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COMPARATIVE ANALYSIS IN THE REGULATION OF CCTLDS: <.LT>, <.SK> AND <.KZ>

TATSIANA SIAMIONAVA
Polotsk State University, Belarus

Using trade names of world-famous companies or just “high-value” titles in the domain names for sale or advertisement purposes, otherwise known as cybersquatting, nowadays is a deeply rooted problem. Thus, the situation brings challenge to the legal regulation of domain names all over the world.

The current situation in the regulation of country code top level domain names (ccTLDs) worldwide is still far from settled. The deeply rooted problem of domain name hijacking, otherwise known as ‘cybersquatting’, has been plaguing the World Wide Web up until today. Cybersquatting basically means using of trade names of world-famous companies or just “high-value” titles in the domain names for sale or advertisement purposes. Although the domain names have been in existence for a considerable time, even so often new ways are sought to ensure that the system of domain name registration and use would be as streamlined as possible to enable the natural and legal persons to implement rights to a domain name and protect them from illegal exploitation without much difficulty. This is where national legal regulation comes into play. A majority of world countries use a variety of mechanisms to protect their national domain from undesirable registrations, which are most of the time a part of the national legislation. For example, in some countries, such as Ireland, an arbitrary choice of domain name by a registrant is prohibited, i.e. a domain name should exactly correspond to the name of the registrant.

The latest statistical data show the growth in the number of the registrations of European ccTLDs, while the global gTLDs (e.g., <.com>, <.net>, <.info>, etc.) are in the decline³. This leads to the prediction that cybersquatting inevitably is going to spread from the global to the national level. Therefore, in this article, the author aims to look at the latest trends of domain name concept and its definition in several European countries, discover its differences and common trends of country code domain names and make a comparison of them. Further on, the author will be examining the domain name registration in Lithuania, Slovakia and Kazakhstan. Attention will be paid to the recent changes in legislative framework and the conclusions will be drawn of the differences and similarities focusing on the recent case law, showing the latest trends of domain name regulation and protection. Where available, the author of this article will provide the views of the most recent scholarly writings.

The object of this research is the country code domain name legislation and case law of Lithuania, Slovakia and Kazakhstan. Having separate legal acts that aim at regulating country code domain names is still an exception rather than a usual method of domain name regulation (e.g., Finland, partly the USA, etc.). All of those countries, including Lithuania, do not have their special legal acts regulating the use of domain names.

1. Legal definition of domain names in national legislation

The first step of protecting the legitimate owners of domain names and related trademarks in all three countries comes from national legislation. In neither of the three countries, Lithuania, Slovakia or Kazakhstan, separate legal acts are dedicated specifically to domain names. However, there are numerous unsolved and problematic areas regarding the domain names, such as the legal classification of the definition, use and relationship with other legal institutes [1]. Apparently, legal definition of domain names is one of such areas. A separate legislation could assist in that matter, attributing domain names to a particular type of intellectual or industrial property. However, the legal status and definition of domain names is left to the national courts and scholars to agree upon. There is still a lack of settled case law applying some particular provisions on this matter, which could provide us with legally binding definitions and clarify this institute. Fortunately, there are a few recent court decisions, which give some important clues on the matter.

In Slovakia, Article 2(1)(d) of the Act No. 22/2004 Coll. on electronic commerce [2] (which is primarily dealing with the consumer protection connected to e-shops and international cooperation in electronic commerce) provides for a rather poor and non-exhaustive definition of “domain” as a “symbolic address in electronic communication network”. The domain name is a certain code, a devised set of symbols representing a particular location on the Internet. It allows for the identification of the computer concerned connected to the structure of the computer network and the communication among these computers. In order to perform its function, it has to be saved in the DNS database server. Technically, it exists physically in a bipolar form as a set of electromagnetic notes created by a man, and thus, from a legal perspective some authors consider it being a thing/object. The problem is that there is no exact definition of the word “thing/object” in the Slovak legal system: the major civil legislation, division of things into movable and immovable is only given in the Civil Code of the Slovak Republic (hereinafter referred to as the Slovak Civil Code). The courts are inclined to interpreting things as “physical objects provided that they are manageable and useful thus they do serve people’s

