Legal nature of domain names

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Abstract. There is no consensus in doctrine and case law on the legal nature of domain names. This is because the term domain name has a legal definition, which covers only its basic, technical characteristics, but not the features of the legal phenomenon of domain name and its legal nature. An additional difficulty is created by the scarce legal framework, which uses the terms domain or domain name, but does not explain what domain names are from the point of view of law. The present study aims to answer the question of what is the legal nature of this new phenomenon for the law – domain name (domain). To achieve it, the following tasks are performed: (1) to analyze the continental and Anglo-American legal systems, making a critical analysis of the theory and case law regarding the phenomenon of domain name; (2) to analyze the supranational and national legislation, the Bulgarian legal doctrine and case law in order to clarify the peculiarities of the legal phenomenon domain name; (3) to answer the question of what is the legal nature of the phenomenon of domain name and whether it belongs to the relative or absolute subjective rights; (4) to separate the right to a domain name from the right to a trademark and from the right to a company name. Comparative legal analysis of case law and different legislative systems are performed. The technical features of domain names are outside the scope of this study. The results of the scientific research show that in the Bulgarian legislation there is no explicit regulation of domain names, which would reveal the legal peculiarities of the phenomenon. After the analysis, a reasonable conclusion can be made that the right to a domain name is a relatively subjective right, which is regulated by the general legislative framework of the Republic of Bulgaria.

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1. Introduction

On October 29, 1969, the first message was sent by ARPANET (Advanced Research Projects Agency Network), which is actually the forerunner of the Internet we know today. Since then, the web has evolved, and while the Internet was not so popular in the early 1980s, there is hardly anyone today who can imagine the world without it. What was common then and now is that the Internet continues to use the TCP / IP protocol, without which it would be impossible. It is thanks to this protocol that all resources and devices connected in the network can exchange data with each other. Each resource on the Internet has its own IP address, which a 32-bit number is written as four decimal numbers, which are separated by dots – e.g. 90.154.202.183. According to the website Domain name registration's statistics (www. domainnamestat.com) number of all registered top-level domains as of June 2022 is 594 452 504.

As the Internet gained popularity, it became clear that this type of addressing was inconvenient because users of different resources would have to remember thousands of combinations of numbers to access a particular device or resource on the network. In order to facilitate the access to resources in 1985 a mechanism was created, thanks to which the names we write as an Internet address are associated with their IP address through a special register - the so-called. Domain Name System (DNS). In practice, the DNS system is our virtual directory, which records which name (Internet resource) to which IP address corresponds (associated with it). Thanks to the DNS

system, users do not need to remember 594 452 504 combinations of 32-bit numbers, but their alphanumeric association.

At the dawn of the Internet domain, the name was understood as a verbal name through which a resource is available on the Internet. With the advent of technology and popularity, the Internet is no longer just a place to connect one resource to another or one device to another, but a whole new universe in which people communicate and retailers operate and offer goods and services. Gradually, the domain name becomes a resource for raising capital, a means of individualizing goods or services, even the subject of a transaction. As of February 2022, the most expensive domain sold is CarInsurance.com, valued at $ 49.7 million (Goodly, A, 2022). The dynamics of relations in the digital world also raise questions related to the legal nature of phenomena that are developing for the first time in the digital environment. Domain names are no exception.

2. Discussion

There is no consensus in the scientific literature and case law on the legal nature of the domain name phenomenon, and the present study is devoted to it.

There is no consensus in the Anglo-American legal system on the legal nature of domain names. Analyzing the case law of the United States and Canada, where the legal system is based on case law, three main theories can be derived about the legal nature of domain names (Mark Weston & Hill Dickinson, 2021).

The first theory based on the case of Dorer v. Arel, 60 F. Supp. 2d 558 (ED Va. 1999) assumes that a domain name is nothing more than a telephone number or address that we use to reach a particular entity. The court concluded that domain names in themselves have no value, but their value is given by the "reputation" of the trader who uses them or owns a trademark. The right to a domain would be defensible if the trademark is infringed. If the registration of the domain is not related to the possession of a trademark, the court accepts that the relationship is based on a contract between the registrant and the registrar, therefore these relationships are no different from the relationship between the subscriber and the telecommunications company which provided him with the relevant number.

