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DOMAIN DISPUTES: PROBLEM ASPECTS

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Purpose: the purpose of this article is to clarify the main problems of litigation of domain disputes and suggest ways to overcome them. **The methodological basis** of the study are general scientific and special methods of cognition. The use of these methods made it possible to describe the problems of litigation of domain disputes. **Results:** the study found that neither domestic law nor domestic justice is ready to deal with cases related to domain disputes. Because in practice they face the problem of clarifying judicial jurisdiction and the impossibility of applying the rules of international law. The plaintiff faces the problem of identifying the defendant, there are difficulties in proving and the need to file a statement of claim. And the plaintiff, most often, can only be the owner of a registered trademark (mark for services). **Discussion:** it is possible to overcome the existing problems of litigation of domain disputes by improving the procedure of domain name registration, which will prevent violation of the rights of owners of means of individualization of participants in civil circulation, goods and services, and in case of violation of these rights.

Keywords: domain names; domain disputes; judicial proceedings; judicial jurisdiction; proof; defendant; security for claim.

Problem statement and its relevance. Analysis of scientific researches dealing with the problems of the legal status of domain names on the World Wide Web testifies to the fact that modern civil law pays little attention to the judicial proceedings of domain disputes. Domain names have a complex legal nature for they are similar to trade marks (service signs), commercial (company) names, natural person's name and that often leads to legal collisions related to the rights for domain names and other similar objects of intellectual property law [1, p. 26]. This causes different application of legislation by courts in this sphere.

By registering a domain name the rightsholder of the brand can acknowledge the fact that it sounds

similar to his brand, but is registered by another person. In this case, the parties engage in a domain dispute. Thus, a **domain dispute** is a dispute arising due to the legal nature (bad faith) of registration and using a domain name between the rightsholder of the domain name and another interested party (e.g. owner of the trademark certificate) (service mark).

One can say that domain disputes arise due to the infringement of the law called *cybersquatting* – seizure of domain names – registration of domain names that are the same or similar to brand with their further use in bad faith both for their own commercial aims and to resell them to the corresponding brand owners [2, p. 215].

In Ukraine, legal practice in the sphere of domain disputes is not yet widespread, however, every year the number is gradually growing. It may be related to the fact that solving domain disputes requires special knowledge in the sphere of exact sciences and information technologies. In fact, this is the most difficult issue for both the parties to the domain dispute, and the intermediaries trying to regulate it.

The position is open to discussion for even the court (or another person, or body) do not require an obligatory expert's opinion to prove the claims or objections of the parties when hearing cases of this kind. We consider that special knowledge in this case should be understood in a different way: what is meant is the technical understanding of the web site's functioning, differentiation of the technical functions of the registrant, registrar, and administrator of the Internet addressing space, technical possibilities to change the web site's owner, etc. A judge or a lawyer can have general technical knowledge, but it will be difficult to understand the technical details of some issues correctly.

Analysis of the latest researches and publications. Legal nature issues and the definition of domain names in the system of intellectual property law objects were researched by the following scientists: Boiko D.V., Bontlab V.V., Hrytsai V.I., Diduk A.G., Ennan R.Ye., Kalyatin V.O., Kodynets A.O., Korshakova O.M., Kulinich O.O., Maidanyk N, Milyutin Z.Yu., Nesterovych S., Sergo A.G., Kharitonova O.I. and others. However, the specific character of judicial proceedings of domain disputes was insufficiently researched. Still, some researchers investigated in their works cases of infringement of rights for domain names and the order of their protection: Volina T., Gorkusha M., Zerov K., Nagornyak G., Neznamov A., Nosik Yu., Sklyarov R., Tarasenko L., Cibizova S.A. and others. A characteristic feature of researches of this kind is the fact that the problems the parties to the domain dispute face are described from the practical point of view and the authors attract the readers' attention to the deficiencies of national justice. Moreover, numerous problems on the specific character of judicial proceedings on domain disputes remain still unsolved.

Purpose of the article. The aim of this article is to determine the main problems of judicial proceedings on domain disputes and to offer ways of their settlement.

