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THE ROMAN LAW OF CYBERCONVERSION

Richard A. Epstein*

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INTRODUCTION: SOMETHING OLD, SOMETHING NEW

It is a great privilege to be invited to participate in a Conference with a title I cannot quite understand. The phrase "Intellectual Property, Sustainable Development and Endangered Species: Understanding the Dynamics of the Information Ecosystem" suggests some haunting comparison between the worlds of tangible and intellectual property, with the dark hint that the problems that afflict the environment might in some way afflict the world of intellectual property. The subject matter of my own panel, "Black Acre and Black Beauty: Strange Bedfellow or Happy Marriage?," also refers to the overlap between the two sorts of property, but again does not specify the exact nature of any reinforcement or opposition. I therefore have decided to write about a small subject that speaks in less than cosmic terms, but which nonetheless makes an important point about the extent to which an appreciation of traditional legal learning often helps us to navigate our way through tricky modern problems. This particular topic is the extent to which the tort law of conversion should govern the misappropriation of domain names in cyberspace.

In dealing with this question, it is necessary to explore the boundary lines between contract and tort. It is just at this juncture that the Roman Law element inserts itself into the title of this paper. Roughly speaking, the English law affords contractual remedies only for those promises that are supported by consideration. That leaves certain gratuitous promises in limbo. The general tort law is geared to dealing with transactions between strangers, which are often best governed by a strict liability rule, or, that failing, a

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stringent negligence standard, often fortified by switching the burden of proof under the banner of *res ipso loquitur*. Neither of these decision rules makes the slightest sense in connection with gratuitous transactions under ordinary contract theory. This paper aims to show how the classification matters, and that the Roman view is systematically more sophisticated than our own. The central point is simplicity itself: if parties can limit consequential damages by contract in bargain contexts where they have otherwise been required, then for gratuitous undertakings the default rule should exclude consequential damages in all cases but deliberate fraud.

The judicial decision that has sparked these reflections is the notorious case of *Kremen v. Cohen*. At the heart of *Kremen* lies a modern version of the eternal triangle: Which of two innocent parties should bear the losses attributable to the deliberate wrongs of a third-party knave? This modern rerun of an age-old conflict arose, innocently enough, when the plaintiff, Kremen, in a burst of imagination, registered the domain name "sex.com" with the defendant, internet domain registrar Network Solutions. Kremen listed Online Classifieds as the owner of the name, with Kremen as the contact person. Shortly thereafter, Cohen, a long-time swindler, sent a business letter to Network Solutions falsely informing it that Classifieds had fired Kremen. The letter then added that Online Classifieds had decided to abandon the use of the domain name sex.com, and had no objection whatsoever if Cohen used that name for his own benefit. Ever equal to the task, Cohen promptly used his new name to create "a lucrative online porn empire." Cohen's letter was a total fabrication, but Network Solutions never checked with Kremen or Online Classifieds to verify Cohen's claims, a clear case of negligence. Once aware of the fraud, Kremen sued Cohen, who had fled to Mexico. He also tacked on a suit against Network Solutions for breach of contract and for conversion.

The case represents a delicious blend between the old and the new. In order to deal with the legal issues, Part I addresses the recurrent dilemma

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1. Compare Louisville Ry. Co. v. Sweeney, 163 S.W. 739 (Ky. 1914) (imposing strict liability), with Randall v. Shelton, 293 S.W.2d 559 (Ky. 1956) (overruling Sweeney, embracing *res ipso loquitur*).
2. 337 F.3d 1024 (9th Cir. 2003). I should state at the outset that my attention was called to the case by an extraordinary independent student paper prepared under my supervision by Patrick Curran, entitled "The Case Against Conversion Liability for Domain Name Appropriation."
5. Id. at 1026.
6. Id. at 1026-27.
7. Id. at 1027.
which poses this question: which of two innocent persons should be required to bear the losses created by the fraud of a third party? Part II then applies the general analysis to cyberspace, and looks closely at the contractual arguments that Judge Alex Kozinski advanced to deny plaintiff's claim on a contractual theory. Part III then compares the received solution with those which are found under Roman Law in order to explain why the no liability solution is correct, precisely because the law of contract, rightly understood, does apply, and denies liability for what looks like a negligent, or perhaps even grossly negligent, breach of contract.

I. THE ETERNAL TRIANGLE

Historically, the eternal triangle gives rise to many disputes over ownership. One common variation was that $A$ owned a chattel, which was taken by $B$, and then sold to $C$ who has no knowledge of $B$'s wrong against $A$.\(^8\) No one doubts that $A$ had an action against $B$ for the theft of the chattel. Choosing the proper theory of relief applicable to the case was a decided second-order consideration. The offense was typically to both possession and ownership, so that within the classical framework either trespass, which was keyed to possession, or conversion, which was keyed to ownership, could cover the basic situation.\(^9\) In addition, $B$'s deliberate taking or conversion of the thing laid to rest any doubts about whether he had the requisite mental state to commit the tort. The only loose ends concerned such matters as pleading requirements, jurisdiction and venue, service of process, and the like. No one thought hard about the issue of liability because no one could find any reason based either on justice or efficiency to allow $B$ to prevail over $A$.

