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Report Q173

in the name of the Hungarian Group
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Issues of co-existence of trademarks and domain names: public versus private international registration systems

1. Analysis of current domain name registration procedures

1.1 Nature of signs

What is the status of a domain name in your country? Does the registration of a domain name confer exclusive rights to the proprietor? Can domain names be the subject of dealings such as assignment, mortgage and the like?

Apart from their primary function and definition of being source identifiers, it has been widely recognized, both internationally and nationally that domain names have become very important business identifiers, in many ways akin to trademarks. That is being the case in Hungary as well. Registration of a domain name confers *de facto* exclusivity to the proprietor. Although there is no *expressis verbis* recognition of domain names giving their proprietors exclusive rights (on the contrary to trademark rights for example) there are multiple rights attached to and associated with domain names. They can be used, assigned, mortgaged, with or without consideration, however they cannot be inherited, at least not under the current Rules of Registration (hereinafter: Rules).

1.2 Legislation

Is there any legislation in your country dealing specifically with domain names and the domain name registry? If so, please describe it.

There is no legislation in Hungary dealing specifically with domain names and the registry. A self-regulating entity running and operating the Hungarian Registry has adopted its own Rules, which contain regulation regarding acquisition, registration and maintenance of domain names.

1.3 Type of registry

Which organisation has been assigned responsibility for the ccTLD domain in your country? Is this organisation a public or a private entity? If it is a private entity is it subject to a regulator? Is the registry's conduct of business (e.g. the setting of registration fees) subject to judicial or independent review?

The entity operating the Hungarian Registry of the .hu ccTLDs and a number of .hu cc-SLDs (such as: co.hu, org.hu, info.hu, tm.hu etc.) is the Council of Hungarian Internet Service Providers, a self-regulating non-profit corporation performing activities of public interest. Pursuant to the Act on Non-Profit Organizations of Hungary, such organizations are subject to supervision of the tax authority for tax purposes, of the State Audit Office for auditing the utilization of budgetary subsidies (if such a source is available), and of the public prosecutor's office for judicial purposes. This means that the Registry's conduct of

business (obtaining, registering and maintaining rights in and to domain names, various types of disputes regarding all these matters) is not subject to any regulatory or judicial supervision or control.

1.4 National treatment

Does the applicant require legal or natural status in your country to register a domain name?

In general, both natural and legal persons may obtain domain name registrations, irrespective of their national status. However, foreign applicants are entitled to obtain registration of .hu ccTLDs only if they have a valid trademark registration or a registered establishment under the name matching the domain name sought.

1.5 Bars to registration

Is the domain name registry in your country entitled to reject applications on public policy grounds? If so, on which grounds (e.g. immorality or generic terms)?

Illegal, offensive, frightening and/or abusive applications might all fall under the scrutiny of public policy, and constitute grounds for rejection. On the other hand, the Registry excludes the responsibility of mandatory acting when public policy protection would so require.

1.6 Appeals

Does the applicant for a domain name have the right to appeal against the refusal of the registry to register a domain name? If so, to which entity and based on what kind of procedure (e.g. arbitration or administrative procedure)?

In case a Registrar has refused to process a domain name application, both the applicant and the Registrar may turn to the Advisory Board of the Council of Hungarian Internet Service Providers for taking stand on the registrability of the domain name, provided that a prescribed fee is paid. In case the Registry has refused registration of an application processed by a Registrar, it may also turn to the Advisory Board, whose recommendation will be binding for both the Registrar and the Registry. The Advisory Board has adopted and is applying its own procedural rules.

1.7 Publication, opposition and cancellation

Is the application for or registration of a domain name made public in your country? Is there any procedure available to third parties to oppose such application (prior to registration) or registration? If so, on what (relative or absolute) grounds (e.g. prior trademark registration or generic term) and based on what kind of procedure (e.g. arbitration or administrative procedure)? Is it possible for a registered domain name to be cancelled? If so, by whom and on what (relative or absolute) grounds (e.g. prior trademark registration or generic term)? Is it possible to request cancellation of a domain name based on general statutory law (e.g. unfair competition law)? Which procedure is followed, in the case that cancellation is required? Is the ccTLD registry liable for domain names which infringe trademarks?

The Rules recognize two types of domain name applications: priority applications, meaning that the applicant has either trademark or company name rights in the name sought, and non-priority applications when no such title is available to and presented by the applicant. Contrary to priority applications, non-priority applications are advertised for a period of fourteen days following publication, within which period third parties may oppose such applications. Grounds include those of public policy relevance, as well as prior rights to the domain name applied for. The decision on whether the domain name is registrable for the applicant will be taken by the Advisory Board, provided the due fees are

paid. Third parties having prior trademark and/or company name rights matching the domain name applied for may overtake the application by filing a priority application within those fourteen days. Once the domain name is registered, there is no possibility to formally request its cancellation, neither under the Rules, nor under the general statutory law.

