

Kentucky domain name seizures – no more!

For once, there is some good news coming out of the US on internet gambling. Common sense has been restored and the Kentucky domain name seizures have been overturned by the Court of Appeals in a decision made on 20 January 2009. The Court has ordered that the Franklin Circuit Court is prohibited from enforcing its order seizing 141 domain names and from conducting a scheduled forfeiture hearing.

To recap, on 18 September 2008 following a civil complaint (filed by the Justice and Public Safety Cabinet of the Commonwealth of Kentucky) the Franklin Circuit Court ordered the seizure of 141 domain names of online gambling businesses. Applications by internet gambling trade associations to dismiss the order were rejected at a hearing on 3 October and a final forfeiture hearing was scheduled for 17 November. It was then rescheduled for 3rd December but stayed (ie prevented from proceeding) by the Court of Appeals until the higher Court could hear petitions to prohibit the enforcement of the original forfeiture order. The petitions were brought by Interactive Media Entertainment and Gaming Association Inc, the Interactive Gaming Council and six of the seized domain names.

I commented in previous articles that the basis of the seizure order was strange to say the least and appeared to be based on policy rather than the law. The domain names were construed by the Franklin Circuit Court as illegal "gambling devices", even though a gambling device is defined in Kentucky State law (Kentucky Revised Statutes (KRS) 528.010(4)) as either a slot machine or "any other machine or mechanical or other device, including but not limited to roulette wheels, gambling tables and similar devices, designed

and manufactured primarily for use in connection with gambling". The Court of Appeals said, **"It stretches credulity to conclude that a series of numbers, or Internet address, can be said to constitute a "machine or any mechanical or other device ...designed and manufactured primarily for use in connection with gambling." We are thus convinced that the trial court clearly erred in concluding that the domain names can be construed to be gambling devices subject to forfeiture under KRS 528.100"**

Encouragingly, the Court of Appeals also went on to suggest that the decision of the Circuit Court was policy not law based and said that regardless of its view as to the advisability of regulating or criminalising Internet gambling sites, the General Assembly (ie the law making body in Kentucky) had not seen fit to amend the law to bring domain names within the definition of gambling devices. The upshot is that the Circuit Court does not have jurisdiction over domain names under the above mentioned law KRS 528.

Will the Assembly amend the law to give jurisdiction over domain names in the future? It seems unlikely as the regulation of interstate commerce is a matter for the Federal government. Having exceeded its jurisdiction and failed once, the Assembly is unlikely to

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provide it with another opportunity to do so on the same subject matter. Any new restriction on internet gambling in Kentucky is likely to have to be in the form of a completely new and specifically tailored law.

Further, there still remains the question as to whether domain names are assets that are capable of being seized (in *Network Solutions, Inc. v Umbro International, Inc (2000)* the Supreme Court of Virginia saw a domain name as a product of and subject to a particular contractual agreement between a registry and domain name holders). On this argument a domain name is not a tangible asset that can be the subject of a forfeiture order against it. There was a dissenting opinion in the Kentucky Court of Appeals judgement where Judge Caperton argued that a domain name could be construed as a device but, frankly, it was wholly unconvincing and illustrated a lack of knowledge about the operation of the internet. He believed, "internet domain names are but one of the components that are unified into an internet gambling device and properly within the definition of device as that term is used in KRS 528.100". Unsurprisingly, his view was out voted two to one by the other Judges.

Judge Taylor gave a separate concurring opinion that the State could not use a criminal statute, such as KRS Chapter 528, to bring a civil forfeiture action as a gambling device had to be "possessed or used in violation of this chapter". What he is saying is that a person or an entity had to be convicted of a crime under

Chapter 528 before their gambling device could be forfeited. However, no criminal charges had been brought against anyone in this case.

There are also First Amendment freedom of speech issues to contend with if access to particular websites is prohibited and, in any event, enforcement of any domain name seizure is a problem as State authorities do not have direct authority over out of State registrars. Neither of these issues were addressed in the Court of Appeals hearing as once they had decided the gambling device issue against the State, they did not need to go further. Another issue that was raised by the trade associations and domain name petitioners was whether poker is gambling. No doubt they would love to see it construed as a game of skill but that perpetual argument was also left for another day.

So is the domain name seizure case a dead duck? Not quite. The day after the Court of Appeal's Order, the State of Kentucky lodged an appeal to the Supreme Court of Kentucky. I am not aware of any hearing date yet nor of the grounds of appeal, however, I would be surprised if it gets anywhere. In the interim the Court of Appeals order is stayed and stalemate remains. Consequently, this episode has not quite reached the end but its nearly there. Regardless of the final outcome, online gambling businesses have learnt a stark lesson that they should always think carefully about the location of the registrars they use for their domain names.

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