The second theory assumes that the right to a domain name is a special property right. This theory is based on the idea that the right to a domain name can be the subject of a disposition transaction - it can be sold, transferred for use for a certain period, etc. The Court of Ontario, Canada in the case of Tucows.Com Co. v. Lojas Renner SA, 2011 ONCA 548 recognizes that property is a broad concept, including any including any intangible, non-material property, including domain names. To determine whether a domain has ownership, the court applies a "three-part test": "First, there must be an interest that can be precisely determined; Second, he must be able to possess exclusive possession or control; and Third, the alleged owner must have established legitimate claims of exclusivity. "The Court held that the domain was a special type of property, a new phenomenon which, however, had to be protected. Kremen v. Cohen , 337 F.3d 1024 (9th Cir . 2003) and the aforementioned three-part test to determine whether or not there is a right of ownership over a particular good. The said decision advocates the traditional understanding of property, according to Canadian law (Bruce Ziff, 2000), namely "... things that a person can own. Ownership is not actually a thing, but rather a right, or more precisely, a set of rights (over things). Explained in another way, the term property means a set of relationships between people that affect claims to tangible and intangible property. ". The court, using these arguments and basing its conclusions on the theoretical formulations of Bruce Ziff, namely that property is a set of relationships between people that relate to claims for property and intangibles, concludes that a domain name is a special non-property right that is defensible and can be considered in Ontario as a property for the purposes of Rule 17.02 (a) of the Procedural Law. The rule of Article 17.02 (a) applies to cases involving personal property.

The third theory, which advocates a number of judgments, is that the domain does not represent any special type of ownership of intangible assets, and its registration is carried out on the basis of a contractual relationship between the registrar and the registrant. In Oppedahl & Larson v. Network Solutions, Inc., 3 F. Supp. 2d 1147 (D. Colo. 1998) of the United States District Court for the District of Colorado, the court held that disputes concerning domain names are based on contract law and are brought in connection with non-performance of a contract or breach of the provisions of the domain name registration contract and the general terms and conditions applicable to it. The theory that domain names are not a special right of ownership over intangible property is also supported by English law. One of the leading registrars of domain names in the UK – Nominet (www.nominet.uk), explicitly states in its general terms and conditions that the domain name as such does not constitute any kind of property. Nominet explicitly clarifies to its terms and conditions that domain names are the addresses that each user uses to access a particular resource on the Internet. Closer to the first theory discussed above, Nominet explains that domain names work on the principle of telephone numbers, allowing computers using the Internet to find the specific location of a particular resource or email (incoming mail). The

relations that develop between Nominet and its customers are based entirely on contract law and are subject to the General Terms and Conditions accepted by the parties.

How does the Bulgarian legal theory have two theories about the legal nature of domain names?

Before discussing the legal nature of domain names, it is necessary to clarify what is meant by "subjective right". The term "subjective right" has no legal definition in a normative act, it is derived from legal theory and is defined as the recognized and guaranteed possibility of one person to have certain behavior and ask another person or persons to adhere to certain behavior, in order for the holder of the subjective right to satisfy his interest recognized and guaranteed by law (Tadzher. V, 2001).

There is a consensus in the doctrine and there is no dispute regarding the given definition of subjective right. From the given definition its characteristic features can be deduced. In the first place, subjective law always arises and only on the basis of a legal norm, it is “ a function of the legal order ”(Valchev D., 2019), which determines its content and creates preconditions for it to be guaranteed; Subjective right is a legal possibility , and it depends on the holder of the subjective right whether he will exercise it or not; Whether the holder of the subjective right will exercise it depends on his willingness to satisfy a particular interest, i.e. on the reasons for the acquisition of subjective right, on the objective pursued by the holder of subjective law - from the goal, which was pursued by the holder of the subjective right ; the last feature of subjective law is that each right corresponds to an obligation, ie. the holder of subjective law may require other entities to adhere to a particular conduct or, if they do not adhere to it, unilaterally, by force of state coercion to make a change in the legal sphere of the subjects who do not adhere to the requirements of the holder of subjective right behavior.

