

TLDs and IP Blocks: Attachable property or not?

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Story starts

- Several terrorist incidents
 - that were said to be state sponsored
- Victims/heirs sue in US courts
- Obtain default judgments (after much legal argument)

Story *really* starts

- when they try to enforce
- by looking for property
- that belongs to the governments of
 - Iran
 - Syria
 - North Korea

June 23, 2014

- *Sub-poena* served on ICANN
 - claiming access to documents
 - and requiring ICANN hand over
 - several (cc)TLDs (including IDN)
 - and IP blocks.
- ICANN defends

Why do we care?

- What is important for ccTLDs collectively?
 - whether any legal precedent is established
 - that affects us ...
- not the outcome of the case.

ICANN says

- (cc)TLDs
 - are not property
 - might be property, but if they are, they are not attachable
 - if they are attachable, ICANN cannot transfer them unilaterally
- even if they can transfer ccTLDs, this would 'wreak havoc' (*'Chicken Little' argument*)

ICANN also says

- Defendants do not own the ccTLDs
- Even if they do own, 'foreign sovereign immunity' applies
 - Which means ICANN cannot be compelled to hand them over

Basis of argument

- In its argument at first instance, submitted early this year, ICANN relied upon
 - ICP-1; and
 - GAC Principles 2000

in order to inform the court about the nature of ccTLDs

Court ruled

- ICANN was not required to comply with the order
- The Court's order has been widely misreported
- Nothing was decided about property
 - So we still don't know whether in US law a top level domain name could be property
 - But the judge gave a hint

Plaintiffs did not succeed

- because even if TLDs are property
 - *'and they might be'*
 - they would not be the kind of property that you can attach under D.C. law
 - BUT

The Appeal

- The Plaintiffs have appealed
- It seems this is essentially on the basis that the applicable law in D.C. is unclear
- when applied to domain names/TLDs.

ICANN's Defence

- Filed their defence to the appeal on 28th Sept 2015
- Contains much the same argument as before
- Probably with a good chance of success on the original winning point.
- However . . .

Appeal

- The appeal is more on law than fact
- The most significant factor for the appeal appears to be
 - how a particular (DC) statute law is to be interpreted (i.e. if a TLD or IP block is property, is it the kind of property that can be seized).

Referral

- A procedure exists to make a reference from Federal courts to state courts to get an answer on such issues where it involves the interpretation of State law.
- *to European eyes this appears to be analogous to the power of EU Member States court to refer a qualified question to the ECJ in Lux.)*
- Plaintiffs have applied to do this
- ICANN opposed

What next?

- Currently arguing over *whether* to refer the question
- Oral argument in the case scheduled for late January 2016.
- A refusal to refer to, or an confirmatory answer from the DC court would appear determine the the appeal.

In summary

- ccTLDs *might* be property
- Court seemed to think it might possibly, maybe . . .
- but we don't know
 - since it wasn't required for the court to decide this at 1st instance.

Finally . . .

Other US states have different laws

Where intangible property CAN be seized . . .