

## CDT Urges Kentucky Courts to Reverse Course on Gambling Domain Name Seizures

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In November, CDT, along with the Electronic Frontier Foundation and the American Civil Liberties Union of Kentucky, filed a "friend of the court" brief with the Kentucky Court of Appeals in support of various petitions seeking to overturn orders by Franklin County Circuit Court Judge Thomas D. Wingate seizing the "domain names" of gambling websites located outside of Kentucky. The Court of Appeals heard argument on December 12, 2008, and issued an order staying the seizure pending its ruling in the case, which it is likely to issue in the next month or two.

[\(1\) CDT files brief opposing Kentucky's seizure of 141 domain names](#)

[\(2\) The court misunderstands the Internet and the seizure constitutes a dangerous interference with the Domain Name System](#)

[\(3\) Order violates First Amendment, Commerce Clause](#)

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### **(1) CDT Files Brief Opposing Kentucky's Seizure of 141 Domain Names**

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The appeal challenges Judge Wingate's October 16 order permitting the seizure of 141 domain names associated with Internet gambling sites, which the court determined were unlawful "gambling devices" under a Kentucky anti-gambling statute. In its brief, CDT argues that the order is unconstitutional because it violates both the First Amendment and the Commerce Clause of the US Constitution, and because the seizure is overbroad and exceeds the court's jurisdiction. If allowed to stand, the order would set a dangerous precedent that would threaten free speech and the continued growth of a vibrant, global Internet.

Judge Wingate's order was based on shortsighted reasoning about the architecture of Internet communication, and failed to consider the international ramifications of state seizure of domain names. A critical feature of the Internet is the stability and reliability of the Domain Name System (DNS), by which the associations between domain names and numeric "IP addresses" are maintained. The court's conclusion that domain names "contain" their associated sites is akin to finding that a phonebook listing for a casino "contains" the casino. If the Kentucky court order were to be upheld, the DNS could potentially break down, with users not reliably gaining access to the sites they expect when entering a website address into a browser.

CDT argues in its amicus brief that the First Amendment and the Commerce Clause of the Constitution bar states from such action. Misconstruing the relationship between domain names and websites led the court to impose its judgment of various gambling sites on the legal speech that is the association of those sites and their domain names. Furthermore, by the court's logic, Kentucky could take control of any domain name, rerouting all Internet traffic away from websites deemed illegal in Kentucky. This broad reach would give Kentucky the ability to censor content far beyond its

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borders, in clear violation of the Internet free speech rights affirmed in the Supreme Court's 1997 decision in *Reno v. ACLU*, 521 U.S. 844 (1997).

In addition to contravening the First Amendment, such an action is barred from state jurisdictions by the Commerce Clause. The Internet is a medium of global communication, and indeed the United States has already been involved in an international dispute over Internet gambling. Numerous cases across the country have applied the Commerce Clause to strike down attempted state burdens on Internet communications, and this case should be no exception.

As a policy matter, especially in countries that lack these Constitutional safeguards, if similar local interference with global Internet communications were to become widespread, the results would be disastrous for Internet users all over the world attempting to access lawful content.

[Joint press release](#) [1]

[Amicus brief](#) [2]

[The Circuit Court seizure order](#) [3]

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## **(2) KY Court Misunderstands Internet; Seizure a Dangerous DNS Interference**

The Kentucky court's order is based on a troubling misunderstanding of Internet communication. The court went through a multi-step analysis in considering its authority to approve seizure and potential forfeiture of the domain names, including whether domain names are property, whether the court could exercise jurisdiction, and whether domain names were illegal gambling devices under a Kentucky statute that allows seizure of such devices. Leaving aside the thorny question of whether a domain name constitutes intangible property subject to seizure at all, the public interest in an open and vibrant Internet should preclude interference with the DNS of the type blessed by the Kentucky court because of the network instability that action might cause.

The order turns on a strained definition of what constitutes an illegal gambling device under Kentucky law and reveals the court's limited understanding of Internet architecture. In holding that the domain names were gambling devices subject to seizure, the court mistakenly found that "domain names, when used as virtual keys to access, create and maintain a virtual casino, contain the vice at which the statute is directed." Far from containing websites, domain names are simply pointers to IP addresses where websites are served. By eliding domain names - essentially automated directory listings - with the servers and software that constitute the websites associated with those domain names, the court effectively punished the messenger for delivering unlawful content to Kentucky.

