laws of Taiwan.”²⁰³

Second, forum selection clauses should make clear that they apply only to disputes between the registrar and the domain name buyer, perhaps with an additional disclaimer that there may be third-party claims that stem from other jurisdictions. For example, the registration agreement provided by the

199. *Registration Agreement Service Agreement*, DOMAINREGISTRY.COM (Mar. 2005), <http://www.domainregistry.com/agreement.jsp>.

200. Of course, there are some preconditions to trigger the ACPA’s in rem provision, including that the purchaser provided false or outdated information to WHOIS and cannot reasonably be located. But the number of purchasers who provide fraudulent information cannot be overstated: one study found that seventy-seven percent of registrations contain false or unverifiable information. McCarthy, *supra* note 12. Purchasers commonly provide such false information for less than malicious reasons, such as a desire to protect their privacy or avoid spam. *See id.*

201. *See Web.com Master Services Agreement*, NETWORK SOLUTIONS, <http://www.networksolutions.com/legal/static-service-agreement.jsp> (last visited Aug. 20, 2017).

202. *See Domain Registration Agreement*, INTEGRITY TECHNOLOGY SERVICES, <http://www.integritytechservice.com/domain-registration-agreement> (last visited Aug. 20, 2017).

203. *Id.*

registrar Namecheap effectively states that its forum selection clause applies only to disputes between the registrar and the buyer:

You agree that any action brought by you to enforce this Agreement or any matter brought by you and which is against or involves us and which relates to your use of the Services shall be brought exclusively in the United States District Court for the Central District of California You consent to the personal and subject matter jurisdiction of any state or Federal court in Los Angeles County, State of California in relation to any dispute between you and us under this Agreement.²⁰⁴

Third, for all domain names subject to U.S. registries, contracts should provide notice about the ACPA and its protection of U.S. trademarks, as well as the possibility of an in rem action against foreign registrants. This would only require an additional line such as: “The registry for this top-level domain is a U.S. entity, and domain name disputes arising out of any U.S. trademark claims may subject this domain name to the jurisdiction of U.S. courts under the Anticybersquatting Consumer Protection Act.” These changes would at least help inform registrants about their exposure to U.S. law, and perhaps even effect changes in behavior that would prevent cybersquatting attempts.²⁰⁵

A significant advantage of this solution is that it can be achieved not only through legislative action by Congress but also regulatory action by ICANN. One way for such contract reform to be implemented, of course, is for Congress to pass a law directing all U.S. registrars to include these clarifications and provisions in their registration agreements. However, the downside of the congressional action approach is both that it would be difficult to achieve²⁰⁶ and that it would only be able to affect registrars that are U.S. entities. Because exposure to the ACPA is currently often based on

204. Registration Agreement, NAMECHEAP, <https://www.namecheap.com/legal/domains/registration-agreement.aspx> (last visited Aug. 20, 2017).

205. Admittedly, such attempts to inform registrants can only be successful insofar as people read their terms of service, which is a lot to ask given how lengthy and complicated such agreements are, and people are conditioned to simply click through these “clickwrap” or “browsewrap” agreements. For these fixes to be truly effective, they should be situated in a larger reform of such online agreements, for example to offer the agreements in plain English. For a discussion of these issues, see Allison S. Brehm & Cathy D. Lee, “Click Here to Accept the Terms of Service”, *COMM. LAW.*, Winter 2015; Thomas A. Dickerson & Mark A. Berman, *Consumers’ Loss of Rights in the Internet Age*, N.Y. ST. B.J., October 2014, at 38.

206. Indeed, a Congress willing to pass legislation to improve registrar contract would likely also be willing to reexamine the ACPA in its entirety, which would be a more direct approach to the ACPA’s problems.

registry location rather than registrar location, this would not help improve notice for foreign registrants using foreign registrars, a more likely scenario.²⁰⁷

A more feasible and comprehensive alternative would be for ICANN to require registrars to include such language in their agreements. As the upstream entity that certifies and delegates power to registrars, ICANN has the power to require all registrars to include standard terms in their service agreements.²⁰⁸ ICANN already does this, for example, when it requires registrars to obtain certain personal and contact information from its registrants in order to populate the WHOIS database.²⁰⁹ With broad power to shape the interaction between registrars and registrants across the world, ICANN can take action to implement these reforms for all registrars and provide better notice to all registrants.

VI. CONCLUSION

The ACPA arose out of an important effort to help U.S. trademark holders combat cybersquatting. However, in crafting a solution to the problem, Congress passed an overbroad law that both faces legal difficulties and reflects a unilateral approach to Internet governance that is no longer U.S. policy today.

This Note has suggested two ameliorative measures, short of a direct modification of ACPA by Congress, to help fix the worst of the ACPA's legal and policy problems. First, the courts should redefine the situs of a domain name exclusively as the location of the registrar. This approach would not only be legally consistent with the treatment of other intangible property but would avoid the type of extraterritorial application to foreign registrants that infringes on due process rights. Furthermore, it would be a step toward a more diversified system of authority over domain name disputes given that registrars are more widely dispersed across the globe than registries. Second, registration agreements should provide registrants notice of their potential exposure to the laws of the United States and other countries, as applicable to the type of domain name they purchase. In order

207. Of course, if Congress or the courts were to adopt this Note's proposal to limit the ACPA's definition of situs to the location of the registrar only, this approach *would* be adequate to inform all registrants facing exposure under the ACPA since only those registrants that interacted with a U.S. registrar would be subject to the in rem provision, and all such registrants would have received notice through their agreements with the U.S. registrars.

208. Froomkin, *supra* note 19.

209. *Id.*

to achieve this, confusing forum selection clauses should be revised, and specific guidance should be included for each type of top-level domain.

The ACPA is no longer a functional or desirable policy for the United States without some much-needed fixes. More than a decade and a half after the passage of the ACPA, much has changed in the manner in which domain name purchasers interact with domain name registrars. With the introduction of new services like gTLDs, the online environment is likely to grow even more complex and internationalized. U.S. policy regarding Internet governance has also shifted to embrace a more open model of Internet governance with the October 2016 handover of the Internet directory to ICANN. In light of these changes, Congress and the courts should reexamine the ACPA and its extension of in rem jurisdiction over domain names.