The analysis, of course, became much tougher when $B$ had fled the jurisdiction or became insolvent, consuming along the way the proceeds he received from the sale of the chattel. At this point, the inquiry switches into one of the most rudimentary challenges to any legal system. When the first-best solution is not achievable for strictly practicable reasons, which second-best solution should be adopted in its stead? Put otherwise, both $A$ and $C$, as innocent parties should be fully protected against the devious machinations of $B$, who has stolen from the former and sold goods under false representations or warranty of title under the latter. But now that $B$ is gone, we have to decide

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8. See Saul Levmore, Variety and Uniformity in the Treatment of the Good-Faith Purchaser, 16 J. LEGAL STUD. 43 (1987) (Levmore notes that all societies attack the bad faith purchaser, but are divided in how they deal with the more difficult disputes between the original owner and the innocent purchaser.).
which of two innocent victims has to bear the loss created by the deliberate misdeeds of a third party. Good luck.

The formal property-based solution to this question is one that starts with the assumption that the owner of property keeps it as his own unless ownership is transferred or surrendered for good cause. The standard causes that justify that loss of title are only two. The first is that the goods were promised to a third person, so that keeping them counts as a breach of contract for which specific performance is (at least in many circumstances) an appropriate remedy. The second is that the owner has committed some wrong that requires compensation, which would justify the seizure of particular assets to execute on an unsatisfied judgment. But A in the above example has committed neither wrong, so if he is unable to recover his property against C, then the sanctity of ownership is necessarily undercut. But even if that is the case, C is in a position to argue that this sacrifice of ownership rights is all for good reason. The argument here typically rests on the contested empirical claim that it is easier for an owner to guard his property against theft than it is for the innocent purchaser to check on the title to the stolen goods, when the thief has apparent ownership of the goods in his possession. From there one makes the further leap that since no present or future owner knows in advance whether he will be in the position of A or C, from the ex ante perspective, while nestled behind the veil of ignorance, everyone will prefer that rule which minimizes the number of thefts and conversions, even if it involves suspending in this narrow context the usual, and vital, rule that no one is able to convey a better title than he owns. The upshot is that if protection of the bona fide purchaser reduces the number of thefts, then we can identify a Pareto-improvement in this deviation from the basic property law construct, which no one in principle should oppose.

The opposition to protecting the bona fide purchaser is often couched in exactly the same logic, but with a different conclusion. If the innocent purchaser is allowed to succeed, then the fence will be able to disguise his true intentions, so that matters will not improve overall. The response is that if the true owner can protect himself by branding key goods, it is easier to establish who is a bad faith purchaser (assuming the property is effectively brandable, which frequently will not be the case). At this point the struggle is over whom, the standard owner or the standard buyer, is in a better position to prevent or avoid the loss. The underlying problem gets no easier because the use of letters for people conceals the endless variation in those individuals who fill the roles of As and Cs in different contexts. A could be either a naïve consumer or an experienced trader or dealer who specializes in the trade of certain goods. C could take on the same two roles. The effort to fragment the overall rule to account for these deviations, so that there is one rule for consumers and another for commercial traders is one response, but its
effectiveness depends on maintaining the sharp lines between the two categories on the one hand, and the homogeneity within both categories.\textsuperscript{10}

The situation is further clouded because of endless factual variations on the central theme. In some situations the $B$-$C$ transaction could take place in an organized market, while in others it might take the form of a casual sale. The question then arises whether the institutional setting does, or should, make a difference in the choice of the relevant rule. A second difference of great importance concerns the role of $B$. One common case deals with the $B$ who was a common thief who acquired the goods by force or stealth. But in many situations $B$ is a bailee to whom $A$ entrusted the goods for safekeeping, only to see them sold out from under him.\textsuperscript{11} As a conceptual matter, this difference in institutional arrangement looks unimportant for in both situations $A$ claims that $B$ cannot convey to $C$ a better title than he, $B$ the bailee, has: \textit{nemo dat quod non habet}. But once the possibility that suspension of the overall ownership rules will yield systemwide improvements is taken seriously, then the case of the faithless bailee looks stronger for $C$ than the sale by a thief: $A$ has the choice of baiiles and it is reasonable to say that he therefore had the better opportunity at nipping the problem in the bud.