In the context of the present study, it is necessary to distinguish between absolute and relative subjective rights, given that in Bulgarian legal theory there is a dispute as to whether the right to a domain name is a relative or absolute subjective right. The absolute rights under Bulgarian law are numerus clauses, i.e. they are explicitly regulated by law. The holder of the absolute subjective right can oppose them to any third party, and in case of violation he can protect it, including through state coercion. Absolute right is the right of ownership, the right to a trademark, the right to a company name, etc., as the specific for each of them is that it is regulated in an explicit legal norm.

The Bulgarian legal theory maintains two opinions about the legal nature of domain names. According to Prof. Irina Tsakova, the right to a domain name is an absolutely subjective right, substantiating her thesis with the fact that the right to a domain name can be the subject of a disposition transaction - ie. to be transferred from one subject to another (Tsakova I., 2012). This thesis does not take into account that the relative subjective rights can also be the subject of a disposition transaction - transfer of receivables, replacement of a party, entering into debt, etc. Another argument in support of her thesis is Article 19, 1 of Regulation (EU) 2019/517 on the implementation and functioning of the .eu top-level domain name. The .eu top-level domain and the principles governing registration allow the registrant's heirs to ask the Registry to transfer the domain name and to be the holder of the domain name. Regulation (EU) 2019/517 is repealed by Regulation (EU) 2004/874. Even if the regulation was not repealed, there is no doubt in theory that relative subjective rights can also be inherited and the rights and obligations of the testator to pass into the patrimony of the heirs by virtue of the inheritance relationship – etc. inheritance of rights under a preliminary contract of purchase and sale. In support of this theory is the thesis that domain name is a special object of intellectual property, which is very similar to the trademark, as the domain name "distinguishes products, including services of one company from those of another, in a digital environment" (Borisov, B & Borisova, V., 2015). In fact, a domain name can be considered as a quasi-intellectual property object, but only if there is already a protected absolute right – registered trademark or other protected intellectual property right, which is infringed by the registration of the respective domain name. This will be the case when a trademark is registered and a third party registers a domain name that is identical to the trademark. In this case, the trademark holder can protect his rights by requiring the registrar to terminate the registration of the domain name of this third party and accordingly request that the domain be registered with the trademark holder. Similarly, a hypothesis would develop in which the right of the company name is violated and the domain name is registered by a third party. The right to a company name allows the trader to register the so-called "Secure domain". In case the domain is registered by a third party, who does not justify other protective rights over the domain, the registry will terminate the registration; respectively will register the domain of the trader. In both cases, the domain name is not a protected object of intellectual property, and the opposition to its registration is a means of protecting the absolute right of the trademark holder or trader (company name holder). The thesis that the domain name is a special object of intellectual property does not take into account the fact that when registering a domain on two competing grounds – e.g. trademark and company name, the domain name will be registered to the registrant who first applied for registration. This thesis does not take into account that a trademark can be registered by different applicants in different classes.

According to Prof. G. Dimitrov (Dimitrov, G., 2004), the right to a domain name is a relatively subjective right, since the absolute subjective rights are numerus clauses, i.e. they are explicitly provided for in the law and cannot by analogy be applied the legal norms regulating the absolute rights for the cases not settled in the law. Thus, the right to a trademark is an absolute right, but its regulation cannot be applied by analogy to domain names not regulated by law. The legislation in the Republic of Bulgaria defines the technical characteristics of domain names, using the term "domain name". According to paragraph 1, item 6 of the E-Commerce Act, this is "an alphanumeric or alphanumeric indication of an electronic address ensuring the identification of a resource, computer or group of computers on an Internet network by means of a standardized Internet data transfer protocol.". The definition itself gives only the technical characteristics and explains the phenomenon in a purely technological, but not legal aspect. There is no definition in the Bulgarian legislation that answers the question of what is the legal nature of domain names. The relationships that arise in connection with domain names are based on contractual relationships (contract on general terms). It is in the relations between the parties in the Register proceedings that the legal nature of domain names should be sought. According to Prof. Dimitrov, the right to a domain is not transferred in itself, because there is no such right at all (not regulated by law). The obligatory material relative right of the registry to maintain the registration of the domain name against payment of the price determined by the registry for the service (annual fee and/or maintenance fee) is transferred. This theory should be shared insofar as it corresponds to the legal nature of domain names. As stated in the Bulgarian legislation there is no regulation on the regulation and protection of domain names. The registration of a domain name is possible only upon concluding a contract under general conditions with an organization (register) accredited by ICANN (Internet Corporation for Assigned Names and Numbers). Relationships regarding the registration of domain names arise, develop and terminate on the basis of contractual relations. This theory of the legal nature of the domain name is shared by one of the theories of the legal nature of domain names from the countries of the Anglo-American legal system (contract theory).

