Articles

Legal Regime of the Domain Names

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Summary:

The current article focuses on issues related to the legal nature of domain names in the context of the Bulgarian common theory of law and in particular the theory concerning the subjective rights. It draws an analogy with the regulatory regime of trademarks and offers some suggestions about legislative initiatives in connection with the use of the national domain.bg.

Key words: domain names, virtual space, internet, objects of law, absolute subjective rights

JEL Classification: K20, O34

The topic about the Internet and the legal framework is widely discussed today by legal experts. Reasonable questions like: do legal norms pertaining to Internet regulation form a separate area of legislation; do real and virtual affect the legal theory regarding the particularities of the Internet as a new sphere of regulation; how the aims of legal regulation should be interpreted in the area of the Internet, are the subject of analysis in this paper. Together with all these general questions the increasing number of social relations that are established in the virtual reality require a formal assessment of this reality and the specification of the new objects concerning legal regulation, including domain names. At the same time, the character and dynamics of the contemporary legal systems are subordinate to the joint influence of the system of law regulation and social existence (life), among other things. That is why the attempt to treat the law in isolation, irrespective of the influence of social life, which follows its own rules of development, is ill-founded. The information culture is a reality that defines the methods of functioning and the basic characteristics of different social institutions, and legislation, among other areas of social life.

In the contemporary world, which is now divided into real and virtual, two tendencies can be identified, both of which impact the methods, functioning and the basic characteristics of different social institutions and legal ones, in particular. The first tendency, which is a function of the nature of virtual reality (area) itself, is that the virtual society or internet society is becoming more and more persistent in imposing the principles of ignoring the positive law in regulating relations and confirming self–regulation as the single source of law, guaranteeing access to information and social freedom.[1]

On the other hand, national legislative systems tend to show extraordinary caution and even if they do not show any interest in the social relations realized in the virtual reality, they justify their refraining from the technological nature of the Internet, determining the possibility for self-regulation which eliminates the interference in the national normative systems.

I think this is due to both the insufficient realization of this reality and the typical conservative attitude against the influence of

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[1] My work on the present research paper came out together with the social debate about the acceptance of the so called ACTA Act. In January 2012, at a special ceremony in Tokyo, Japan, 22 member countries, signed this agreement. Bulgaria is one of them. That act brought about a wave of protests all over Europe. Under their pressure, on the 11th February, our country stopped the ratification of the document, until the common European position on the issue was clear enough. On the 4th July the European Parliament rejected the acceptance of ACTA with – 478 votes " against ", 146 " abstention" and only 39 " for ".

the developing new information order.

These two tendencies contribute to the abandonment of the legal rationalization of numerous phenomena from the objective reality, realizing themselves in the virtual environment and, as a result, in private legal decisions that create rather than resolve more problems because they are not based on a common conceptual method. The question is of practical significance, since it is related to the development of the Internet, new objects that are not regulated by legislative prescriptions, under which some social relations and social connections are realized with an increasingly high financial interest.

The tendency is clearly defined in the so called "net addressing", which is known under the name of domain or a Domain Name System – DNS. So far there is no generally accepted legal definition, not only in legislation, but among all experts as well.

In the legal area, including the Bulgarian legislation, there is no common method yet for defining the meaning of "domain name" as an object of legal regulation or the nature of the subjective rights on domains. At the same time the national legal systems of separate countries, the Acts of the European Council and those of international organizations, regulate public relations in detail taking into consideration such objects as trademarks and company names.

What is the proper attitude of domain names to these objects, considering the fact, that all these numerous arguments arising in connection with the registration and usage of domain names are connected mainly with a conflict between a registered domain name and the objects of intellectual property such as trademarks - in this case it is the subjective right to the domain names. Does the specification of virtual reality influence the possibilities for a legal regulation of the objects in this environment, and how? Will the new objects of "virtual property" bring some changes to the dogmatic bases of legal structure, including some basic concepts and institutes, such as the Institute for Private Property Rights?

A satisfactory answers to these questions cannot be given without conducting a fluent theoretical analysis in the context of the general theory of law, or of civil and procedural law.