Also relevant to the \textit{Kremen} situation is that owners and bailees normally have an independent relationship that allows $A$ to have some genuine recourse against $B$, especially if $B$ is an institutional player, such as a warehouse that stores goods in the ordinary course of its business.\textsuperscript{12} At this point, the $A$-$B$ contract should have a good deal to say about the allocation of any loss between them in the event of some misappropriation by $B$. More to the point, if the theft of goods takes place from $B$ by $C$, then the contract should be the best way to allocate the risk of that loss as between these two parties, with the understanding that the loser in the $A$-$B$ dispute gains any and all rights that remain against the third-person thief. This last element gets us closer to the mark because one source of confusion in these cases involves the misdelivery of the goods stored to a person who is not the true owner. One variation is that the warehouse receipt is stolen from the owner and presented to the bailee for redelivery. Another is that the goods are delivered by mistake to a third person who poses as the owner but who does not furnish a receipt for the goods. A third is that some agent of the bailee misappropriates the goods either by acting alone or in collusion with some third party. There is good


\textsuperscript{12} See \textit{RESTATEMENT (SECOND) OF TORTS} §§ 227-228 (1965). See also \textit{EPSTEIN, supra} note 9, § 1.12.3; \textit{FOWLER HARPER ET AL., THE LAW OF TORTS} §§ 2.17-2.22 (1986).
reason why these variations assumed such a large role in the early development of property law, when the frequency of irregular conduct was high, and the devices to guard against it were weak.

II. TRIANGLES IN CYBERSPACE

As we fast-forward from these early rules to the modern context, how should the older rules that govern trespass, conversion and breach of contract in the case of stolen or misappropriated goods carry over? The best answer is, without a hitch. The first point to note is that this situation (like that of trespass in cyberspace) does not reflect anything that is distinctive about information economy. This not a case where the dominant question is the trade-off between the incentives to produce the information in the first place and the ability to disseminate that information in the second. Nor in this instance do we deal with patents or copyrights, where there is a high cost of initial production coupled with a very low cost of imitation by others. Rather, the closer analogy here is to trade names, which have very different features even though they are also lumped under the general heading of intellectual property. The entire point of the name or mark is to allow for branding so that consumers can have adequate information about quality or location by looking to a simple proxy that indicates origin. The term “sex.com” might not qualify as a trade name for all sorts of obvious reasons e.g., it is too descriptive and too much in common use. Indeed, if the term were a trade name, then other remedies would be available to deal with the situation. But for these purposes, the only question is whether it meets the much weaker requirement of a domain name that can be registered with Network Solutions. The only way that Kremen has a chance of success is for that question to be answered in the affirmative, for otherwise his own registration would be invalid. If he had no protectable name, then he would not have had any subject matter for any future voluntary assignment and no possibility to protest against involuntary misappropriation. But once the registration is allowed, then the domain name becomes a unique identifier with the valuable attribute that it can draw business, and this opportunity was lost by the illicit misappropriation.

13. See, e.g., Intel Corp. v. Hamidi, 71 P.3d 296, 309-11 (Cal. 2003). For my views, see Richard A. Epstein, Cybertrespass, 70 U. CHI. L. REV. 73 (2003) (arguing that when dealing with unauthorized use of someone else’s server, the usual rules should apply without deviation and allow for the issuance of an injunction, a position that was rejected explicitly in Hamidi).

How should we think about the risk of loss through the misconduct of the third party? The first way is to think about this problem in terms of the stranger model, which asks whether an action for conversion should be allowed against Cohen for his specific acts of misappropriation. On that question, the choice of theories does not really matter. One could argue that the domain name should be analogized, for these purposes, to a trade name, so that the usual rules on misappropriation applied. Once this is done it becomes possible to see reasonably through the mists that arise. Any action that is brought against Cohen is either a suit by conversion or misappropriation. The choice of category could well be important for second-tier issues. But there is no question that liability will be allowed and in the ordinary case will require a return of the domain name so that it could be reregistered in Kremen's name. Kremen could also enjoin Cohen from using that name. Kremen could also collect from Cohen all gross revenues from willful conversion of the site, without any offset against expenses, the better to make sure that Cohen does not profit from his own wrong.\(^\text{15}\)

Unfortunately, this case did not present circumstances requiring the heavy lumber because Cohen was successful in secreting assets, siphoning money into off-shore accounts and generally stripping his retained real property of any assets of value.\(^\text{16}\) So we are back to that question of whether or not there is a second best remedy that is available to Kremen against Network Solutions, which administered the domain name system. Here again, the competing considerations on this question are not distinctive to the world of cyberspace but have their origins in much of the Roman and English disputes over the proper definition of the domain of contract. To make matters more concrete, Network Solutions looks as though it should be a vulnerable defendant. The entire scam began when Cohen announced that he had received an assignment from Kremen's company, Online Classifieds, which had not been properly finalized because Kremen had been dismissed and that no one had gotten round to informing Network Solutions that Kremen was no longer the administrative contact for Online Classifieds.\(^\text{17}\) The letter continued that Online Solutions had decided to abandon the sex business and therefore assigned its internet domain name, sex.com, to Cohen.\(^\text{18}\) The entire

