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DOMAIN NAME IN THE SYSTEM OF OBJECTS OF INTELLECTUAL PROPERTY RIGHTS

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Purpose: *study the actual problem of determining the place of domain names in the system of objects of intellectual property rights.* ***The methodological basis:*** *generally recognized methods of scientific knowledge, namely: analytical, comparatively legal, systemically structural and others.* ***Results:*** *the definition of the concept of a domain name in the current Ukrainian legislation was studied, a comparative analysis of the concepts of «trademark» and «domain name» was carried out, and topical problematic issues of methods and means of protecting a domain name as a separate object of intellectual property rights and as an object of different legal branches were identified, and also the suggestions for overcoming such issues were presented.* ***Discussion:*** *the discussion in the study is devoted to finding methods to solve the problem of determining the place of domain names in the system of objects of intellectual property rights and methods and means of protecting domain names as separate objects of intellectual property rights.*

Key words: *domain names; trademark; intellectual property; domain name protection.*

Problem statement and its relevance. Today, domain names are especially valuable and are used to identify individuals on the Internet, they are also included in the list of generally accepted means of individualization of participants in civil circulation. At the same time, the definitions of the concept of a domain name at the time of publication of this scientific paper are contained in the Laws of Ukraine No. 3689-XII, No. 1089-IX, No. 1280-IV, Resolution of the Cabinet of Ministers No. 522, however, the very definition of a domain name in these normative legal acts (hereinafter referred to as the NLA) contains differences.

Usually, domain names, known as identifiers for web resources on the World Wide Web, are often compared to trademarks for goods and services. Consequently, the problem regarding the presence of differences in the definitions of a domain name for different legal entities and the absence of special methods and means of protecting domain names in Ukrainian legislation indicates an existing problem in defining domain names in the system of intellectual property rights.

Analysis of the latest research and publications. Particular scientific and theoretical developments on this issue were carried out by such scientists as A.V. Aksyutina, O.V. Nestertsova-Sobakar, V.V. Tropin, O.B. Vovk, V.V. Passchnyk, N.B. Shakhovska, V.S. Yakushev, V.I. Grytsay, I. Poluektov, A. Pekar, V.V. Filinovych and others.

Purpose of the paper. In this scientific study, the author aims to study and analyze the current

legislation to define the concept of domain names, determine the place of domain names in the system of objects of intellectual property rights, identify problematic issues of the sphere mentioned and provide suggestions for their solution.

The presentation of the main material. As we know, recent research in the field of intellectual property law indicates a much greater value of the intellectual funds of business entities in comparison to their material resources.

What is intellectual property? The scientific definition of intellectual property is as follows: intellectual property is the result of the intellectual, creative activity of the person (author, performer, inventor, and the like) or several people [1, p. 23].

Its legislative definition is given in Article 418 of the Civil Code of Ukraine, according to which the right of intellectual property (hereinafter referred to as IP) should be considered the right of an individual to the result of his intellectual, creative activity, or another object of intellectual property rights defined by law. The right under consideration includes personal non-property and property rights, whose content is determined by law.

The legal status of the subjects of the rights under consideration is determined by the provisions of the Basic Law of Ukraine, its Civil Code, and special legal acts in the field of intellectual property law. Thus, Article 421 of the Civil Code defines the maker, that is, the creator of the corresponding IP object, and other persons who own intellectual property rights following the norms of the current legislation as subjects of IP rights.

Objects of IP rights are determined by Article 420 of the Civil Code. Literary and artistic works, scientific discoveries, computer programs and databases, phono- and videograms, plant varieties, and animal breeds, performances, programs of broadcasting organizations, rationalization proposals, inventions, and utility models; layouts of semiconductor products, trade secrets, trademarks, industrial designs, geographical indications, commercial names [2].

As you can see, the domain name is not mentioned in Article 420, which provides for a clearly defined exhaustive list of objects of IP rights. At the same time, domain names have characteristics inherent in intellectual property objects, are not material objects, and are the property of registrars.

To fully understand domain names, we should first comprehend the process of creating a domain name.

A domain name is a unique set of symbols and denotations assembled and created by a person in the process of intellectual activity. The registrant (the future «owner» of the domain name) does not receive from the registrar when registering a domain name the material rights to the domain name in full, but only the right to use and dispose of the domain name for a certain period [3, p. 85].