However, the Rules provide for an option that the Registry itself may withdraw a registration that was obtained in clear violation of public policy principles, in violation of the Rules, or in violation of others prior rights to the domain name. Since there is no procedure adopted for such a remedy, and what is more important, no clear set of provisions as to which criteria must the applicant satisfy in order to get that remedy, the Registry will not be restricted as to how to proceed (if at all) upon such requests of third parties.

Irrespective of the Registry's preclusion from any kind of responsibility in case of registration of domain names infringing trademarks, we are of the opinion that the general principles of liability under the Code of Civil Procedure might be applicable, of course pending circumstances of each particular case (e.g. the Registry takes active role in registering such a domain name, or assists in some fashion in acquisition of such a domain name).

1.8 *Maintaining the registration*

Must use requirements be satisfied in order to maintain the domain name registration? If so, is there any definition of what constitutes use? Is a renewal fee payable, in addition to, or in place of, a maintenance fee?

Domain names registered under either the .hu ccTLD or any of .hu ccSLDs need not be used in order to be maintained. Domain names are considered to be properly maintained as long as maintenance fees are paid and the technical operability ensured, which also means that since there is no formal renewal obligation, maintenance of a domain name registration is not subject to payment of any renewal fee.

1.9 *Generic Top-Level Domains (gTLDs)*

Are gTLDs subject to regulatory control in your country? If so, in what ways? Are there any differences to the treatment of ccTLDs? If so, what are they?

gTLDs are not subject to any control in Hungary.

2. Proposals for adoption of uniform rules

2.1 *Nature of signs*

Should the registration of a domain name confer exclusive rights to the proprietor? Should domain names be subject of dealings such as assignment, mortgage and the like?

In our view a domain name should be recognized as property with a bundle of exclusive rights accrued, such as right to use, profit from, assign, dispose of, mortgage and inherit the same.

2.2 *Legislation*

Should legislation be enacted to deal specifically with domain names and domain name registries?

No.

2.3 *Type of registry*

Do you think the domain name system should be administered by public or private entities?

If you think that the DNS should be administered by private entities should they only perform technical functions or should they also perform policy functions? If you think that they should only perform technical functions who should perform the policy functions? What do you think Government's involvement in a privately administered DNS should be? If the DNS is administered by private entities do you think that their actions should be subject to a regulator and to an independent review? If so, which institutions should perform these functions?

If you think that the DNS should be administered by public entities which institutions should perform the technical and policy functions? Should the assignment of gTLDs and the key internet co-ordination functions (e.g. the stable operation of the Internet's root server system) be performed by a treaty based multi-governmental organisation? If so, should an existing organisation such as WIPO or ITU be tasked with these functions or should a new one be created?

One can hardly argue with the view that in general, Registries function in environments of great public or common interest, while at the same time the Internet community has widely been driven by the way of transparent, private sector managed organizations (e.g. the Hungarian Registry is a self-regulatory body), for many reasons. If an efficient solution can be found and these two principles can coexist, we see no particular reasons for assigning all or any of the attached functions to public entities or governmental organizations. However, we support private entities performing important public or common interest functions only in case of a global, transparent and responsible representation of all concerned.

2.4 *National treatment*

Do you think domain name registries should be entitled to impose restrictions on the application process based on the nationality of the applicant?

We think that all ccTLDs should be available to potential applicant irrespective of their nationality or other alike requirements. Defensive registration have proven to be a fairly efficient way in protecting interests in various intellectual property related assets, and in addition, national regimes should focus more on providing adequate recovery and enforcement options, instead of restricting availability, in many cases affecting potential bona fide applicants.

2.5 *Bars to registration*

Do you think domain name registries should be entitled to reject applications on public policy grounds? If so, on which grounds (e.g. immorality or generic terms)?

Yes, in cases of obvious violation of basic public policy requirements, registries should be given such an entitlement. Clearly and easily recognizable offensive and abusive applications, offending, shocking applications could all fall under such scrutiny.

2.6 *Appeals*

Do you think that the applicant for a domain name should have the right to appeal against the refusal of the registry to register a domain name? If so, to which entity and based on what kind of procedure (e.g. arbitration or administrative procedure)?

The possibility of appealing refusals of domain name applications would make the whole system working more transparent, and with that, more acceptable and appreciated by the general public. It would be up to national regimes to determine how, and through which

authorities would the system be supervised. Such authorities could then be in charge of appeals (likely subject to payment of certain fees), based on a procedure embodied in basic set of regulations. We stress on the importance of the appeal body being completely independent from the Registry.