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15. See, e.g., Earl C. Arnold, The Law of Accession of Personal Property, 22 COLUM. L. REV. 103, 111 (1922). The gist here is that honest mistake is no defense to an action for conversion, but that it allows the converter an offset for value added to the product, which is denied the bad faith converter. \textit{Id.}
17. \textit{Kremen}, 337 F.3d at 1026.
18. \textit{Id.}
transaction was done by letter because Network Solutions was told that Online Classifieds did not have an email address.19

It does not take a deep knowledge of the law to realize that Network Solutions was the problem. Any transaction that purports to release rights should be checked with the transferor and not the transferee because of the risk of fraud, a rule that applies with equal force in cyberspace as it does anywhere else. Moreover, the explanation that an online firm does not have an email address is so preposterous that any sane person when confronted with this fraud would check it out with the original holder of the domain name. Since the letter was a total forgery, there was no way in which Kremen could have gotten wind of the initial fraud except by receiving some notification from Network Solutions. If the decisive question is which party is the cheaper cost avoider, then this case is a no-brainer. The defendant should be responsible for something, and lost profits seems like a suitable measure of loss, given that the domain name can at this point be restored to its proper owner. Whether it is for conversion, misappropriation or breach of contract is almost a detail.

The legal gears, however, do not respond to these visceral reactions, but move down strange paths. The first and most obvious point is that Kremen should think about an action for breach of contract against Network Solutions. The naïve lawyers among us would first ask to see the contract in order to figure out how it allocates the risk, but that solution does not track the timeless methods of the Anglo-American common law. Rather, for these purposes the initial question is whether the registration transaction between Kremen and Network Solutions crossed that contractual threshold when the practice at the time (1994, in year one of the Web) was for the domain name provider to supply its services for free.20 At this point, the case leaves the heady world of cyberspace and deals with the grubby particulars of the law of consideration, which received a faithful but mechanical treatment that concluded the ability to create contractual liability failed for a want of consideration.21

A defendant is normally not liable for breach of contract, however, if he promised to do something for free. The party claiming breach must show that, in return for the promise, it conferred some benefit the other party was not already entitled to receive, or suffered some prejudice it was not already bound to endure.22

Judge Kozinski rejected all clever arguments to the effect that the increased traffic for Network Solutions was the kind of benefit that could count, or that

19. Id. at 1026-27.
20. Id. at 1028.
21. Id. (citing CAL. CIV. CODE § 1605 (West 1982)).
22. Id. (citing CAL. CIV. CODE. § 1605).
there was some way in which the registration of this domain name conferred a benefit on Network Solutions by improving its position under its contract to run the domain-name site that it had received from the National Science Foundation.\textsuperscript{23} If consideration is a requirement for a contract, then there is no contract here. "Kremen did not give consideration for his domain name, so he had no contract with Network Solutions."\textsuperscript{24}

The ever-resourceful Kozinski then proceeded to demolish the plaintiff's claim that his case was viable as a third-party beneficiary claim under the contract between Network Solutions and the National Science Foundation.\textsuperscript{25} On that point, too, his decision is surely correct, for the acid test of whether one creates third-party beneficiary liability is whether the two initial parties have any intention to confer a right of action on a third person who has brought nothing to the table. If Kremen has this action, then every holder of a domain-name contract gets the benefit of this contract between strangers. There is no explanation as to why anyone would assume that added liability in a contractual arrangement primarily devoted to other objectives. Another no-brainer.

A third possible avenue of relief for Kremen might have been to appeal to theories of promissory or equitable estoppel. Here the basic theory is found in \textsc{Restatement (Second) of Contracts} \textsection{} 90, which outlines the theory of detrimental reliance,\textsuperscript{26} but in this situation it would be necessary at the least to show that Kremen had relied to his detriment on some specific undertaking from Network Solutions. But there were no specific interactions at all, for the success of Cohen's forgery was to keep Kremen and his company out of the loop altogether. Detrimental reliance (as opposed to harm) is just not a part of the picture. If therefore the question is whether modern American contract law smiles with favor on this claim, then the answer to that question is a regrettable but firm no.

To Judge Kozinski all this contractual chatter was a prelude to the main event, Kremen's tort claim of conversion, which Kozinski ominously regards as another matter altogether.\textsuperscript{27} To Kozinski, the logic follows centuries of

\begin{footnotesize}
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\item[23.] \textit{Kremen}, 337 F.3d at 1029.
\item[24.] \textit{Id.}
\item[25.] \textit{Id.}
\item[26.] The Restatement provides:
A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires. \textsc{Restatement (Second) of Contracts} \textsection{} 90(1).
\item[27.] \textit{Kremen}, 337 F.3d at 1029-36 (analyzing the conversion claim).
\end{itemize}
\end{footnotesize}
common law reasoning.\textsuperscript{28} If a case does not fall within the domain of contract, then the only body of law left to determine liability is tort.\textsuperscript{29} At that point, he enters into a prolonged account of the tort of conversion which covers both arcane and familiar ground.\textsuperscript{30}