Statement of basic materials. Taking into account the novelty of cases related to domain disputes, Ukrainian courts are practically not ready to hear them for the national legislation does not regulate the concrete procedure of hearing domain disputes by any of the mechanisms of protecting infringed rights (including judicial protection), and there is no Uniform Dispute Resolution Policy (UDRP) to resolve domain disputes for the .UA domain zone.

Thus, judicial protection of rights related to the use of domain names has some problems that are manifested in many aspects. Let us dwell on some of them.

Let us define court jurisdiction of domain disputes. Most often, such disputes in Ukraine arise on the basis of protection of rights for a trade mark (service sign) and commercial (company) name, that is why they are heard in commercial courts, as a rule, at the location of the registrant of the domain name. Other cases of this kind are heard in courts of general jurisdiction.

It might be easier to prove that somebody illegally uses another person's commercial (company) name in the domain name because the intellectual property right for the commercial (company) name is valid from the moment it is first used and is protected without obligatory application for it or its registration irrespective of the fact whether the commercial (company) name is part of the trade mark (service sign).

However, in this case the court can ask the person who claims his rights were infringed to prove he really uses the commercial (company) name. The evidence to prove the validity of using the commercial (company) name is determined separately in each particular case.

One should also pay attention to the people participating in domain disputes. Usually, they are the administrator, the registrant, and the registrar of domain names.

Administrator is the company administering the addressing space of the Ukrainian segment of the Internet network.

Yet, according to legislation in force (part 3 of article 56 of the Law of Ukraine “On telecommunications”) [3]: “Administering the addressing space of the Internet network in the .UA domain shall be performed by a non-governmental organization that is formed by self-governing organizations of Internet operators / providers and shall be registered according to international requirements”.

Registrant is a person that has exclusive right for the domain name for a period it is registered for. Registrant’s data are in the “admin-c” field of the “WHOIS” protocol and its main application is to obtain registration data on the owners of domain names, IP addresses and autonomous numbers in the Internet network.

According to paragraph 2.7.2. of the .UA domain Regulations a registrar is a business entity rendering services to the registrant that are necessary for the technical provision of delegation and functioning of the domain name. Registrars function on the basis of a contract with the administrator of the public domain. The official list of registrars in the domain names .UA, .COM.UA, .KIEV.UA is on the site of the administrator of the domain zone .UA. The service realization scheme of .UA ccTDL and public 2DL must be two-level, the registrars are in economically equal conditions, fairly compete with each other and work directly with the end user. Thus, a registrar is a person the registrant directly addresses to register a domain name. Moreover, this person may also re-delegate (transfer usage right as specified in paragraph 2.19 of the .UA domain regulations) a domain name to another registrant.

It should be noted that these specified people form the parties to a litigation on the rights for a domain name. A separate issue in domain disputes is the choice of defendants for the majority of domain disputes are aimed at cancelling the delegation of the domain name with its further registration on the legal rightsholder.

However, acquisition by a person of a processual status of a defendant, according to the law, is related not to the availability of jural relationships between the parties and the corresponding obligation of the defendant to perform certain actions in favour of the defendant or to forbear from their execution to protect and realize the rights and legal in-

terests of the plaintiff, but only to the fact of bringing of a suit to the person.

At the same time, a proper defendant in the case is only a person having obligations to the plaintiff under the circumstances that form the subject of the claim. In other cases, claim adjustment is impossible for the defendant has no obligations to the plaintiff to stop infringing his rights and legal interests for he is not the person to be accountable for the disputable jural relationships.

Thus, in case the court ascertains that an action was brought in against the wrong party that has to be liable to the plaintiff in a material and jural relationship, then the court with the claimant’s approval changes the wrong defendant for the competent one or disallows the claim due to absence of legal foundation.

Secondly, there arise difficulties in the process of presenting evidence in domain disputes. Preparation of argumentation for this type of disputes has a lot of specific peculiarities and details.

The systematic analysis of the norms of the legislation in force and court practice testifies to the fact that the circumstance in proof in disputes, arising due to the registration and use of the domain names, includes the following circumstances: 1) the domain name of the registrant of the disputable domain that is identical or easily confusable with the trade mark (service sign) for which the plaintiff has rights; 2) the domain registrant has no rights for the trade mark (service sign) that corresponds to the domain name he registered in other classes of the international classification of goods and services; 3) a disputable trade mark (service sign) was used in a disputable domain name on a web site it is related to without sufficient legal justification, thus infringing the rights of the owner of the trade mark (service sign), whose name corresponds to the disputable domain.

