

THE RELATIONSHIP BETWEEN DOMAIN NAMES AND INTELLECTUAL PROPERTY

العلاقة بين أسماء النطاقات والملكية الفكرية

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Abstract:

The rights of Intellectual property are considered as moral rights. These rights, which come to non-material things, are the product of human thought and mind. They are developed and applied on the ground to become an intellectual product that may be material or moral. Among these ideas and innovations that has been emerged in recent years is Domain names.

This term is often related to the domain of intellectual property in its branches. The reason for this is the novelty of this subject and its relevance to the field of information technology, in addition to the similarities that are associated with concepts of intellectual property such as trademarks and trade names. For example, more domain names in the field of intellectual property its disputes under the laws of similar elements such as the trademark.

key words : *The Intellectual property; moral rights; Domain names.*

المخلص:

تعتبر حقوق الملكية الفكرية حقوق معنوية، فهي تلك الحقوق التي ترد على أشياء غير مادية تكون نتاج الفكر والعقل البشري، حيث يتم تطويرها وتطبيقها على أرض الواقع لتصبح نتاجا فكريا قد يكون ماديا أو معنويا، ومن بين هذه الأفكار والإبداعات التي استجدت في السنوات الأخيرة هو موضوع أسماء النطاقات.

هذا المصطلح كثيرا ما يرتبط بمجال الملكية الفكرية بتفرعاتها، وسبب ذلك هو حداثة هذا الموضوع وارتباطه بمجال تكنولوجيا المعلومات، إضافة لأوجه الشبه الكبير الذي تربطه بالمفاهيم السائدة في الملكية الفكرية كالعلاقات والأسماء التجارية مثلا، وما يقرب أسماء النطاقات أكثر بمجال الملكية الفكرية هو اللجوء لحمايتها وحل منازعاتها في ظل قوانين العناصر المشابهة لها كالعلاقة التجارية.

الكلمات المفتاحية:

الملكية الفكرية- الحقوق المعنوية- أسماء النطاقات.

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INTRODUCTION:

Intellectual property rights constitute the highest forms of ownership ever, and are reflected in the connection of these rights to the human mind, creativity and intellectual manifestations. Intellectual property rights grant their owners exclusive rights in their intellectual production.

Intellectual property rights are divided into intellectual property rights and industrial and commercial property rights. Recently ,a new type of intellectual property rights has emerged, namely digital property rights or so-called intellectual property rights on the Internet that coincided with the emergence and development of the Internet, As the domain name, which has attracted the attention of the players in all fields, and the reason for the economic value it represents, as it has become the cornerstone of the projects created by companies, and represents their reputation and attractive power, as well as their marketing ability.

In front of this role played by domain names and the status it has taken among other intellectual property elements, it has become necessary to reconsider domain names as they are no longer just Internet addresses, but are becoming an enriching factor for companies through the economic returns that derive, As well as their marketable economic and financial value.

In intellectual property no law is needed to expand to include new elements, domain names are not the first intellectual property rights created without legislative intervention, preceded by the commercial name and trade address established by the jurisprudence, if domain names are legitimate and not prohibited from registration, must be subject to intellectual property law, and the problem that may arise is the domain name's location within these rights. Can it be considered as an existing intellectual property right? Or can the domain name be included in industrial and commercial property rights?.

1 - JURISDICTIONAL OPINION ON ASSIGNING DOMAIN NAMES TO INTELLECTUAL PROPERTY RIGHTS :

The jurisprudence on several occasions emphasized that the domain name should be protected, which implies recognition of an exclusive right to the domain name. This was confirmed by the Court of Strasbourg, which ruled in the case of *Alsaceimmo*, : " And that such protection arises from registration and is acquired through use on the Internet⁽¹⁾. "In order to meet this need for protection, the majority of the decisions made the domain name a distinctive mark, hence the Lons explicitly stated that the domain name was a trademark Through its ruling in 2003 in the case of (*pernoel.com*) the "domain name can be classified in the category of protected markings"⁽²⁾ , and the Court of the First Instance in LEMANS approved earlier through the issue of (*Océanet*)⁽³⁾ in June29, 1999 that

The domain name may give the trademark the right of priority and precedence, in accordance with the provisions of article (L711-4) of the Intellectual Property Act of France.⁽⁴⁾

On 18 October 2000, the Court of Appeal of Paris established conditions for the protection of a domain name which proved to be the same as the protection of distinctive marks. The legal status of the distinctive mark granted by the Court to the domain name allowed the same protection for both, in particular threats to the domain name directly, from this , the court has emphasized that , "according the commercial value of the domain name for the company it owns, it can be protected against any infringement it may cause. This does not preclude the necessity of powering the rights of the conflicting parties to the judicial authorities regarding the name claimed, as well as the primacy of its use in comparison with the disputed mark and the possibility of confusing among the public regarding the spread of the latter (the mark) ⁽⁵⁾ .