Without entering into the theory of the legal nature of contracts, it is sufficient for the purposes of the study to note that contracts as such "do not create an objective right, but relationships from which subjective rights arise" (Yossifova, T., 2019). This means that entities have the possibility to voluntarily and freely enter into contractual relations which arise, develop and terminate in accordance with their autonomous will. In certain cases, it is not appropriate for a huge number of contractual relationships to arise after individual negotiation with each counterparty. This would not only hinder the trade turnover, but would also hinder the trader himself, as different types of service will be subject to different contractual terms for each of its contractors. For these cases, it is appropriate for the trader not to negotiate individually with each of his customers, but to develop general terms and conditions, and the contract will be considered concluded with their confirmation.

In Bulgaria the registration of a first level domain - .bg or .бг is carried out by the trade company "Register.BG" Ltd., respectively by the trade company "Imena.BG" JSC, as both companies are accredited by ICANN for Bulgaria Registers in the field of bg respectively бг (ccTLD).

The registration of domain names in the field .bg / .бг is possible either through an official registrar to the respective register or by registering through a registrar accredited by the Register. Regardless of whether the ccTLD registration is done through the official registrar or an accredited domain registration agreement in the field of .bg / .бг is a contract under the general terms and conditions. By submitting the application for registration, the counterparty (registrant) agrees to enter into a contractual relationship with the relevant Register and accepts its general terms and conditions.

As can be seen from the general terms and conditions of "Register.BG" Ltd., the registration of a domain name can be terminated:

- Upon request for termination of registration by the registrant;
- In case of non-payment of the annual/maintenance fee;
- When a domain name is inappropriate;
- Where the domain name may mislead consumers on the Internet about the goods and services offered (for example, replacing the letter "c" with " k " in the domain name so as to mislead consumers that a product is original and not an imitation product) ;
- When submitting documents with false content (e.g. when registering a secure domain);
- By decision of the competent court or the arbitration commission at Register.BG;
- When an application for deletion is submitted by a person who has grounds to use a domain name already registered by another person. In these cases, a deliberate arbitration procedure is applied, which is carried out in accordance with the General Terms and Conditions of the Register as the arbitration commission does not represent arbitration within the meaning of Art. 1 and Art. 4 of the LTA (Order №166 / 2014, SCC).

By analyzing the general terms and conditions of "Register.BG" Ltd. we can conclude that the relationship regarding domain names arises, develops and terminates on the basis of contractual relations upon conclusion of

a contract under general terms and conditions. The possibility for the Registry to unilaterally terminate the registration of a domain name and register it with another third party who has grounds for using the already registered domain indicates that the right to a domain name is a relatively subjective right. The right to a domain name may be protected, but only where an absolute subjective right is infringed and that protection is a function of the protection that the legislator gives to the absolute rights.

3. Conclusion

From the comparative study it can be concluded that the right to a domain name is not regulated by Bulgarian law and therefore its specific legal nature should be sought in the contractual relations from whom legal relations arise between the entities in the Register proceedings, respectively protected subjective rights. It could be concluded that the right to a domain name is a relatively subjective right, insofar as absolute rights are numerus clauses and explicitly regulated in a legal norm. When there is an absolute right that is defensible – trademark, company name of the trader, etc., the trademark holder or the trader may protect his infringed absolute right and require the Registry to terminate the registration of the domain name and register it to the rightful entity.

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