In the Bulgarian legal doctrine, legal objects are discussed as a structural element of legal relations. In his monographic research work, Tencho Kolev (2000) defines the objects of legal relations as "the goods, by which, the legal subjects interact among themselves within the limits of legal relation", as "the character of the object of legal relations depends on the demands and interests, which should be satisfied". As objects in virtual reality there can be different material and non-material rights as there are in real life, which are subject of civil law. At the same time, there are some objects, which are characteristic only of the Internet, such as the domain names, which we are studying.

I fully accept T. Kolev's theory, according to which a criterion for the significance of one phenomenon and the assumed quality of legal objects are defined by the economic value of wealth. Today, in the century of information technologies and the developed information society, the new objects are certainly part of these goods, where legal analysis and assessment of their nature should be carried out.

As an object, which is created in the technological environment of the Internet, the domain possesses all its characteristics, which in principle concern all objects in virtual reality. Yet, on the other hand, there is the sociality of the domain as an object, under which a real joint action is created among the subjects in the virtual reality. This dual nature of the real Internet environment and particularly the objects of social activity in it, bring to action two different methods in its specific interpretation, around which, all researchers of the domain nature are combined.

According to one of the methods, the domain names fulfill only the function of "addressing" a certain information resource and in this way the legal regulation should be fulfilled at a technical level, within the limits of a preliminary created programme environment, which excludes the possibility of doubling the two equal domains, as the rules for their usage as well as the arguments about the rights on them, are created and solved on the basis

of self-regulation, which includes technical standards and rules, created by ICANN, the organization authorized to manage the system of domain names (www.icann.com).

According to the second method, used to define the nature of domain names, the addressing function shows only the technical aspect of this concept, but it isn't the function which dominates when forming the quantitative characteristics of the object. What is more, the very domain name bears no significance for the addressing. Even if there is no domain name, or if it is named differently, browsing in the Internet reality will be fulfilled in the same way, by using the IP address function. This method is accepted and approved by Sharlot Waelde (Lecturer in Law. University of Edinburgh, Domain names and trade marks: What's in a name?, http://www.law.ed.ac.uk/ it law /ch4_mainhtm).

According to her, the domain name and the addressing function are not equivalent. The name of the domain, she says, is not the address itself, but it is a part of this address, and it has got a symbolic meaning. "Each resource in the Internet, for instance a web page or a file has got its own address or Uniform Resource Locator /URL/. The name of the domain is a part of this address"- she comments. Apparently, Waelde differentiates between the "addressing" function, performed by the protocol and the domain name.

In fact, the addressing function is fulfilled by the protocol TCP/IP/- the protocol performs addressing even before the existence of domain names/ and not from the domain name, which is its only verbal designation. But, the latter possesses characteristics other than usual addressing, because they fulfill an individual function regarding a certain information source, of the contained information in it about subjects, goods and services. The existence of these functions leads to identifying the domain names with other existing in the real environment objects possessing similar functional characteristics such as trade marks, company names and so on. On the other hand, the domain name is accepted also as an information object, i.e. not only as a data bearer but as data itself which, as we have already mentioned, will be discussed later in this paper.[2]

The two methods shown above are logical continuation or, more likely, reflect the tendency where the virtual environment can be seen as technological environment, which doesn't need any special legal regulation. But apparently, it is the social environment, which practically puts forward the discussed issues (questions), and in particular those concerning the nature of the objects, created in this environment and also for the method which should comply with their legal decision and legal regulation.

The Internet is both technical and social environment and for that reason we must point out that all legal and public relations established in the Net are not brought about by the Internet as a computer network, but they are caused by the objects in it, which in one way or another are connected with this network. The majority of these objects are not newly created, as the studied by us domain name is, but their existence in the virtual, logical environment of the Internet is quite different. The objects in this environment, as we have already mentioned, design its characteristics and in this way their existence has got a technical and social aspect, which makes them unique by nature. Law, as a social regulator is interested in the second aspect of this existence, but it cannot realize the mechanism of law regulation, without considering the prerequisite, the technical standards of regulation, processing the part of the content of the concept known as "self-regulation".