From the preceding paragraph, we clarify the three conditions for the protection of the distinctive mark of legality, availability and discrimination, and that the protection of the domain name in the same way as the protection of a trademark is explained by its belonging to the same category. In order to protect the domain name, the court requires the owner of the domain name to prove his or her legitimate right over the chosen name, which implies that the acquisition of a right over the domain name by legitimate use and thus does not affect the rights of others, for the purpose of ensuring that the domain name is protected against another label that must logically prove the primacy of use.⁽⁶⁾

Finally, a domain name can only be protected when there is confusion in the public because of these two symbols. This refers to the principle of specialization. This principle allows for the registration of two identical trademarks by two different companies, provided that the services and products represented by this mark differ for each company. That in the ordinary situation the mark does not result in any ambiguity with a similar mark when it is used in a different activity, and it is therefore emphasized that "confusion is the standard and the extent of protection recognized to holders of such an identifier, "thus, the confusion of the audience reduces the degree of discrimination of the mark⁽⁷⁾, therefore, must be eliminated.

We note that the jurisprudence refers to trademark law for the purpose of ensuring the protection of domain names, which is the same as the procedure for alternative dispute resolution procedures related to domain names at the international and national levels.

2 - THE DOMAIN NAME LOCATION OF THE INTELLECTUAL

PROPERTY ELEMENTS:

Most of the jurisprudence adds the nature of the domain name to industrial and commercial property rights, while another jurisprudential trend is emerging that establishes a new idea that the domain name is a private legal idea independent of similar elements

A - DOMAIN NAME AND BRAND:

The relationship between a trademark and a domain name is very strong , since it is effective in the domain of communication to use a domain name from a trademark known to its customers. That is why many disputes between domain name owners are associated with trademark owners that reward them.⁽⁸⁾

Prior to this, the definition of the trademark must be examined in Algerian legislation, as defined by the Algerian legislator. The trademark in the text of Article 2 of the Trademark Law No. 03/06 is defined as "the mark of the commodity or service is mandatory for any goods or services provided, sold or Offered for sale through national territory, and all symbols capable of linear representation, especially words, including names of persons, letters, numerals, drawings, images and distinctive forms of goods or their illustration and colors alone, all used to distinguish goods or services of a natural person or a moral about the goods or services of others".

The trademark protection field is restricted by the principles of the region and specialization. These principles include the need to register a trademark for specific products on a specific territory. These principles permit the coexistence of identical marks on different regions or in a single region when it comes to different products.⁽⁹⁾

On the other hand, the domain name is not subject to the above principles. It is unique and international, where domain names cannot coexist, and only the same domain name can be registered from level 2 in different domains of the first level. (As in the case of the trademark) which performs the identification function⁽¹⁰⁾. This explains why some jurists have resorted to the assertion that the domain name is a "de facto international trademark"⁽¹¹⁾ , that only needs one registration and not several as they require international protection and thus the domain name can over ride the trademark.

This analysis has a lot of criticism. Firstly, it is undeniable that the majority of disputes subject to settlement procedures are for the benefit of trademark owners, not for domain name owners. This indicates that the brand is strong enough to outweigh the domain name. , If some domain names are able to overcome trademarks, they can not be considered as trademarks, and with respect

to the fact that domain names are not subject to the principle of specialization and territory, it is for technical reasons.⁽¹²⁾

Although the jurisprudence considered domain names a trademark capable of granting precedence over the trademark⁽¹³⁾, and went so far as to confer the same legal force, domain names nevertheless could not obtain the same legal definition of the trademark, and two adjudications (court rulings) explicitly rejected this Adaptation to domain names⁽¹⁴⁾.

The name of the domain does not necessarily have a distinctive character, whereas the discriminatory nature of the trademark and the object of this is set out in article 22 of the Algerian Trademark Law⁽¹⁵⁾. The French legislator provided for this in article (L711-2)⁽¹⁶⁾ French intellectual property.

On the other hand, it seems that trademark law with a regional application area is difficult to apply to a domain name that does not recognize geographical boundaries. Therefore, the principle of regionalization cannot be applied to the first level or top-level domains because it can be accessed from any region the world.⁽¹⁷⁾

Finally, there is a difference in function between the trademark and the domain name, although both perform the identification function but do not specify the same things. The trademark helps to "distinguish between the products or services of a natural or juridical person" (L711-1)⁽¹⁸⁾ The domain name identifies the operator on the Internet for the purpose of proposing goods or services or advertising for his or her economic activity "⁽¹⁹⁾, hence the jurists noted that the domain name is ultimately closer to the commercial address to name Trade with the similarity between these signs in turn is not complete.