In Art. 1 of the Ukrainian law «On Telecommunications», in which «domain name» is indicated as «domain», it is indicated that the latter is part of the hierarchical address space of the World Wide Web (i.e. the Internet), it has a unique name, is served by a group of domain name servers and centrally administered [4]. Today, this regulatory legal act is no longer in force (of 01.01.2022). From the above norm of the law, it can be determined that a domain name is a unique address on the Internet for addressing computers and resources to it.

According to Article 1 of the Law «On the Protection of Rights to Marks for Goods and Services», a domain name is a name used to address computers and resources on the World Wide Web [5].

Paragraph 22 of Art. 2 of Law 1089-IX «On Electronic Communications» (dated 12.06.2020) states that the domain is part of the hierarchical address space of the worldwide network, which has a unique name (i.e. domain name) that identifies it, and is also served by a group of domain name servers and is subject to centralized administration [6].

Furthermore, the definition of the term in question is included in Art. 1 of the Law «On the Protection of Rights to Marks for Goods and Services», according to which it should be considered a name used to address computers and resources on the Internet [5].

10.04.2008 in paragraph 1 of Art. 20 of this law, a separate paragraph was added (based on Law No. 254-VI), according to which the use without the consent of the owner of a trademark certificate in domain names of the corresponding trademark should be considered a violation of the rights of the specified subject (the relevant powers are listed in

clause 5 article 16 of this Law). Therefore, the definition of a domain name in these legal acts contains differences, but the most exact definition of the corresponding concept, in our opinion, is contained in the Law of Ukraine «On Electronic Communications» (even though the term «domain name» in this law listed as «domain»).

In the studies of civilists, one can see two main points of view concerning the legal nature of the domain name. Z.Yu. Milyutin, V.I. Skiba, and S.A. Babkin adhere to the first of them, arguing that the domain name is not an independent means of individualization, and the scholars compare it with a telephone number or postal address. Scientists explain this by the fact that a domain name is provided to a certain person for use for a certain time, it is a symbol used to gain access to an Internet resource. According to this point of view, the features of its legal regime are limited to technical regulations and contractual relations. Scientists A.G. Sergo, V.O. Kalyatin, V.B. Naumov, and S.V. Petrovsky adhere to a different opinion, arguing that a domain name is: 1) a new means of individualization with a special legal regime; 2) a symbol designed to individualize information resources on the Internet [7, p. 110].

Domain registration entities are the *registrant* (a person wishing to register and delegate a domain), *registrar* (a business entity, that provides services for the technical support of the registration and operation of the domain and acts based on agreements with the administrator), and the *public domain administrator* (a business entity that administratively ensures the operation of the public domain). In Ukraine, based on an agreement with ICANN, the functions of the .UA domain administrators are performed by Hostmaster LLC) [8, p. 269].

The State Committee for Information Policy, Television and Radio Broadcasting of Ukraine, the State Committee for Communications and Informatization of Ukraine issued an Order No. 327/225 of 25.11.2002 by which the Procedure for the content and technical support of the Unified Web Portal of Executive Authorities and the Procedure for the Functioning of Websites was approved. This normative act determined that the website should be understood as a set of software and hardware with a unique address on the Internet, together with information resources that are at the disposal of a certain subject and provide access for legal entities and individuals to these information resources and other information services via the Internet. The owner of the site is the person to whom the corresponding domain name is registered. For a site to be tagged with a specific domain name, it is first necessary to register the domain name in the corresponding domain [9].

In the 21st century, almost every enterprise, small and large, uses the Internet to offer its goods and services to a potential client (buyer).

As of the date of publication of this scientific article, a fairly common there is the situation in which the commercial name of a certain enterprise is part of the name of the domain name used by such an enterprise to individualize it on the World Wide Web. That is the domain name performs the functions inherent in the means of individualization of legal entities, their goods, and services.

As an example, we can cite such companies as LLC «ROZETKA. UA» (code of the Unified State Register of Enterprises and Organizations of Ukraine (hereinafter – USREOU): 37193071), it has a domain name https://rozetka.com.ua/, LLC «ELDORADO» (USREOU code: 13917349) has a domain name https://eldorado.ua, LLC «MOYO TRADE» (USREOU code: 43633171) has the domain name https://www.moyo.ua, LLC «NOVA POSHTA» (USREOU code: 31316718) has the domain name https://novaposhta.ua.