That is why, during the formation of the domain name concept, the complication ensues from the task involved, i.e. to show, on balance, both the technical properties of the domain and its legal characteristics. Due

[*] During the research work on the issue of the existence of some marks of an intellectual property object inside the domain name, such as intellectual activity results protected by law and their equivalent means of individualization of institutions, goods and services, it must be pointed out that quite a big number of the domains is used not only for trade. The purposes and many of the owners of rights on domain names are ordinary people, who are not traders as stipulated in the Trade Law.

to the specific characteristics of domain names it is difficult to regulate them the way trade marks are formally regulated by law.

According to article 9 of the Law on Marks and Geographical Indications (Zakon za markite I geografskite oznachenia, http://lex.bg/bg/laws/ldoc/213468057): "The Trade mark is a symbol which is able to distinguish the goods and services offered by one person from those provided by other persons and this can be done graphically. Such symbols can be words, including names of persons, letters, numbers, drawings, figures, the shape of goods or their packaging, a combination of colours, sound symbols or any combinations of such symbols".

First, we must bear in mind the fact that domain names can present symbols, which are able to differentiate the goods and services offered by people and institutions from others of the same kind. But as it has already been said, the domain name can consist only of a limited number of words and art symbols, while the trade mark can be expressed by a wider range of symbols. These can be "words, letters, numbers, drawings, figures… or any combinations of such symbols. It is also known that colour differentiation is not typical of domain names. At the same time, article 11 of the Law on Marks and Geographical Indications lays down imperative regulations, regarding the possibility for registration of one word symbol or another as a trade mark. As apparent reasons for denying the registration of a trade mark, the law outlines all cases, involving marks or symbols, that have become quite popular in the spoken language or in the established trade practice of the Republic of Bulgaria where marks or symbols show the type, quality, quantity, purpose, function, value, geographical origin of the goods and so on. The Law forbids the registration of any trade mark, which is against public order or the good customs in society, which leads to fallacy regarding the nature, quality, geographical origin of the goods and services, or a trade mark which consists of abbreviations or names of international intergovernmental organizations and others. A similar limitation is also found in the General conditions for registration and maintenance of domains in area.bg and sub-regions of Register BG, where item 5.4, titled "Inconvenient internet names", stipulates that obscene and/or offensive words and word combinations cannot be registered as internet names (it was already been pointed out that the registrar has adopted this term instead of a domain name), which are against the public interest and the good practices. When the domain name, applying for registration, can result in complication, the registrar must choose another name (www.register.bg).

Along these lines it can be pointed out that considering the ex-territorial nature of the Internet, domain names cannot be classified as trade marks, characterizing themselves with the symbol of a territorial region. The laws, dealing with trade marks, allow a number of registrations for one and the same trade mark in different geographical locations, as well as for different goods and services, when there is a slight possibility for complication.

Trying to find the answer to the question about the nature of domain names and their functional characteristics, if they perform only the addressing function or they are means for individualization, is as complicated a process as defining the very concept of a domain name. The problem lies in the different thesis built on the basis of a comparison between domain names and other existing objects of intellectual property and most of all with the trade marks on which, I myself must say, was tempted to pay more attention than usual. This, actually, turns out not to be the most accurate method, because we have a civil law object, which had not existed before the appearance of the Internet. It is obvious that the basic theoretical question regarding domain names is their legal nature. The existing points of view vary from the discussion of domain names seen as a means for addressing the confirmation of the idea that domain names are a way, a method for adding different means for individualization – trade marks, company names, personal names and others. The last point of view is obviously mistaken since domain names cannot be in practice connected with an object, regulated by the law. The concept of domain name can be discussed as a separate part of the means

for individualization, but in the wider sense of this concept.