B - DOMAIN NAME AND TRADE NAME:

The Algerian legislator only included the definition of the trade name in the Trademark Law specifically the fifth paragraph of Article 2, which states that "the trade name: the name or address that defines the establishment", and the reference to the trade name as a component of the business,) Of the Algerian Commercial Law No. (75/59) of 1975, which states that "it is part of the commercial premises... and also includes all the other funds necessary for the exploitation of the commercial premises, such as the address of the shop and the trade name, Commercial No. (79/15) for the year 1979 that "the registration data must contain all the Information on the identity, nationality, eligibility, trade name ,and commercial address.⁽²⁰⁾

A trade name can be defined as a designation by which a natural or legal

person exploits a store to distinguish it from other stores and is an element of it. Some domain names can apply this definition, particularly when the company's existence is limited to the Internet only)⁽²¹⁾, But this is not always the solution since the majority of domain names can be excluded from this definition, in particular the domain names of persons. Moreover, like trademark protection, trademark protection is subject to the principle of territoriality. For this, the domain name has an international dimension, therefore its protection cannot be regional⁽²²⁾.

C - DOMAIN NAME AND COMMERCIAL ADDRESS:

The Algerian legislator did not issued a definition of the commercial address except what has been mentioned in the article 78 of the commercial law and the code of trade record 15/79.

The Jurisprudence defines the commercial address as "a land mark of the commercial local that distinguish one from the others"⁽²³⁾ As a result, the definition of the commercial address is similar to that of domain Name. (Greoire Loiseau) defines domain name as follows " it is as the commercial address that a specific company uses it in the network as a virtual platform that enable clients to contact the company to get goods, service, or to ask about the commercial activity of the company"⁽²⁴⁾this scholar considers the commercial address is the name that distinguish the company, this may go with the function of the domain name that present the commercial local in the Internet. Several objections can be made, since the protection of the trade address and the reverse of the domain name is subject to the principle of regionalization. Furthermore, this definition excludes many domain names, and indeed the various definitions of the trade address always refer to the concept of a company, enterprise or business. In fact a company or business does not allow or support a business⁽²⁵⁾.

D - DOMAIN NAME AS A NEW ELEMENT OF INTELLECTUAL PROPERTY:

In contrast to the position of the jurisprudence and the justice regarding the inclusion of domain name within the elements of industrial and commercial property, another trend considers that domain names is a new element of specific nature that should be organized under special provisions. The authors of this view argue that domain names have many functions that make them a new element of industrial and commercial property. Domain names have a technical function that contribute in determining the websites and distinguish one from others, in addition to the economic importance that represent the company that active in the network. The authors of this trend argue also that it is Impossible to match the legal nature of domain names with similar elements such as: the brand, trade

name and commercial address due to the fundamental differences that have already been stated⁽²⁶⁾.

In the view of the above, the proposition is made that domain names are a new element to the elements of industrial and commercial property. This new element is of special legal nature for the technical function it performs, its area of operation and the planned protection space, without neglecting the legal system that govern this element.

CONCLUSION:

The present study ends to the following findings and recommendation:

- The legal aspect that acquired the domain name makes it a major focus of research and study by the jurisprudence and the judiciary. This is because the domain name has great legal effects on its owner and other parties, such as the owner of the domain name is subject to attack constitutes an attack on legitimate rights. Domains represent an interface for organizations and companies to spread their activities in all fields.

- Domain names are unique and distinctive addresses used to locate their webmasters and their owners, as they distinguish projects from each other.

- Domain names have taken their place in intellectual property rights, and their technical function has gone beyond the characteristics that have attracted the attention of actors in most areas.

- In view of the increasing role of domain names on the Internet through the functions it carries in the addressing and identification. It becomes close to some of the existing legal elements, and emerged many of the jurisprudential views in the adaptation of domain names, and showed us through the review that the domain name is not a form of special brand. Because there are fundamental differences between them in technical and esthetic terms. The other juristic trend considers the domain name to be an independent right of a special nature.

- The legal nature of domain names is still in development and what has been reached so far is due to the judicial efforts of both ICAAN and OMPI without the interference of legislation.

- Domain names belong to intellectual property rights, specifically industrial and commercial property, but as a new element with its rules and provisions.

- We suggest a legislative intervention in Algeria to determine the legal rules of domain names. It does not just leave terms and conditions imposed on the applicant without taking into account the interests of the owner of the domain name and other parties. This is achieved through an authentic draft law guaranteeing full and comprehensive protection of domain names and rights.