The arcane ground addresses the question of whether domain names lose their status as a protectable form of property given their irreducibly intangible nature.\textsuperscript{31} Kozinski is undeterred by this objection and concludes that California is prepared to protect domain names even if they are not merged into some written instrument, much the way shares of stock are merged into their stock certificates.\textsuperscript{32} I shall not dwell on this issue at any length because Kozinski's point seems largely irrefutable.\textsuperscript{33} To deny property rights in domain names is a remedy too powerful for its own good. Not only does it block the conversion action that Kremen has against Network Solutions, but it would also block a similar action against Cohen, who to common understanding surely counts as a thief. So if this is not an action in conversion, then we can happily call it something else, an action on the case in the style of conversion, in order to close the gap in the law. The list of intangible property in need of protection against misappropriation is too large to countenance this void: customer lists,\textsuperscript{34} and audio broadcasts\textsuperscript{35} are just two types of cases to which Kozinski referred. No matter how strong our sympathies, we do not wish to mar the structure of conversion to allow Network Solutions to escape liability on this ground. Indeed, no one would rue that decision more than Network Solutions, given that its customary role is to provide protection for the domain names that it issues. The domain name counts property.

The more familiar issue in the law of conversion addresses the standard of liability which by general reckoning is governed by a strict liability theory.\textsuperscript{36} So long as the defendant exercises conscious dominion and control over the chattel, he acts at his peril on the question of whether he is correct or

\begin{itemize}
\item \textsuperscript{28} \textit{Id.} at 1031-34 (analyzing the common law).
\item \textsuperscript{29} \textit{Id.} at 1028-29 (rejecting the contract claim).
\item \textsuperscript{30} \textit{Id.} at 1029-36.
\item \textsuperscript{31} \textit{Id.} at 1030-36.
\item \textsuperscript{32} \textit{Id.} at 1031-32.
\item \textsuperscript{33} But not without controversy. The District Court rejected both the contract and conversion claims, the latter on the ground that conversion did not exist for intangibles. Kremen v. Cohen, 99 F. Supp. 2d 1168, 1172-73 (N.D. Cal. 2000).
\item \textsuperscript{34} \textit{Kremen}, 337 F.3d at 1032 (citing Palm Springs-LaQuinta Dev. Co. v. Kieberk Corp., 115 P.2d 548 (Cal. App. 1941)).
\item \textsuperscript{35} \textit{Id.} (citing Lone Ranger Television, Inc. v. Program Radio Corp., 740 F.2d 718 (9th Cir. 1984)).
\item \textsuperscript{36} \textsc{Re}\textsc{e}\textsc{state}\textsc{ment (Second)} of Torts, § 224 (1965).
\end{itemize}
mistaken as to its true ownership.37 Thus, Kozinski writes with commendable passion when he refuses to jettison the received wisdom of the common law in order to satisfy the special pleas of a single litigant by picking up the most powerful theme of strict liability: if it is a choice between A and B, then the liability should fall on the party who has done something rather than on the party who has done nothing at all.38 Thus Lord Cranworth in his short opinion in Rylands v. Fletcher, put the point in the familiar form: “For when one person, in managing, his own affairs, caused, however innocently, damage to another, it is obviously only just that he should be the party to suffer.”39 Kozinski hits hard on that same theme:

We must, of course, take the broader view, but there is nothing unfair about holding a company responsible for giving away someone else’s property even if it was not at fault. Cohen is obviously the guilty party here, and the one who should in all fairness pay for his theft. But he’s skipped the country, and his money is stashed in some offshore bank account. Unless Kremen’s luck with his bounty hunters improves, Cohen is out of the picture. The question becomes whether Network Solutions should be open to liability for its decision to hand over Kremen’s domain name. Negligent or not, it was Network Solutions that gave away Kremen’s property. Kremen never did anything. It would not be unfair to hold Network Solutions responsible and force it to try to recoup its losses by chasing down Cohen. This, at any rate, is the logic of the common law, and we do not lightly discard it.

The district court was worried that “the threat of litigation threatens to stifle the registration system by requiring further regulations by [Network Solutions] and potential increases in fees.” Given that Network Solutions’s “regulations” evidently allowed it to hand over a registrant’s domain name on the basis of a facially suspect letter without even contacting him, “further regulations” don’t seem like such a bad idea. And the prospect of higher fees presents no issue here that it doesn’t in any other context. A bank could lower its ATM fees if it didn’t have to pay security guards, but we doubt most depositors would think that was a good idea.