The legal definition of domain names can be unbiased and can allow a comparatively extensive discussion, in order to transform legislation without changing any of its basic positions. Indisputably, domain names are special information items on the Internet that have a social and technological aspect, which is typical of all the objects on the Internet and they are subordinate to a complex legal regulation. On the other hand, we should point out that domain names are designed for the individualization of the domain and for the data resources situated in this domain. In fact, it does not correspond to the results from the intellectual activity, at least until no change has been made in the present legal registration. This does not change our point of view because the domain name is a uniform object that has technical and social dimensions alike, but the correct understanding and definition of the method should be based on their clear differentiation. The technical individualization on the computer is due to the domain, and the domain name makes legal individualization of people, goods, and services possible. The domain name is subject to legal regulation, and the domain is regulated by technical protocol rules, created through self-regulation. As soon as the domain name enters the social turnover, it becomes subject to legal regulation, and the domain continues to be such, only until it matches the functional characteristics of the domain name itself.

In this way, if we accept that the domain name does not fulfill functions other than addressing data source from a clearly technical aspect, the subject choice will be deprived of objective criteria. The last conclusion, logically, concerns the questions about the nature and subjective rights on the domain names.

What is the nature of the domain from a judicial point of view and on the basis of the Bulgarian legal doctrine regarding the category of subjective law[3]. It is accepted that subjective rights should be different titled between themselves on the base of the criterion by a proper correlation of one. Subjective right to the other people. According to this criterion, subjective rights are divided into relative and absolute (T. Kolev, 2000, p.82). The absolute subjective rights give the opportunity for their холдерс to require a certain behavior from all other people or to act тоßарgс all of them accordingly.

Is the law on domain name an absolute one?

I am provoked here again to draw an analogy with the rights under the Law on Marks and Geographical Indications allowing the input of law on the trade mark declared insolvent (article 22 of the Law on Marks and Geographical Indications). According to the text, the right to the mark is included in the mess of insolvency during a declared insolvency procedure of its owner. This fact is registered in the State Registrar of marks upon filing an application by one of the parties to the deed and is published in the official bulletin. A similar option is also opened in the organization for the transfer of rights on trade marks. (article 21 of the Law on Marks and Geographical Indications). The owner of a trade mark can freely transfer his/her right of ownership to another person. The transfer is registered in the State Registrar as this registration is a legal fact, which has a constitutional power, i.e. the transfer involves third persons from the moment of its registration in the Registrar.

According to item 8.6 from the General conditions for registrations and maintenance of domains in area.bg and the sub - regions of Register.BG, the transfer of a domain from one registrar to another becomes a fact after signing a contract between the two parties. The contract must be signed by notary and sent to the registrar by the chosen registrar or signed with electronic signatures of the representatives of both registrars and sent to the registrar, by the registrar's interface. The contact for the transfer of the domain name (as well as the

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contract for the transfer of trademark rights) will be legal after writing down the details of the receiver of the rights in the registrar. It is then that the registration becomes constitutionally recognized. From this moment on, the right of the new owner of a domain name will be opposed to third persons.

Another analogy should be pointed out as well. Yet it should be noted that such an analogy makes no attempt to provide all similarities between the organization of exclusive rights, in particular, the rights on marks, according to the Bulgarian legislation and the organization of the rights on domain names based on the rules, created through self–regulation. The right to a certain mark can serve as a financial collateral under a pending future claim. If a claimant presents his/her claim the court may (without informing the defendant) issue a protective measure such as a prohibition of use of the rights to the mark by the owner/licensee (article 22a, item 1 Law on Marks and Geographic Indications). In item 3 of Chapter 9 of the General conditions for registration of a domain name on the *.eu* domain created by the EUrid registry (European Office for registration of domain names, certified under Decision 2003 / 375/EO of the Commission dealing with defining a registration office in the first level domain .eu), (www.eurid.eu) a rule stipulates that the registry shall be informed about a ADR procedure (out-of-court procedure for taking decisions on arguments for rights to domain names) or a judicial procedure. While these procedures do not finish with a decision, the registry blocks the transfer of the domain name and the registered person can change neither his contact information or his registrar regarding the blocked domain name.

The above texts confirm the conclusion which has been made i.e. a bigger part of acceptable mistakes in identifying the domain name as a legal object and legal regulation is related to the discussion of the concept "domain" and "domain name" as identical and as a result the discussion of the rights to domain names as relative, pending and developing within the limitations of the compulsory connection between a registrar and a registered person.

