

IN THE COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO

ANN M. YEAGER,

Plaintiff,

v.

GO DADDY GROUP, INC.; INTERNET
CORPORATION FOR ASSIGNED
NAMES AND NUMBERS; UNKNOWN
REGISTRANT(S) & USERS OF
COPYRIGHTED WORD; IBRAHIM
KAZANCI,

Defendants.

Case No. 11CVC4434

Judge Guy L. Reece II

REPLY OF DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND
NUMBERS TO PLAINTIFF ANN M. YEAGER'S MEMORANDUM CONTRA TO
MOTION FILED MAY 13, 2011

FILED
FRANKLIN COUNTY COURT
2011 JUN -6 PM 3:30
CLERK OF COURTS

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. ICANN IS NOT SUBJECT TO PERSONAL JURISDICTION IN OHIO	2
A. ICANN Does Not Transact Business In Ohio And Therefore Is Not Subject To Jurisdiction Under Ohio’s Long Arm Statute.....	2
B. Plaintiff Cannot Satisfy Constitutional Due Process And Therefore ICANN Is Not Subject To Jurisdiction In Ohio.....	5
II. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION AGAINST ICANN FOR COPYRIGHT INFRINGEMENT	6
III. CONCLUSION.....	7

TABLE OF AUTHORITIES

	Page
CASES	
<i>ATC Distribution Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.</i> (C.A. 6, 2005), 402 F.3d 700	7
<i>Berning v. BBC, Inc.</i> (S.D. Ohio 1983), 575 F. Supp. 1354	5
<i>Bird v. Parsons</i> (C.A. 6, 2002), 289 F.3d 865	5, 6
<i>Buckeye Check Cashing of Arizona, Inc. v. Lang</i> (S.D. Ohio Feb. 23, 2007), 2007 WL 641824 (“ <i>Buckeye</i> ”)	3, 4
<i>Burger King Corp. v. Rudzewicz</i> (1985), 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528	6
<i>Coles v. Wonder</i> (6th Cir. 2002), 283 F.3d 798	7
<i>Edwards v. Erdey</i> (C.P. 2001), 118 Ohio Misc.2d 232, 770 N.E.2d 672	3
<i>Kerger v. Dentsply Int’l, Inc.</i> (Ohio App. Jan. 13, 2011), No. 94430, 2011 WL 208300	6
<i>Parshall v. PAID, Inc.</i> , 2008-Ohio-3171, 2008 WL 2553098	3
<i>Purdue Research Found. v. Sanofi-Synthelabo, S.A.</i> (C.A. 7, 2003), 338 F.3d 773	3
<i>Rank v. Hamm</i> (S.D. W. Va. Mar. 21, 2007), No. 2:04-0997, 2007 WL 894565	5
<i>Reed Elsevier, Inc. v. Muchnick</i> (2010), 130 S.Ct. 1237, 176 L.Ed.2d. 18	7
<i>Scotts Co. v. Aventis S.A.</i> (C.A. 6, 2005), 145 Fed. Appx. 109, 2005 WL 1869653	6
<i>Tewarson v. Simon</i> (2001), 141 Ohio App. 3d 103, 750 N.E.2d 176	7

TABLE OF AUTHORITIES (cont'd)

	Page
<i>Third Nat'l Bank in Nashville v. WEDGE Group, Inc.</i> (C.A. 6, 1989), 882 F.2d 1087	5
<i>World-Wide Volkswagen Corp. v. Woodson</i> (1980), 444 U.S. 286.....	4
 STATUTES	
15 U.S.C. § 1114(1)(a).....	7
15 U.S.C. § 1125(a)(1)(A)	7
17 U.S.C. § 411(a)	7
28 U.S.C. § 1338(a)	7
R.C. 2307.382(A).....	5
R.C. 2307.382 (A)(1).....	2
 OTHER AUTHORITIES	
Local Rule 12.....	2
Ohio Civil Rule 4.3.....	2

INTRODUCTION

In its Motion to Dismiss, ICANN established that Plaintiff's Complaint should be dismissed with prejudice for lack of personal jurisdiction. Plaintiff's arguments in opposition do not establish otherwise, but instead ignore the law and applicable precedent. Plaintiff tells this Court that because ICANN, a California nonprofit public benefit corporation, operates a website – available anywhere in the world – ICANN should be subject to personal jurisdiction in Ohio. Ohio courts have consistently held the opposite – ICANN's maintenance of a passive, informational website (which offers nothing for sale and does not specifically target Ohio residents) is not enough to render it subject to suit in Ohio.