As courts grapple with the jurisdictional problems that the Internet raises, it is crucial that they understand some of the key technology behind how Internet messages get transmitted. While states' interest in preventing illegal activity extends to the Internet, the public interest in the Internet remaining a diverse and vibrant forum demands that courts avoid interfering with how the Internet transmits information.

Such shortsighted attempts to block international communications with local regulation have wrought havoc on the Internet before, and it is critical for courts to consider these examples when grappling with jurisdictional questions regarding the Internet. In early 2008, Pakistan Telecom, an ISP, attempted to implement a state order to block YouTube, by misrepresenting itself as hosting the video-sharing site's range of IP addresses. Within seconds, requests for YouTube were being rerouted to servers in Pakistan, where they were promptly ignored. The misdirection spread around the world,

and YouTube was inaccessible for hours.

Incidents like this are common, and are usually quickly corrected manually by conscientious ISPs, but if any court could legitimately compel domain name registrars to redirect requests for domain names to unexpected IP addresses, the effect on global Internet speech would be catastrophic. Also in early 2008, the U.S. District Court for the Northern District of California was quick to dissolve an injunction against the domain name registrar of wikileaks.org after various amici of opinion rose to educate the court about the dangerous ramifications that follow domain-name blocking. In that case, a Swiss bank had sought to prevent access to several of its internal documents that had been posted publicly on wikileaks.org. In dissolving the earlier stipulated permanent injunction against the wikileaks.org's domain registrar, the court recognized that disabling the link between a domain name and the corresponding IP address was overbroad and could potentially censor legal speech.

This decision stands in stark contrast to the Kentucky court's order in recognizing the potential damage caused by court interference with the DNS. The Kentucky Court of Appeals should consider these examples and vacate the lower court's seizure order.

[CNET article on Pakistan ISP and YouTube](#) [4]

[CDT's headline on wikileaks.org case](#) [5]

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### **(3) Order violates First Amendment, Commerce Clause**

In their "friend of the court" brief, CDT, the EFF, and the ACLU argue that Kentucky's action in this case is unconstitutional on free speech and jurisdictional grounds. Regardless of the legal basis in Kentucky for the seizure of domain names, the global nature of Internet communications makes such seizure by a state court unreasonable. The order demanded the complete transfer of control of the domain names, interfering with the ability of Internet users to access any of the content on the websites to which those domain names point, not just to the content to which Kentucky objected. Furthermore, since the domain name is not directly tied to the content of the websites, that content is likely to change, and in time what is referenced by a particular domain name might be perfectly legal speech, even under Kentucky's anti-gambling device statute. By not narrowly focusing on the objectionable content, the seizure of domain names thus constitutes an overbroad and unconstitutional interference with potentially legal speech.

In addition to being overbroad with respect to what content it blocks, the order is overbroad in terms of where it blocks that content, namely everywhere. This would include traffic from locations around the world where the content might be perfectly legal.

In the U.S., this kind of state interference with international speech is untenable under the Commerce Clause, which reserves for Congress the right to regulate interstate and international commerce. Congress has legislated on Internet gambling; the World Trade Organizations has already penalized the U.S. for its discriminatory treatment of online gambling. Given this and the international scope of the Internet, an action by a state to disable global access to any domain name (gambling or otherwise) would have a direct and concrete impact on the United States' trade and diplomatic relations with the rest of the world. That is simply not something that any state is permitted to do under the U.S. Constitution.

Certain countries around the world would, frankly, be thrilled to see Kentucky set the precedent that any locale in the world has jurisdiction to seize any global domain name so long as the content linked to by the domain name violated the local laws. China, for example, would be very happy to follow Kentucky's lead by seizing the domain names of U.S. web sites that promote religions and ideologies that China seeks to suppress.



The Kentucky Court of Appeals has issued an order staying the seizure order pending its ruling in the case. The Court of Appeals heard argument from both sides on December 12, 2009, and will likely issue a ruling in the next month or two.

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