To settle the claim directed at the protection of the rights of the owner of the trade mark (service sign) it is necessary to determine all the specified circumstances in general. Absence of at least one of the mentioned circumstances gives grounds to dismiss the claim.

Thus, in the process of hearing domain disputes by the national courts it is very important to pay special attention to the fact that the analysis of leg-

islative provisions leads one to the conclusion that taking into account the legal matter of the trade mark (service sign), an obligatory condition of using the sign is its use with reference to the goods and services it was registered for.

Placement of a verbal sign, similar to the trade mark (service sign) for some goods and services, even in the .ua domain and on web site pages without producing goods and rendering services, for which the disputable trade mark (service sign) was registered, cannot evoke associations of the designation with goods and services of the person owning the relevant trade mark (service sign). Moreover, the use of the disputable designation in the Internet network for Ukraine can only be accepted in case of registration of the site that reproduces the trade mark (service sign) in the .ua domain.

In the process of collecting evidence for cases of this kind one needs to take into account the interpretation given by the Superior Commercial Court in paragraph 46 of the Resolution of the Plenum № 12 of 17.10.2012, according to which web pages in the light of the provision of part 1 of article 5 of the Law of Ukraine “On electronic documents and electronic documents circulation” are considered electronic documents that cannot be delivered to court, however, they can contain significant information on the circumstances of the case if they are objects of copyright or adjacent laws). Thus, taking into account part 1 of article 32, part 1 of article 36 as well as provision of part 1 of article 39 of the Code of Commercial Procedure of Ukraine, the court takes into account the concrete circumstances of the case and is not deprived of the right to inspect and study the evidence in the place of their location with the record of corresponding procedural actions in the minutes that shall meet the requirements of article 811 of the Code of Commercial Procedure of Ukraine.

Correspondingly, the specific nature of the Internet as a sphere of functioning of domain names, as some researchers claim, leads to the fact that traditional means of evidence often become non-effective to record significant facts to resolve disputes; and vice versa, non-traditional means of evidence (e.g. documents in electronic form, e-mails) can characterize the state of jural relationships of the parties to the dispute in the best way [4, p. 311].

However, courts are very careful with this kind of evidence.

Thus, video and audio records of the investigation process can be used as evidence by any of the vested interests of the site that is known to be infringing copyright or adjacent laws; this record on an electronic or other medium (computer hard drive, floppy disk, laser sensing system disc, other information medium) is submitted to the court specifying when, who and under what circumstances made the record and then it can be used as a corpus delicti in the case. Written evidence can also be certificates obtained from providers and network search services.

Print-outs from Internet web sites cannot serve as evidence in a case. However, if the relevant documents were issued or attested by an institution or a specially authorized person having the power to do so according to an established form, adhibited by an official stamp on the territory of one of the member states of CIS, then in compliance with article 6 of the Treaty on the order of resolving disputes, related to performing economic activity of 20.03.1992 they have the evidential force of official documents on the territory of Ukraine.

T. Volina states that courts of general jurisdiction accept print-outs from the site. Commercial Courts do not regard it as evidence. That is why, in a commercial process the judge himself can view the information on the site (however, it can disappear until the court hearing), or one needs to turn for help to an expert. However, expertise of this kind can be long-term and expensive. It would be cheaper to record the information on video and the Superior Commercial Court will consider it a proper evidence in the case [5].

Taking into account the number of issues that are to be cleared up, one may conclude that courts in the course of settling disputes courts do not have to restrict themselves to expert reports in the expertise they prescribe, but also determine in each particular case whether the court expert trespassed beyond his powers.

Court practice testifies to the fact that court experts often undertake the resolution of legal issues, though only the court has the power to do so.

Furthermore, in the process of hearing domain disputes to prevent the evidence of infringement of

rights being destroyed the plaintiff should present a statement of claim and apply for a security for a claim.

The majority of Ukrainian courts do not apply international regulations. It is conditioned by the fact that according to article 4 of the Code of Commercial Procedure of Ukraine such norms are not introduced into the list of references that Commercial Courts base their decisions on when hearing disputes [6].