Also, quite often today there is a phenomenon when, before the appearance of creative work (object of IP), everyone can get preliminary information about it on the website. As a rule, when creating its domain name, the title of the work is translated into English. That is, the object of copyright appears only in the form of the title of the work, which, following Article 9 of the Law of Ukraine «On Copyright and Related Rights», is protected in the same way as the entire work [10].

This is because the procedure for delegation of second-level domain names in the «.UA» zone is regulated by the Regulation on the Peculiarities of Registration of Second-Level Private Domain Names in the «.UA» Domain and the Regulation on the Public Domain. These documents were produced by Hostmaster LLC, so they are not the regu-

latory framework governing this process. At the legislative level, there is no procedure for delegation of domain names, so the courts, considering disputes arising from the legitimate use of domain names, perceive the provisions of these documents differently.

Under clause 3.3 of the Regulations on the Peculiarities of Registration of Second-Level Private Domain Names in the «.UA» Domain, private second-level domain names in the «.UA» Domain should be delegated only if the corresponding domain name is fully or in its second-level component (before the sign, but not including this mark), in spelling coincides with the mark, the rights to use which on the territory of Ukraine belong to the corresponding registrant [11].

Therefore, from the analysis of the provisions of the above regulations, we can conclude that to obtain a domain name with the ending «.UA», the registrant must own a Mark for goods and services Certificate (Trademark Certificate) valid on the territory of Ukraine, that is, the registrant must have a trademark registered in the prescribed manner, a name of which matches the desired domain name.

The commercial value of a domain name gives rise to several difficulties in its use, because such a name is a single resource, in the use of which several people are often interested at once. According to statistics, the number of disputes between applicants for domain names is steadily increasing. As Francis Gurry, director of the World Intellectual Property Organization's Center for Mediation and Arbitration, argued, this is due to the importance of the Internet for business. In addition, the availability of domains makes them an «ideal springboard for unfair competition» [13, p. 26].

At the same time, there is also the problem of «cybersquatting». Cybersquatting is a «hijacking» of domain names for commercial gain (it is illegal). While such an unlawful act is a fairly common way to «earn money» in many developed countries of the world, it appeared practically at the outset of the World Wide Web as such. Most often, cybersquatting exists in the following forms: the acquisition of domains and their subsequent resale at prices higher than the first price or the purchase of such domains, whose names coincide in whole or in part with the names of well-known brands recognizable on the market [14, p. 73].

The «fight» for the google.ua domain broke out between GOU OGLE LLC and Google Inc back in 2006. During this period, Ukrainian businessmen registered two trademarks called Google and Go Ogle. Then, under one of them, the domain name google.ua was registered. For a long time, Internet users visited the google.ua website, but the system redirected them to a third-party resource – a dating site.

According to the management of Google Inc, it is not entirely correct to use a domain name and a trademark in such a concept, because it misleads users about the entity providing search and data placement services. And therein lies the rationale.

Google Inc filed a lawsuit demanding that GOU OGLE LLC cease using the commercial brand name Google in the google.ua domain, and the administrator of this name, Hostmaster, stopped delegating the google.ua name to GOU OGLE LLC and transferred it to Google Inc.

Disputes in court continued for more than 5 years and as a result were transferred to the Supreme Economic Court of Ukraine, which finally resolved this issue. In case 12/25, he approved that GOU OGLE LLC was obliged to stop using the Google name in the google.ua domain. Then this domain was transferred to Google Inc [15].

As for the legal position of the Ukrainian courts, it should be noted the decision of the Court of Appeal of the city of Kyiv of 17.07.2018 in case № 761/39376/16. According to it The Panel of Judges of the Judicial Chamber for Civil Cases of the Kyiv City Court of Appeal noted that at the time of registration of the second-level domain name INFORMATION_4 by PERSON_5, PERSON_2 did not have valid rights concerning this domain name, the classes of goods and services under the International (Nice) Classification of Goods and Services for the Purposes of the Registration of Marks are different, and no evidence was provided about violation of p. 1 of Article 20 of the Law «On the Protection of the Right to Marks for Goods and Services» (while Hostmaster LLC is the administrator of a public domain that performs a set of organizational and technical measures). So the panel of judges agreed with the conclusions of the

court of the first instance that there is no violation of right.