needs" [3]. The main emphasis is put on the fact that the thing has to be a physical object. In the opinion of the academic authors, a domain name is certainly not a physical object. For quite a few years until now, the majority of Slovak academic community and respected authors of Slovak and Czech legal science have been sharing the notion that it would be too extensive and not very accurate to consider a domain name as a thing/object; it would subsequently go against the settled case law and legislation. In their view, a domain name is *de facto* effective *vis-à-vis* every other entity in the manner that without the consent/expression of consent of the person for whom it has been registered everyone is excluded from using such domain name. The person concerned has a quasi-ownership, however, *de jure* do not possess any absolute rights regarding the domain name, but is merely entitled to use it, give consent to another person to use it, either for free or for remuneration, cancel the registration or transfer the above-mentioned rights. From this point of view, the domain name is a subject of the rights and is capable of being a subject of possession. Under Article 129 of the Slovak Civil Code, things/objects and rights, including relative rights, are subject to possession.

The most recent scholarly writings show the popularity of the *sui generis* theory of property as regards the legal nature of domain names. Konstantinos Komaitis, the Swiss researcher of domain name law, has recently discussed the domain names as *sui generis* "e-property" rights based upon the experience of the cases resolved under the Uniform Domain Name Dispute Resolution Policy (UDRP) [4]. This theory of property was also previously advocated by Lithuanian scholars [5, p. 30]. It is evident that the domain name is, first of all, a name, and a name ought to be protected by the law. Legislative bodies are still not sure about the legal nature of domain names, but the latest developments in the courts and panels indicate that proclaiming domain names as the *sui generis* industrial property is the right way for legislators to take.

As it was mentioned, there is an evident lack of legal regulation of rights to domain names and procedures of dispute resolution in Slovakia. Therefore, taking into account the nature of the registration process and legal relationships arising out of the agreement for the registration of a domain name, any rights related to the domain name, falling within the scope of the civil law, are based solely on contractual grounds. Article 118(1) of the Slovak Civil Code specifies that "things/objects, rights and other assets (value in property) shall be considered a subject of the civil legal relationships." It was mentioned that there is a general consent that the domain name shall not be considered as a "thing" in legal terms. Finally, acknowledging that the domain name is not a right (since there is a difference between the domain name as a set of symbols expressly identifying a certain area in the Internet and the contractual rights arising out of the agreement on registration), it might be concluded that in accordance with the afore-mentioned section of the Slovak Civil Code the domain name shall be considered as "other asset" (value in possession).

The same issue has been dealt with in Kazakhstan, mainly in the case law of national courts as well as in the works of legal scholars. In the Decision, the judge Ms. Zh. S. Zhumabaeva considered the domain name to be related to tangible benefit and property rights [6]. As a component of company's activities, used for identification of the company and its products in traditional business and electronic trade, a domain name has become one of the forms of intellectual property in accordance with subparagraph Article 961(4)(3) of the Civil Code of the Republic of Kazakhstan (hereinafter referred to the Kazakh Civil Code), and therefore, the registration of it, being similar to trademarks, company's names, tangible profits with all derivative property rights, is necessary. Only the registration of a domain name as a trademark would give the object of intellectual rights mandatory court protection and would help to resolve disputes regarding compensation of damages.

In the opinion of the author of numerous publications on legal issues of the Republic of Kazakhstan, Mr. I. Loskutov, it is necessary to evaluate the relationship between the concepts of "trademark" and "domain name". Herewith, it is noteworthy that according to the effective legislation of Kazakhstan, the domain name is not an object of intellectual property rights, unlike a trademark, which is protected by the related legislation on intellectual property rights and used as the means of individualization in the entity's activity. Mr. Loskutov considers that in the framework of Internet-based relationships the principle of separation of objects providing key information loses clarity by reason of newly formed objects, such as domain names, which share many similarities with traditional objects of intellectual property. In his opinion, such relations require special legal regulation (of the top level rather than subordinate legislation, as it is now), as it was done in regards of other objects of intellectual property. Currently, the registration of objects of intellectual property rights is regulated by the Law of Republic of Kazakhstan No. 456-I of 26 July 1999 "On Trademarks, Service Marks and Appellations of Origin", whereas the registration of domain names is regulated by the Order of the Minister of Communications and Information of the Republic of Kazakhstan No. 220 of 7 September 2010 "On approval of rules of registration, use and distribution of the domain space of Kazakhstan segment of Internet"; the registration of trademarks is done by the Committee on intellectual property rights of the Ministry of Justice of the Republic of Kazakhstan, whereas the registration of domain names is carried out by the institution "Kazakhstan Network Information Center", which is not a governmental body, and it is done in the same way in Lithuania or Slovakia.