The district court thought there were “methods better suited to regulate the vagaries of domain names” and left it “to the legislature to fashion an appropriate statutory scheme.” The legislature, of course, is always free (within constitutional bounds) to refashion the system that courts come up with. But that doesn’t mean we should throw up our hands and let private relations degenerate into a free-for-all in the meantime. We apply the common law until the legislature tells us otherwise. And the common law does not stand idle while people give away the property of others.40

The first part of this passage is couched on the assumption that there is no contractual relationship between the two parties that regulates the risk of

37. See, e.g., Maye v. Yappen, 23 Cal. 306, 310-12 (1863); Poggi v. Scott, 139 P. 815, 816 (Cal. 1914).
38. My defense of that principle in stranger cases has been steadfast. See Richard A. Epstein, A Theory of Strict Liability, 2 J. LEGAL STUD. 151 (1973).
40. Kremen, 337 F.3d at 1035-36 (citations omitted).
loss. At this point, the parallel to the argument from *Rylands* has a good deal of force because the flooding involved there was treated as though it had occurred between strangers. But Kozinski’s opinion reveals the inapplicability of the stranger model to this situation when it dismisses the argument that the imposition of liability in this case will result in the increase in fees for registration services. This unexplained move from tort to contract is the subject of the next section.  

III. **Roman Contract Law Vindicated!**

As noted earlier, *Kremen* starts correctly from the implicit premise that contract dominates tort. But it goes astray on the minor premise that the only time we can find contracts are those cases in which a particular promise is supported by consideration. To a nonlawyer, that point should surely seem odd since there were extensive business relations between Kremen and Network Solutions even if there was no agreement that qualified as a contract under Anglo-American law. But the key source of difficulty in this case is the unsatisfactory treatment that the Anglo-American law has given to gratuitous transactions relative to the more subtle treatment of that subject found in the Roman Law. Here the distinctive feature of Roman law is that it does not treat consideration, or even consideration plus detrimental reliance, as the key feature of contractual liability. To be sure, in some cases the differences in approach do not matter all that much. The contract of sale applies to cases in which an interest in property is exchanged for a money consideration called the price. Consideration, as the common lawyers understand it, is quite literally built into the definition of the underlying transaction. The same can be said for leases, mortgages and employment contracts. There is certainly logic to enforcing promises supported by consideration. By now it is common wisdom that trade persists over time for the mutual advantage of the parties, and that element of joint gain is built into the Anglo-American definition of contracts at the ground floor. Any principle that tracks the dominant theme of trade cannot be so far off the mark.

But this powerful correspondence need not be perfect. In particular, it hardly follows that just because consideration is a sufficient condition for the enforcement of serious promises, that it should be treated as a necessary condition as well. More specifically, the consideration requirement does a

\[41.\] On this point, as an aside, Judge Kozinski is too glib. The question is not whether precautions should be taken: they should. But the question is which ones, and for what reasons. Nor does it follow that there will be no precautions if there is no private action. Reputation is a very potent constraint on business. The bank will keep guards even if it is not liable for losses to individual customers from robbery.
poor job in tracking the requirements of trade in a variety of transactions that lie at the periphery of commercial law. The addition or subtraction of a single term, or surety, or any alteration in the price often take place without consideration. A firm offer may be held open as a business matter for a short period of time without consideration, in order to prompt the potential buyer or seller to give it more serious examination. Free samples and replacement parts are routinely promised in the course of long-term business relationships, wholly without any immediately binding quid pro quo.

More to the point here, we can identify several classes of Roman contracts for which consideration is not a test of contractual viability. The all-purpose contract of mandate is a gratuitous relationship whereby one person agrees to undertake some task for another. The contract was regarded as an imperfect contract of agency. Under it, the party with the mandate (dubbed the mandatarius, in contrast to our agent) entered into a contract in his own name, and thereafter assigned his rights to the party who had authorized the transaction. The arrangement was therefore both gratuitous and one of trust. The liabilities attendant upon the contract followed its basic contours. Because the contract was gratuitous, it was not subject to executory enforcement. Rather, the party who received the mandate could withdraw from the obligation before the time of performance so long as the person who gave the mandate had sufficient time to secure other assistance or to discharge the task himself. But if he did not withdraw, then he could be sued for nonperformance of the basic obligation.

The difference between the Roman and the Anglo-American approach is well reflected in the classic decision of Thorne v. Deas. There, the plaintiff and defendants were coowners of a ship of which the plaintiff was captain. As the plaintiff was about to set sail, he asked his coowner to take out insurance for the voyage, which the latter agreed but neglected to do. When the ship was lost at sea, the captain sued his partner, but was turned aside. The promise to insure was not supported by consideration and no action would lie for simple nonfeasance. The Roman Law, as Kent observed, treated the case the opposite way, and held the promise enforceable