2.7 *Publication, opposition and cancellation*

Do you think that the application for or registration of a domain name should be made public? Do you think that there should be a procedure available to third parties to oppose such application (prior to registration) or registration? If so, on what (relative or absolute) grounds (e.g. prior trademark registration or generic term) and based on what kind of procedure (e.g. arbitration or administrative procedure)? Do you think that it should be possible for a registered domain name to be cancelled? If so, by whom and on what (relative or absolute) grounds (e.g. prior trademark registration or generic term)? Do you think it should be possible to request cancellation of a domain name based on general statutory law (e.g. unfair competition law)? If so, which procedure should be followed? Do you think domain name registries should be liable for domain names which infringe trademarks?

Yes, we do. Publication of both the applications and registrations would ensure greater transparency of the whole system and with that, be better accepted by all concerned and interested in. We are in support of giving space for both the opposition and cancellation possibility to third parties. Grounds for opposition could include violation of basic public policy principles, as well as violation of third parties' prior rights in and to the domain names sought. Deciding on oppositions could remain in competence of the registration authority, with a possibility to appeal such decisions at the body controlling and supervising the Registry (in Hungary it could be the Communications Authority or the Ministry of Informatics and Communications). Cancellation of a domain name registration could be sought before the controlling and supervising body. The procedure that could govern such proceedings could be embodied in the set of rules regarding acquisition, registration and maintenance of domain names. Provided that a workable solution is found within the Rules (of course including any and all amendments required to achieve this goal), we do not think that grounds for cancellation should necessarily be vested in general statutory law.

2.8 *Maintaining the registration*

Do you think that use requirements should be satisfied in order to maintain the domain name registration? If so, what should constitute use? Should a renewal fee be payable, in addition to, or in place of, a maintenance fee?

For the moment, we do not consider timely to adopt use requirement obligation against domain names. Until there is no formal renewal requirement, and the domain names can be kept maintained by paying the requisite maintenance fees, and fulfilling technical operability criteria, we see no reason why payment of any renewal fees should be introduced.

3. Assessment of the trademark registration system

Do you think that the publicly administered trademark registration system is adequate and sufficiently efficient as compared with the privately administered system of domain name registration? If not, please explain.

We do not question adequacy of publicly administered trademark registration systems, while being in support of a globally represented, fully transparent and responsible privately administered domain name registration system. These two systems do not necessarily down one another, and in our view can coexist.

4. Miscellaneous

Modern digital age, in using Internet - among others - as a powerful business tool, has been in many ways racing ahead of the international and national regulatory frameworks. It is a question to a certain extent whether we are fully able to adequately articulate how this has been changing us, and what should we do in order to get as much as possible out of it.

The Hungarian Group recognizes how the current international and national domain system management developed, as well as the reasons that led to an extreme role of technical coordinators in addressing important public policy issues. The Group does not underestimate the importance of technologists organized around the Internet society, but questions that this is appropriate to justify their excessive control of the name and address space, a situation that triggered controversies, concerns and disputes.

On the other hand, it is not without reasons that a fast changing and unpredictably developing regime, such as the administration of the domain name system might need more flexible frameworks than those adopted and operated by international and national public authorities.

Beside all these assessments, there is little doubt that private entities - both internationally and nationally - play a serious policy making role, which is usually performed in our society by public entities.

On the basis of all these, the Hungarian Group is in favor of reaching a compromise between the two considerations, meaning that private entities could remain in charge of domain name management on conditions that they pursue procedural regularity, seek for community consensus, and operate an open, accountable and responsible system, much more administrative than policy making type.

Summary

The Hungarian Group is of the view that domain name registration and management systems better fit into privately administered environments, rather than into publicly administered ones. However, the Hungarian Group is in support of such a solution only if registration and management of domain names is subject to an ultimate authority on which behalf the system is administered in the best public and common interest.

Résumé

Le Groupe Hongrois est d'avis que le système d'administration des noms de domaine devrait être de préférence un système administré dans le cadre de la sphère privée. Il devrait cependant être subordonné à une autorité supérieure sous le contrôle de laquelle les stocks d'informations et de données seront administrés conformément à l'intérêt général et public.

Zusammenfassung

Die Ungarische Gruppe ist der Ansicht, dass das Domainname-Verwaltungssystem mit Vorzug ein im Rahmen der Privatsphäre verwaltetes System sein sollte. Es sollte jedoch einer höheren Behörde unterstellt sein, unter deren Aufsicht die öffentlichen Informations- und Datenbestände dem öffentlichen und allgemeinen Interesse entsprechend verwaltet werden.