Plaintiff also claims that the fact that ICANN has contracts with Internet registries and registrars, who in turn may choose to do business in Ohio, should be sufficient to assert jurisdiction over ICANN, despite established law that personal jurisdiction cannot be premised solely on a foreign defendant's unrelated contracts with a resident corporation or individual.

Moreover, Plaintiff has not established that Ohio jurisdiction over ICANN comports with constitutional due process. At best, the purported contacts Plaintiff asserts are *unrelated* to Plaintiff's claims; thus, the exercise of jurisdiction over ICANN is constitutionally impermissible unless ICANN's contacts with Ohio are "continuous and systematic." Plaintiff does not even attempt to meet her burden and satisfy this constitutional standard. Nor could she. The contacts Plaintiff relies on to assert jurisdiction over ICANN do not establish ICANN's "continuous and systematic" presence in Ohio.

Finally, Plaintiff has not established that she is entitled to copyright protection for the word "Aypress;" or that she has in fact registered such a copyright under the federal Copyright Act. Both of these deficiencies are fatal to Plaintiff's copyright claim against ICANN.

In sum, Plaintiff's Complaint should be dismissed with prejudice.

I. ICANN IS NOT SUBJECT TO PERSONAL JURISDICTION IN OHIO.

A. ICANN Does Not Transact Business In Ohio And Therefore Is Not Subject To Jurisdiction Under Ohio’s Long Arm Statute.

Plaintiff’s only argument for why this Court should exercise jurisdiction over ICANN is based on Section A(1) of Ohio’s long arm statute, which subjects a defendant to jurisdiction for any cause of action arising from the defendant’s “transacting” business in Ohio. Opp’n at 2 (“ICANN does conduct business within this State”); R.C. 2307.382 (A)(1).¹ Plaintiff argues that ICANN should be subject to jurisdiction in Ohio under Section A(1) because: (i) ICANN maintains a webpage that is accessible to any Ohio resident; and (ii) ICANN contracts with registrars and registries who may have done business in Ohio. Opp’n at 5-6.² Neither of these alleged contacts, however, relate in any way – much less give rise to – Plaintiff’s suit. Even if they did, they are still insufficient to confer jurisdiction over ICANN. Tellingly, Plaintiff fails to cite a single case holding that jurisdiction under Ohio’s long arm statute properly may be based on these sorts of contacts. The cases, in fact, hold the opposite. As explained below, Plaintiff has not, and cannot, satisfy her burden of establishing this Court’s jurisdiction over ICANN.

First, Plaintiff argues that any individual or corporation maintaining a website, no matter its content, should be subject to jurisdiction anywhere that website may be viewed. Opp’n at 6 (“Because a webpage existing on another server, or computer, is transported onto a user’s computer—said business, then, exists—within that State—by transportation of its assets:

¹ Plaintiff does not actually invoke any specific provision of Ohio’s long arm statute that could conceivably support the exercise of jurisdiction over ICANN, but instead attaches excerpts from Ohio Civil Rule 4.3, which, though similar to the rules governing personal jurisdiction, in fact only governs service of process on an out of state defendant. See Opp’n at 13-14. Because the focus of Plaintiff’s opposition appears to be the contracts ICANN purportedly enters into through its website, ICANN responds as though Plaintiff has relied on Rule 2307.382 (A)(1).

² Plaintiff reasserts these arguments in her late-filed “Supplemental Motion,” which ICANN received on June 3, 2011. Despite the improper nature of Plaintiff’s filing (which, when combined with Plaintiff’s Opposition, exceeds the page limitations set forth in Local Rule 12, and which also includes 106 pages of inadmissible exhibits), ICANN nonetheless herein addresses the purported contacts referenced in Plaintiff’s Supplemental Motion. ICANN does not address Plaintiff’s request for injunctive relief in her Supplemental Motion, as Plaintiff cannot amend her Complaint through an opposition to a motion to dismiss.