42. See Barry Nicholas, An Introduction to Roman Law 187-89 (1962) (summarizing the rules); see also W.W. Buckland, A Text-Book of Roman Law 514-21 (3d ed. 1963).
43. 4 Johns. 84 (N.Y. Sup. Ct. 1809).
44. Thorne v. Deas, 4 Johns. 84 (N.Y. Sup. Ct. 1809).
45. Thorne, 4 Johns. at 84.
46. Id. at 85.
47. Id. at 97.
in this case for the loss of a ship because the defendant did not renounce his commission before the plaintiff set sail.\(^{48}\)

In this regard, the rule for mandate shows a precise parallel to the rules regarding promises to make gifts. The party who makes a gift promise need not keep it, but once delivery has taken place the transaction cannot be revoked. The point here is that if someone wants to get a binding promise to perform the work in question, then the sensible maneuver is to pay for it. But once that additional undertaking is made, the arrangement is no longer governed by the law of mandate. It becomes a contract for hire, which is a full commercial relationship.

The choice between mandate and hire has consequences with the level of care that is expected during the course of performance. Of course, anyone who undertakes a mandate has to follow the precise terms of the engagement to the extent that these are applicable. But in many settings, a certain level of discretion is required, and here the usual standard of liability is that the party with the mandate shall act in good faith to discharge the obligation in question. As Buckland puts the point: "In the execution of the mandate he [the mandatarius] was liable in the early law only for dolus. This agrees with principle, as he did not profit."\(^ {49}\) Liability is restricted in this way on the ground that it is just too much to ask someone who has done you a favor to assume enormous risks should anything go wrong. Only if there is an intent to cheat should that heavy liability be imposed. The situation under the contract for hire is different, for the receipt of consideration, at least as a first approximation, ratchets upon the level of care that is expected of an agent. The overall historical situation is, as ever, always more complicated. Buckland thus notes that in later periods, the standard of care for the mandatarius might have been ratcheted up to a form of due care, taking into account the circumstances of the case.\(^ {50}\) But here again two qualifications are critical. First, the shift in contractual standard may well have been a response to the use of informal side payments so that the contract was only gratuitous in name.\(^ {51}\) And second, at no point did the standard of care evolve toward one of strict liability.

Parallel rules could be found in other connections as well. The standard rules for bailments are of explicit Roman origin.\(^ {52}\) The bailment is the contract by which goods are delivered from one party to another for storage and return. As with the general contract of agency, the arrangement could

\(^{48}\) Id. at 96-97.

\(^{49}\) BUCKLAND, supra note 42, at 516.

\(^{50}\) Id.

\(^{51}\) Id.

take multiple forms: in some cases they could be gratuitous and in others they could be supported by consideration. Thus, a bailment could be for the exclusive use of the bailee, at which point the standard of liability was high. But if it were for safekeeping for the bailor, then the standard of care would be lower, measured again in terms of good faith. There is no need to recite the variations here. What matters is the central principle. So long as the services of the bailee were gratuitous, then he could pull out at will so long as he gives notice in advance. But once he takes the good into custody then he is held to a standard of care that reflects the absence of consideration, typically one that requires action in good faith. Similar rules are reflected elsewhere in the law. The traditional view of guest statutes which accorded drivers lower standards of care to guest passengers is a reflection of the older view. Likewise, the traditional tripartite standards of care owed to licensees and invitees reflected the same basic scheme. The higher standard of care was owed to the invitee who entered the premises for mutual benefit. The licensee entered chiefly for his own benefit, and was owed a lower standard of care that reflected the distribution of benefits. Of course the licensee could be refused entry or just asked to leave. The position with the invitee was more complicated if the license was pursuant to a contract.

Thus, the Anglo-American and Roman law differ on their understanding of the role of consideration. The Anglo-American tradition uses consideration as the test of contractual validity. The Roman law uses it as a test of executory enforcement. If there is no consideration, then one cannot require someone to carry out the business as an agent or a bailee. But once those duties are assumed, then they must be carried out in good faith.

The application of this formula to this case speaks volumes. It is difficult to treat the transaction in Kremen as though it is a bailment, owing to the absence of any tangible property. But nonetheless the transaction seems to fit squarely within the class of service contracts that would be covered by the Roman law of mandate. The mandator is Kremen and the mandatarius (hardly a self-description) is Network Solutions. Since Network Solutions did not turn down the assignment, it should be judged under the standards of liability for gratuitous transactions. If that standard plays out as bad faith, then it is off the hook altogether. But if it turns out that the incredible set of

blunders is treated as a form of gross negligence, then under at least some versions of the contract, there could have been liability for the losses. The applicable Roman standards vacillated between a standard of care that the reasonable person in the place of the defendant should exercise and one that only asks that the agent bring to his task the same standard of care that he uses in his own affairs. On the former, there could in principle be some liability in this case, given the commercial setting of the transfer. But if the earlier Roman law view is followed then the defendant is off the hook. More on this in a moment. But the one solution that is clearly wrong is the one that was embraced by Judge Kozinski. Nowhere does a strict liability standard ever get paired up with a gratuitous transaction, which is what the result that Judge Kozinski's contraction of the law of contract necessarily creates. The choice of the wrong boundary line between contract and tort has powerful consequences.