Thus, on the basis of all the above stated, and in particularly taking into account the Decision No.2-9819/10 of Almaty Specialized Interdistrict Economic Court of 11 October 2010, in which it was decided that a

domain name should follow the trademark, it seems that further development of case law should take direction of providing protection of trademark owner's rights against the unsolicited use of the trademark in domain names of other individuals.

Kazakhstan is also a member of the World Intellectual Property Organization (WIPO). Thus, it can be assumed that the plaintiffs in claiming against trademark use in domain name may refer to the Article 10-bis of the Paris Convention for the Protection of Industrial Property of 20 March, 1883 (the Paris Convention). In accordance with Article 10-bis of the Paris Convention, "any actions that could create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor shall be prohibited". The Application of Paris Convention is enforceable within the territory of the Republic of Kazakhstan in accordance with Article 3(8) of the Kazakh Civil Code.

According to Paragraph 1.05 of the Model provisions of the WIPO on protection against unfair competition, "the term "industrial or commercial activities" should be understood in the broad sense that covers not only the activities of enterprises providing products or services, in particular the buying and selling of such products or services... So, for the purposes of these Model Provisions, it does not matter whether the activities of a person or enterprise are for profit or not".

According to Paragraph 1.06 of the Model provisions of the WIPO on protection against unfair competition, the model provisions shall be also applied in situations where there is no direct competition between the party who commits the act and the party whose interests are affected by this act. When the act was not directed against a competitor of a person who committed this act, he may, nevertheless, affect competition in the market as a result of strengthening the competitiveness of this person in relation to its competitors. For example, when a well-known trademark is used for completely different products by a person who is not its owner, the user of a trademark does not compete, as a rule, with its owner, but the use of a trademark, however, relates to competition, since the user receives unfair advantage over their competitors who do not use a well-known trademark, which could facilitate the sale of goods to consumers.

According to the Lithuanian legislative framework, domain names should be considered as a special object of intellectual property, enjoying the protection similar to that of trademarks. The analysis of certain provisions of Lithuanian law suggests that the courts may decide the disputes on the basis of Articles of the Civil Code, Law on Trademarks, as well as certain provisions of the Law on Competition and the Law on Advertising.

Legal regulation of domain names in Lithuania, Kazakhstan and Slovakia has more common traits than differences. All of the countries have open registration systems, respecting the first come-first served principle. The legislators are equally reluctant to define domain names as objects of intellectual property, allowing the case law and legal science to come up to a common concept. Although a significant period of time has passed since the introduction of domain names, no specific domain name legislation exist in the analyzed countries. It contributes to confusion and, on the other hand, allows for the legal leeway.

Although none of the analyzed countries have embraced the ICANN UDRP procedures as a part of their national legislation for their country code domain names, the resolution of court disputes is remarkably similar to the decisions in <.com> cases. In all of the mentioned countries, the activity of cybersquatting has been unanimously recognized as being against the law, albeit lacking legal definition in any official instrument. A greater variety of solutions can be found in the cases where a domain name is identical to a trademark. In many of them the decisions are weighted by various factors determining the winning party. The strength of a domain name or a company name, the knowledge of consumers, the similarity of activity and the intent of the first registrant are all relevant factors in court decisions. Those decisions, where a conflict between a company name, a trademark and any other identifiers arises, present the greatest variety of legal opinions in all cases.

In conclusion, it can be clearly seen that the legal regulation of domain names and the related case law are gravitating towards the common international rules and procedures pioneered by the ICANN UDRP in the <.com> cases.

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