Only owners of registered trade marks (service signs) can protect infringed rights related to the use of the domain name. Therefore, Nahornyak H. and Sklyarov R. claim that Ukrainian courts tend to consider that protection should only be given to owners of registered trade marks (service signs), however, this does not include cases when a commercial name is well-known. Court decisions obliging to transfer the domain to the owner of the trade mark (service sign) have a reverse side as well. Taking into account the position of the court, a mala fide user has the possibility to “take over” the domain by registering a trade mark (service sign) with the same name, for the availability of a trade mark makes it highly probable the court will rule in favour of the certificate owner. Unfortunately, this course of events is possible not only in case the domain emerged prior to registration of the trade mark (service sign), but also before the sign emerged. In this case, the court will be governed by law, and the law forbids to illegally use trade marks (service signs). Moreover, the time of registration of the sign and the domain is irrelevant. Popular site owners cannot be sure of the safety of their domain name if the domain is not registered as a trade mark (service sign). Taking into account recent court decisions any person may demand transfer of the domain name it likes by simply registering a trade mark (service sign) with the same name [7, p. 224].

To overcome the above-mentioned and other problems of court hearings on domain names we suggest the following complex of changes and additions to the now available security measures in the Internet network.

1) *as to the anonymity of parties and their identification* – to introduce an obligatory check by registrars of domain names (web addresses) of data

from the “whois” service that are used to direct requests to obtain information on the registration of the domain name as well as on the actual delegation of the web address to the client, thus checking the given information for registration in the context only, whether this information exists at all, but not the adequacy of the specified data;

2) *to protect the rights of owners of trade marks (service signs), whose names contain elements that can be used by evil-doers to advertise their products:*

– to create a service monitoring identical domain names that can be similar to the registered trade marks (service signs) and inform the owners of the exclusive rights for the relevant names and designations about the revealed coincidences; it will improve the speed of reaction to the infringement of rights and will solve the problem of recording such similarity as far as the system itself will be able to inform the rightsholders in both electronic and written form with appropriately attested conclusion on the identity, known information on the owner of the similar web address;

– side by side with the provisions of the Internet Corporation for Assigned Names and Numbers (ICANN) and by introducing into the national legislation, the owner company of the .ua domain should create for web addresses in this and regional domain zones an electronic registry of web sites on the basis of the “whois” database with a further possibility for the web site owner to print out the relevant certificate extract that would serve as proof of the valid rights for the address specified in it and the validity of which (certificate) would be possible to check in court by comparing the certificate registration number and the entry of the web address in the register, full access to which would have only registrars and courts, as well as other authorized institutions. This approach simplifies the possibility to obtain a document certifying corresponding rights and simplifies the demonstrability of the specified data;

– enable regional registrars to settle domain disputes individually according to ICANN regulations provided both parties agree to this kind of settling the dispute, and to leave the alternative possibility to turn to court;

3) *with the aim of establishing the fact of reaching certain agreements which give rise to rights and duties of the parties to the jural relationships* – to introduce a separate service of “public protocol” with the help of which the person using the network would agree to recording the information on his stay on some web resources, and later on, if needed, could get an extract of the protocol of his actions on the Internet as well as attested print screens of his actions (agreements of the parties to conclude a contract, discussion of the terms) as proof of the fact of entering internet jural relationships. Moreover, people participating in such jural relationships would be warned of the use of such a protocol by one of the participants and would then agree to use their certificate in this form, would get access to such information on the actions performed by them;

4) *to improve the efficiency and speed of evaluation of the evidence by court* – to guarantee the possibility for the court to study the evidence that is only electronic in form, to create system support for the court to check electronic signature certificates, to submit relevant materials only on the basis of their prior registration in the base of the Accredited centre of key certification as well as authentication by a signature with an enhanced certificate; to supplement part 1 of the article 111 of the Civil Procedural Code of Ukraine with paragraph 8 in the following formulation: “storing electronic evidence submitted by the parties” and with paragraph 9: “check certificates verifying electronic signatures in the documents of the electronic circulation of documents submitted by the parties” [8, p. 3-4].