There is yet a second way in which to see the error in Kremen. The rules with respect to mandates and contracts for hire are default rules which the parties can vary by agreement. What kinds of default rules should be applicable here? The key point to note is that this case raises once again a very familiar theme from the law of contract, which is what is the proper legal regime for treating consequential damages. On this point, the modern law has taken the general position that all those damages that naturally flow from the loss should be included in the compensable damages. I have long argued that this default misunderstands the nature of the contract/tort divide, even in those cases where promises are supported by consideration. The argument here starts from this simple premise: The point of a contract is to maximize the joint gains of the parties from the ex ante perspective. In those cases where the one side could suffer from serious consequential damages, the parties must include the cost of insurance in the price of the contract, which in turn covers both the anticipated liability and the administrative costs. That nut is just too large for most people to absorb, who would prefer to have some limited form of protection (e.g. a promise to repair or replace) which reduces the price and thus increases the access to the desired goods or services. That prediction is born out by the well nigh routine use of clauses that eliminate all sorts of implied warranties for consequential damages. When I first read Kremen, I asked myself whether that kind of clause was included in the licensing agreement (here on the assumption that it would—or at least should—bind even in the absence of consideration). Certainly neither the Ninth Circuit or the Northern District of California addressed this issue.

In this context, however, it is critical to recall that \textit{Kremen} arose in the early days of the web. Now that Network Solutions has found its sea legs, it was a simple task to go to its web site to find out two things: whether it charged, and whether it had any limitation on consequential damages. Now, of course, it does charge for a variety of packages and services. And their lawyers are all over the transaction with limitations on, and disclaimers, consequential damages and implied warranties that are typical in every other service industry.\footnote{See Service Agreement version rules 7.1, at http://www.networksolutions.com/en_US/legal/static-service-agreement.jhtml (last visited Sept. 18, 2004).} The limitation of liability is about as clear and comprehensive as one could make it, and it excludes consequential damages whenever and however possible. The entire story is told in the first sentence:

\begin{quote}
YOU AGREE THAT OUR ENTIRE LIABILITY, AND YOUR EXCLUSIVE REMEDY, IN LAW, IN EQUITY, OR OTHERWISE, WITH RESPECT TO ANY NETWORK SOLUTIONS SERVICE(S) PROVIDED UNDER THIS AGREEMENT AND/OR FOR ANY BREACH OF THIS AGREEMENT IS SOLELY LIMITED TO THE AMOUNT YOU PAID FOR SUCH SERVICE(S) DURING THE TERM OF THIS AGREEMENT.\footnote{Id.} Liability \textquoteleft\textquoteleft{is solely limited to the amount you paid for such service(s) during the term of the agreement.}\textquoteright\footnote{Id.} Carried over to the case of gratuitous arrangements, it follows that the liability in question then is equal to zero, at least if the clause is enforced, as it surely should be. The irony therefore is that the old rules for the gratuitous contract have become the de facto industry standard for liability in standard commercial contracts supported by consideration.

We are now in a position to see the gulf between the outcome in \textit{Kremen}, and the first-best result in theory. \textit{Kremen} assumes that because a contract does not contain any disclaimers, liability is set under a strict liability standard to the full extent of the law. The Roman position, on the other hand, is that for gratuitous promises, the default rule is liability only for losses caused in bad faith (and that even this rule turns out to be too favorable to the principal relative to his agent). But when Kozinski tries to defend this result he is wrong on two counts. First, he misapprehends the tradition under which these agreements should be understood. Second, he places the contract/tort boundary in the wrong place. The upshot is a complete inversion of a sound system of liability.

The Roman law has something to teach us on the proper organization of cyberspace because it gives us an important cautionary note about the novelty of issues that are found in cyberspace. No one doubts that the basic
technology alters the rate at which information is disseminated across individuals. But it is far more difficult to draw any inferences that these technical changes should require legal changes in response. Long before the rise of the Internet I wrote a paper called “The Static Conception of the Common Law,”⁵⁹ in which I traced the evolution of some early Roman and common law rules and concluded that, right or wrong, their soundness was not much influenced by the major changes in technology that had taken place over the last 2000 or so years. The chief difficulty with the classic libertarian framework is that it does not have a secure place to take into account the rule of forced exchanges and interconnections,⁶⁰ which is surely a critical issue in structuring the overall internet, just as it was critical in dealing with the organization of railroads and communications systems before it. But the issues that we have here involve the allocation of the risk of loss in a broken-down transaction. The differential treatment of stranger and consensual transactions is as old as the law itself, and it continues to maintain its vitality in newer areas. Those who do not master the basic principles are prone to fall into serious error. In one sense that is the key lesson to take away from the sorry saga of Kremen v. Cohen.