webpages.”). Under Plaintiff’s rule, ICANN (or any corporation or individual that maintains a webpage) should be subject to jurisdiction anywhere in the world, be it Tanzania, the Arctic, or Alcatraz, regardless of the content of that webpage. But Plaintiff is wrong. The law is clear: “A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction [under Ohio’s long-arm statute].” *Edwards v. Erdey* (C.P. 2001), 118 Ohio Misc.2d 232, 240, 770 N.E.2d 672; *See also Parshall v. PAID, Inc.*, 2008-Ohio-3171, 2008 WL 2553098, at ¶16 (same). Here, ICANN maintains only passive, informational websites; ICANN does not sell anything through its websites;³ ICANN does not target Ohio residents through its websites. In such cases, Ohio courts have uniformly rejected the exercise of personal jurisdiction. *Id.*

Second, Plaintiff argues that jurisdiction is appropriate because ICANN “has at least one [contract with a] registrar in Ohio.” Supp. Opp’n at 1; *see also* Opp’n at 5 (ICANN “enters into supervisory agreements with registrars”). However, personal jurisdiction cannot be premised solely on the existence of a contract with an Ohio resident. *Buckeye Check Cashing of Arizona, Inc. v. Lang*, (S.D. Ohio Feb. 23, 2007), 2007 WL 641824, *9 (“*Buckeye*”).

The *Buckeye* Court stated: “[t]he existence of a contract between the defendant and an Ohio citizen, standing alone, will not suffice to confer personal jurisdiction over a foreign defendant.” *Id.* at *9 (citation omitted) (holding that jurisdiction under Section A(1) of the long arm statute was lacking where the only contacts the out-of-state defendants had with Ohio were contracts with the Ohio plaintiff). Even more attenuated than the *Buckeye* plaintiffs, Plaintiff here is not a party to *any* agreement with ICANN. An unrelated contract that ICANN may have with a third party Ohio registrar simply cannot subject ICANN to suit in Ohio. *See also Purdue*

³ And contrary to Plaintiff’s attempt to analogize ICANN to an “instant salesman,” “telemarketer,” or “newspaper” (Opp’n at 7), ICANN does not sell anything anywhere, let alone on its website. Atallah Decl., ¶ 14.

Research Found. v. Sanofi-Synthelabo, S.A. (C.A. 7, 2003), 338 F.3d 773, 778 (rejecting general jurisdiction premised on a “stream of commerce” theory – *i.e.*, that a defendant has contacts with third parties who then do business in the forum state).

Nor are ICANN’s contracts with registrars evidence that ICANN somehow seeks “to ultimately control and take fees for said control—all domain names in use on the Internet.” Opp’n at 7; *see also* Supp. Opp’n at 1 (“ICANN has control over all domain names.”); *id.* (“ICANN charges a fee to each creator or register of any domain name.”). As explained in ICANN’s opening brief, ICANN coordinates the Internet’s domain name system on behalf of the Internet community, pursuant to a series of agreements with the United States Department of Commerce. Part of ICANN’s role includes the accreditation of registrars; there are now over 900 accredited registrars. ICANN does not contract with domain name registrants and does not collect fees directly from registrants. While ICANN collects fees from its accredited registrars pursuant to a Registrar Accreditation Agreement, ICANN’s contracts with third party registrars who may then do business with Ohio registrants cannot support this Court’s exercise of personal jurisdiction over ICANN. *Buckeye*, 2007 WL 641824, *9. Moreover, any indirect benefit that ICANN may receive from the contracts between registrants and registrars, to which ICANN is not a party, cannot subject ICANN to personal jurisdiction in Plaintiff’s home state. *World-Wide Volkswagen Corp. v. Woodson* (1980), 444 U.S. 286, 299 (“[F]inancial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State.”).

In any event, none of these purported contacts have anything to do with Plaintiff’s claim for copyright infringement. In both of her opposing papers, Plaintiff does not even attempt to demonstrate that her cause of action against ICANN “arises” from ICANN’s alleged contacts

with the Ohio, as required by Ohio's long arm statute. *See* R.C. 2307.382(A). Plaintiff's failure and inability to do so is fatal to Plaintiff's claims. *Berning v. BBC, Inc.* (S.D. Ohio 1983), 575 F. Supp. 1354, 1357-58 (dismissing complaint under Ohio long arm statute because cause of action did not "arise" out of the nonresident defendant's alleged contacts with the state).⁴

B. Plaintiff Cannot Satisfy Constitutional Due Process And Therefore ICANN Is Not Subject To Jurisdiction In Ohio.

Even if Plaintiff could meet her burden of proof and establish that ICANN is subject to personal jurisdiction under Ohio's long arm statute, Plaintiff still must prove that Ohio jurisdiction over ICANN comports with due process. Plaintiff cannot meet this rigorous constitutional standard, and has not even attempted to do so.