The authors of the research share the view on the suggested ways to overcome the problems of judicial proceedings on domain disputes. However, they consider that it is more efficient to overcome these problems at the stage of registration of the domain names, the procedure of which can be improved by introducing the following ideas:

1) to introduce the procedure of checking the domain name that the registrant mentions during registration whether it is the same or similar to the registered trade marks by means of an automatic analysis of the Registry of trade marks that are in force on the territory of Ukraine and of the Database of international trade marks (service signs) functioning on the territory of Ukraine;

2) this procedure should be conducted by the Registrar. In case of registration of a domain name similar to the trade mark (service sign) the Registrar must bear responsibility together with the Registrant;

3) to introduce changes to the domain regulations and specify the order of involving the registrar as a defendant to cases related to illegal use of the trade mark (service sign) or a commercial (company) name, the rights for which belong to third parties [9].

Conclusions. In the process of the research we have come to the conclusion that neither native legislation, nor native justice are ready to hear cases related to domain disputes. In practice, courts face the problem of determining judicial jurisdiction and fail to apply the norms of international law. The plaintiff faces the problem of identification of the defendant, there are difficulties in evidence and the necessity to apply for a security for a claim. Most often, the plaintiff is only the owner of the registered trade mark (service sign).

One can overcome the available problems of judicial proceedings on domain disputes by improving the procedure of registration of domain names, thus making it impossible to infringe the rights of brand owners, of civil circulation participants, goods and services, and in case these rights are infringed it will lay the legal foundation to involve the registrant as a defendant together with other offenders.

This article dealt with the most problematic issues arising in the process of hearing domain disputes. No doubt, absence of adequate legislative regulation, incompetence of judges and other participants of the trial in the technical aspects, delegation, re-delegation, as well as functioning of domain names complicates the efficient hearing of cases. National courts, especially trial courts most often do factual errors having no necessary special technical knowledge that is essential in this sphere. That is why it seems plausible to introduce to court hearings on domain disputes relevant IT specialists who will give qualified findings on the case. Furthermore, judges have to ascertain in each particular case whether an expert goes beyond his powers.

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ДОМЕННІ СПОРИ: ПРОБЛЕМНІ АСПЕКТИ

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***Метою** даної статті є з'ясування основних проблем розгляду доменних спорів та запропонувати шляхи їх подолання. **Методологічною основою** дослідження є загальнонаукові та спеціальні методи пізнання. Використання цих методів дало можливість описати проблеми розгляду доменних спорів.*

***Результати:** під час дослідження було з'ясовано, що ні вітчизняне законодавство, ні вітчизняне правосуддя належним чином не готові розглядати справи, пов'язані з доменними спорами. Оскільки на практиці постають перед проблемою з'ясування судової юрисдикції та неможливістю застосування норм міжнародного права. Перед позивачем постає проблема встановлення відповідача, виникають складнощі щодо доказування та необхідність подання заяви про забезпечення позову. Та й позивачем, найчастіше, може бути лише володілець зареєстрованої торговельної марки (знаку для послуг). **Обговорення:** подолати проблеми розгляду доменних спорів можливо шляхом удосконалення процедури реєстрації доменних імен, що унеможливить порушення прав володільців засобів індивідуалізації учасників цивільного обігу, товарів і послуг, а в разі порушення цих прав закладе правове підґрунтя притягнення реєстранта у якості відповідача з іншими правопорушниками.*

У даній статті автори зупинилися на найбільш проблемних питаннях, які виникають під час вирішення доменних спорів. Безумовно, відсутність належного законодавчого регулювання, а також необізнаність суддів та інших учасників судового процесу із технічними аспектами, делегування, переделегування та функціонування доменних імен ускладнює ефективний розгляд справ. Національні суди, особливо суди першої інстанції, найчастіше здійснюють саме помилки факту, адже не мають необхідних спеціальних технічних знань, які необхідні в цій сфері. Тому вбачається доцільним під час розгляду доменних спорів залучати відповідних фахівців у галузі інформаційних технологій, які будуть давати кваліфіковані висновки по справі. При цьому судді мають з'ясовувати у кожному окремому випадку, чи не виходить експерт за межі його компетенції.

***Ключові слова:** доменні імена; доменні спори; судовий розгляд; судова юрисдикція; доказування; відповідач; забезпечення позову.*