We should note that from March 19, 2019, the out-of-court dispute resolution procedure in the World Intellectual Property Organization (WIPO) Arbitration Center began to operate in the «.UA» domain under a unified procedure based on the UDRP (Uniform Domain Dispute Resolution Policy). Arbitration does not exclude the possibility of considering claims in the courts but is aimed at avoiding this process. The purpose of out-of-court settlement is speed, cheapness, and convenience for the parties, but only after a while, it will be possible to say whether this is the case and whether the arbitration will help to avoid litigation altogether. However, the courts continue the proceedings.

Conclusion. Following the analysis of the above content, we can argue that the domain name has some unique features, such as:

- absolute uniqueness – since it is impossible to have two or more absolutely identical domain names on the World Wide Web;
- intangible nature – because the domain name is not an object of the material world;
- commercial value – as it was established, to register a domain name, the registrant must have a Certificate for a mark of goods and services valid on the territory of Ukraine;
- specific objective form of expression – for domain names there is an established form of registration;
- unlimited in space – since the domain name is not an object of the material world, its use is not limited in space.

At the same time, the current Ukrainian legislation does not establish that a domain name is an object of intellectual property since it is not provided for either by Article 420 of the Civil Code or by other current normative legal acts regulating activities in the field of intellectual property. This situation reveals the current problem of determining the place of a domain name in the system of objects of intellectual property rights and, more importantly, the availability of methods and means of protecting a domain name established by law as a derivative means of individualization.

In our opinion, the relevance of such an issue to Ukrainian legislation is a big problem, because along with the dynamic development of economic activity using the World Wide Web and the rapid transition of many types of economic activity online, the number of conflicts related to the use of domain names by business entities in violation of principles of fair competition increases, as well as the number of disputes arising from violations of intellectual property rights.

The ways to solve this difficulty, in our opinion, are the improvement of Ukrainian legislation in terms of determining the place of domain names in the system of objects of intellectual property rights, taking into account their features, and establishing methods and means of protecting the rights of domain name users in cases of violation of their rights to the corresponding domain names.

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ДОМЕННЕ ІМ'Я В СИСТЕМІ ОБ'ЄКТІВ ПРАВ ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ

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Сьогодні майже кожен, від звичайної людини до великої компанії, є користувачем інтернету, тому не дивно, що в інформаційному просторі збільшилося використання доменних імен. У той самий час зростаюча популярність доменних імен призводить до все більших зловживань та правоворушень в інформаційному просторі. Для здійснення якісного захисту прав користувачів доменних імен необхідно розробити відповідні правові положення, які б грунтувалися на повному розумінні природи та особливостей доменних імен.

Автори вказують на те, що в чинному законодавстві України не міститься єдиного та повного визначення поняття «доменне ім'я», що перешкоджає визначенню його правової природи та виокремлення його як окремого об'єкта права інтелектуальної власності. В нашій державі правове регулювання здійснюється на досить низькому рівні, що призводить до таких явищ, як «кіберсквоттингу», та великої кількості судових спорів. ***Дискусія*** *у статті розкриває природу доменного імені з різних точок зору. Як результат досліджень автори статті відзначають особливі риси доменного імені та зазначають на необхідності виділення доменного імені на законодавчому рівні як об'єкта прав інтелектуальної власності для встановлення ефективної системи захисту прав користувачів доменних імен.*

Метою *дослідження є вивчення проблеми визначення місця доменних імен у системі об'єктів прав інтелектуальної власності* ***Методологічну основу*** *наукового дослідження склали традиційні методи, як аналітичний, порівняльно-правовий, системно-структурний, та окремі спеціальні методи.*

Результатом *дослідження став аналіз способів визначення поняття доменного імені у чинному українському законодавстві та проведення порівняльного аналізу понять «торгова марка» та «доменне ім'я». Автори також виявили актуальні проблемні питання щодо способів або засобів захисту доменного імені як окремого об'єкта права інтелектуальної власності або як об'єкта інших галузей права, та надали пропозиції щодо подолання таких проблем.*

Ключові слова: *доменні імена; торгова марка; інтелектуальна власність; захист доменних імен.*

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