Where, as here, a defendant's contacts with the forum state are unrelated to the plaintiff's claims, the exercise of jurisdiction is constitutionally permissible only where the defendant's contacts are "continuous and systematic" within the state. *Third Nat'l Bank in Nashville v. WEDGE Group, Inc.* (C.A. 6, 1989), 882 F.2d 1087, 1089. Here, none of the contacts Plaintiff cites satisfy this due process standard. Ohio courts consistently hold that due process is not satisfied just because a party maintains a passive website accessible to residents of the forum state, *see, e.g., Bird v. Parsons* (C.A. 6, 2002), 289 F.3d 865, 874, and the existence of an unrelated contractual relationship between a nonresident defendant and an Ohio resident is not

⁴ Plaintiff's attempt to turn ICANN's approval of the Uniform Domain Name Dispute Resolution Policy ("UDRP") into a contact with Ohio is equally unavailing. Opp'n at 5. The mere fact that ICANN – through the community-driven policy development process – approved a community-created uniform policy applicable to all gTLD domain name registrations does not subject ICANN to jurisdiction every time a registrar enters into a separate contract with a domain name registrant that may refer to that policy. ICANN did not contract with Plaintiff, *see* Atallah Decl., ¶ 13, and had no control where, or with whom, registrars would choose to do business. ICANN did not "purposefully avail" itself of the privilege of doing business in Ohio simply because a third-party registrar did business there. *See Rank v. Hamm* (S.D. W. Va. Mar. 21, 2007), No. 2:04-0997, 2007 WL 894565, at * 12 (holding that "adoption of a nationwide policy does not of itself result in [the policy creator's] purposefully directing personal activities toward West Virginia," where that policy was implemented by third-parties within that State).

In any event, even if the application of the UDRP policy could somehow be considered a "contact" by ICANN with Ohio, this suit does not arise under the UDRP and is not related to it. Further, by the terms of the UDRP itself, ICANN is not a party to any UDRP proceeding.

sufficient in itself to meet the “continuous and systematic” standard. *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 478, 105 S.Ct. 2174, 2185, 85 L.Ed.2d 528 (“If the question is whether an individual’s contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party’s home forum, we believe the answer clearly is that it cannot.”).

ICANN does not have any offices or other facilities, employees or staff in Ohio. Atallah Decl., ¶¶ 4, 6. ICANN does not maintain any telephone listings or addresses or own any property in Ohio. *Id.* at ¶¶ 5, 8. ICANN simply does not maintain any continuous or systematic presence within Ohio, and whatever contacts it may arguably have with Ohio are insufficient to subject it to general personal jurisdiction in this State.⁵ In sum, Plaintiff has failed to satisfy her burden of establishing this Court’s jurisdiction. Plaintiff’s Complaint should be dismissed. *Kerger v. Dentsply Int’l, Inc.* (Ohio App. Jan. 13, 2011), No. 94430, 2011 WL 208300, *5 (dismissing complaint where plaintiff failed to meet its burden of establishing jurisdiction).

II. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION AGAINST ICANN FOR COPYRIGHT INFRINGEMENT.

In her Opposition, Plaintiff persists with her “copyright” claim, making what seems to be the assertion of a common law copyright in the word “Aypress.” Opp’n at 8-9. Plaintiff’s claim fails for a number of reasons. First, as ICANN explained in its opening brief, copyright protection is not available for a single word, regardless of whether it is original. *See, e.g., Bird*, 289 F.3d at 881-82 (affirming dismissal of copyright infringement claim based on use of a word as a domain name because use of a word “simply does not reproduce any of the creativity that entitles [plaintiff] to a copyright. . . .”). Whether or not Plaintiff “coined” the word “Aypress,” the word simply does not have the minimal level of creativity necessary for copyright protection.