- The need to involve professionals in drafting laws for their experience in understanding technical issues and technological terminology more than men of law.

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- (3) TGI Le Mans, 29 juin 1999. Disponible sur: <http://www.legalis.net/jnet>.
- (4) L'article (L711-4) CPIF "Ne peut être adopté comme marque un signe portant atteinte à des droits antérieurs, et notamment :
- a) A une marque antérieure enregistrée ou notoirement connue au sens de l'article 6 bis de la Convention de Paris pour la protection de la propriété industrielle ; b) A une dénomination ou raison sociale, s'il existe un risque de confusion dans l'esprit du public ; c) A un nom commercial ou à une enseigne connus sur l'ensemble du territoire national, s'il existe un risque de confusion dans l'esprit du public ".
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- (7) G. Loiseau, Protection et propriété des noms de domaine, cah. droit des affaire n° 17, Jurisprudence commentaires, commerce électronique, France, 26 avril 2001, P 1379.
- (8) Romain Gola, La Régulation de l'internet: Nom de domaine et Droit des marques, Op.cit, P139.
- (9) Ibid, P139.
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- (13) TGI du Le Mans, 29 juin 1999. TGI du Nanterre, 04 novembre 2002. Disponible sur: <http://www.legalis.net/jnet>.
- (14) TGI du Paris, 28 juin 2000. TGI du Nanterre, 13 Mars 2000. Disponible sur: <http://www.legalis.net/jnet>.
- (15) أنظر نص المادة (22) من قانون العلامات الجزائري الذي ينص على أن " تكون باطلة ولا أثر لها العلامات الخالية من كل طابع مميز وخصوصاً إذا كانت تتضمن سمات أو بيانات يتكون منها التعيين اللازم للمنتجات أو التعيين النوعي للخدمات، وكذا إيداع العلامات التي تتضمن أما بيانات يقصد بها خداع الجمهور وأما سمات ممنوعة بموجب المادة الرابعة".
- (16) L'article (L713-1) CPIF " Le caractère distinctif d'un signe de nature à constituer une marque s'apprécie à l'égard des produits ou services désignés. Sont dépourvus de caractère distinctif : a) Les signes ou dénominations qui, dans le langage courant ou professionnel, sont exclusivement la désignation nécessaire, générique ou usuelle du produit ou du service ; b) Les signes ou dénominations pouvant servir à désigner une caractéristique du produit ou du service, et notamment l'espèce, la qualité, la quantité, la destination, la valeur, la provenance géographique, l'époque de la production du bien ou de la prestation de service ; c) Les signes constitués exclusivement par la forme imposée par la nature ou la fonction du produit, ou conférant à ce

dernier sa valeur substantielle. Le caractère distinctif peut, sauf dans le cas prévu au c, être acquis par l'usage dans le cas prévu au c, être acquis par l'usage".

(17) G. Loiseau, *Nom de domaine et internet : turbulences autour d'un nouveau signe distinctif*, D, n° 23, France, 17 juin 1999, P246.

(18) L'article (L713-1) CPIF "La marque de fabrique, de commerce ou de service est un signe susceptible de représentation graphique servant à distinguer les produits ou services d'une personne physique ou morale. Peuvent notamment constituer un tel signe : a) Les dénominations sous toutes les formes telles que : mots, assemblages de mots, noms patronymiques et géographiques, pseudonymes, lettres, chiffres, sigles ; b) Les signes sonores tels que : sons, phrases musicales ; c) Les signes figuratifs tels que : dessins, étiquettes, cachets, lisières, reliefs, hologrammes, logos, images de synthèse ; les formes, notamment celles du produit ou de son conditionnement ou celles caractérisant un service ; les dispositions, combinaisons ou nuances de couleurs".

(19) G. Loiseau, *Nom de domaine et internet : turbulences autour d'un nouveau signe distinctif*, Op.Cit, P246.

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(21) Claire Albrechtson, *Définition et nature juridique du nom de domaine*, Op.Cit, P24.

(22) Romain Gola, *La Régulation de l'internet: Nom de domaine et Droit des marques*, Op.Cit, P 151.

(23) G. Loiseau, *Nom de domaine et internet : turbulences autour d'un nouveau signe distinctif*, Op.Cit, P246.

(24) *Ibid*, P246.

(25) Romain Gola, *La Régulation de l'internet: Nom de domaine et Droit des marques*, Op.Cit, P 151.

(26) J.C. Galloux et G. Haas, *Les noms de domaine dans la pratique contractuelle, com.com.électr.*, n°1, janvier 2000, P13.