If we look at the transfer of rights to domain names from the point of view of the Institute for Innovation, we must point out, that if a party to the contract wants to make some change (subjective innovation) or replace it, the other party's consent is needed. If there is no such consent, the replacement intended by the first party will be invalid, i.e. the transfer of rights and obligations conducted by one party is in force only if the other party has explicitly accepted this replacement[4]. When a transfer of rights to domain names is undertaken, the registered person has the only obligation to inform the registrar, responsible for submitting the respective information about the completed change to the registrar. The parties in the transfer deal have no obligation to ask for the agreement of the registrar or the register. In chapter 13 of Politics for registration of the domain name .eu (www.eurid.eu) the transfer procedure of a domain name is described in details. According to this procedure, the transferee should address the registrar and ask him to inform the Register about the transfer. Upon receiving the notification, the register will confirm the reception of the suggested change to the transferor and the transferee by sending a message by electronic mail, and each message will contain a unique code, allowing both sides to confirm or reject the suggested transference by using the website of the register within a period of seven days. If there is no confirmation received during this period of time, the register shall send a reminder and give another seven–day period needed for confirmation. And if the register does not receive it, the processing of the transfer is cancelled automatically and the domain name will remain registered to the first registrant.

The licensee can transfer the domain name at any time, under the condition that the transferee has confirmed his responsibilities

[4] DThe contracts can be changed, stopped, cancelled or suspended only if both parties agree or in case there are some legal circumstances, article 20a ZZD.

under the general preliminary conditions defining registration and the register has received all the fees for the transfer and everything corresponds to the procedure, outlined in article 13 from the Politics for registration of eu. Procedure. (Chapter 7 of the General conditions for registration of .eu), i.e. the agreement of the registrar for the transfer of rights is not required, which is a sufficient argument against the thesis about the relative character of the subjective rights to domain names.

Though, under formal judicial causes, we still cannot put domain names to objects of property, we can only conclude, that the objects we have distinguished possesses all characteristics to be regulated as such. For that reason, defining the rights to domain names and principled at knowing new objects on behalf of law, mostly those that are of a technological nature, the followed procedure should not be applied in terms of their categorization in some well-established material area, but with regard to their functions and type of protection, which draws on some relations to these objects.

So, the paradigm "object – necessity of defense – legal regulation " should be added to the paradigm "function –necessity of defense- object of legal regulation".

Opportunities for Legal Regulation

Although, until now there are have been no normative instructions and a comprehensive concept about the nature of domain names and the arguments about domains within Bulgarian legislation, there are some opportunities for regulation within certain legal institutions.

First, we must point out the opportunity for making a change in the Law on Marks and Geographical Indications, where it could be foreseen that using a trade mark as a domain name without the agreement of the proprietor who has got the exclusive right to the mark is an infringement of the latter and such a registration can be cancelled. Another opportunity is to use legislation to protect competition. In the Law on Protection of Competition, there are some established rules concerning unfair competition, which can be used to prove the illegal character of registration and usage of a domain name. Another opportunity is available in the application of the " breach of law" concept. Theoretically, the activities of an unfair registration of domain names can be found under this hypothesis, but the institute for breach of law is applied only in exclusive cases when the breach of law is obvious and the opportunity for other applied norms is missing. But putting the domain names to any object of law or the regulation in the limits of a certain institute could be a temporary situation, because there a number of differences between the objects of civil law and domain names can be established, and here comes the conclusion that the latter must be recognized as independent objects over which, some exclusive rights can occur.

That is why, I believe that making any amendments and changes in the present legislation is not the best method for regulation of the relations for distributing the address area in the zone. bg., and also the relations in the virtual environment as a whole.

Considering all this, a uniform policy for registration and functioning of the domain at a national level.bg should be applied in Bulgaria, similarly to the applied method for regulation of the domain.eu by the Community. The authorization of a certain register should be regulated. On the other hand, we must point out, that the lack of a uniform normative act and the implementation of some changes in the existing legal acts, will result in contradictions, because it will not allow us to admit the specific character of domain names.

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