⁵ Because Plaintiff does not assert that any of ICANN’s purported contacts are related to her claims, specific personal jurisdiction is absent. *Scotts Co. v. Aventis S.A.* (C.A. 6, 2005), 145 Fed. Appx. 109, 113, 2005 WL 1869653, *3.

ATC Distribution Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc. (C.A. 6, 2005), 402 F.3d 700, 709-10 (“Indeed, the Copyright Office will not register a short name, phrase, or expression, such as the name of a product or service, even if it is novel or distinctive.”).

On an even more basic level, Plaintiff’s claim should be dismissed because she has not established that she has registered her copyright with the Copyright Office, which is a prerequisite for asserting a copyright infringement claim. *Coles v. Wonder* (6th Cir. 2002), 283 F.3d 798, 801; *Reed Elsevier, Inc. v. Muchnick* (2010), 130 S.Ct. 1237, 1241, 176 L.Ed.2d. 18 (“Subject to certain exceptions, the Copyright Act (Act) requires copyright holders to register their works before suing for copyright infringement.”); 17 U.S.C. § 411(a) (“no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.”).⁶

In addition, although Plaintiff has not expressly asserted a trademark infringement claim, she continues to allude to ownership of a “trademark” in the word “Aypress.” Opp’n at 10. But despite Plaintiff’s citation to the proposition that the *use* of one’s trademark is required to make out a prima facie case for trademark infringement, *id.*; *see also* 15 U.S.C. §§ 1114(1)(a) & 1125(a)(1)(A)), Plaintiff does not refute the fact that ICANN has not used her “mark” in commerce. Instead, Plaintiff asserts that another defendant, Mr. Kazanci, is using the word “Aypress.” Opp’n at 10. Plaintiff’s allegations do not state a trademark claim against ICANN.

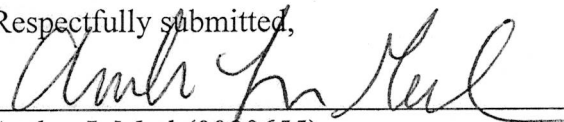
III. CONCLUSION.

For all of the reasons set forth above, ICANN respectfully requests that the Court grant its motion to dismiss in its entirety, without leave to amend.

⁶ Even if Plaintiff could assert a claim based on common law copyright of a single word, this Court does not have jurisdiction to hear Plaintiff’s claim because federal courts have exclusive jurisdiction over copyright claims. 28 U.S.C. § 1338(a); *see also Tewarson v. Simon* (2001), 141 Ohio App. 3d 103, 750 N.E.2d 176, 184 (“federal courts have exclusive jurisdiction over claims arising under the Copyright Act”). “Copyright preemption is both explicit and broad: [Section] 301(a) [Title 17, U.S. Code] prohibits state-law protection for any right equivalent to those in the Copyright Act.” *Id.* at 183-84. Plaintiff’s copyright claim must be dismissed.

Dated: June 6, 2011

Respectfully submitted,



Amber L Merl (0080655)

almer@jonesday.com

JONES DAY

Street Address:

325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215-2673

Mailing Address:

P.O. Box 165017
Columbus, Ohio 43216-5017

Telephone: (614) 469-3939

Facsimile: (614) 461-4198

*Attorney for Defendant Internet Corporation
for Assigned Names and Numbers*

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2011, I served the foregoing by regular United States mail, postage prepaid, upon the following:

Ann M. Yeager
3546 Steubenville Road SE
Amsterdam, OH 43903

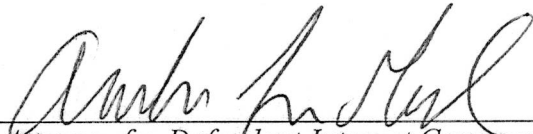
Pro Se Plaintiff

Ibrahim Kazanci
P.O. Box 67158
Calgary, Alberta T2L 2L2
Canada

Defendant

Christopher M. Bechhold
Heather M. Hawkins
Thompson Hine LLP
312 Walnut Street, Suite 1400
Cincinnati, OH 45202

*Attorneys for Defendants Go Daddy
Group, Inc. and GoDaddy.com*



*Attorney for Defendant Internet Corporation
for Assigned Names and Numbers*