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RULES APPROVED FOR ASSIGNING AND REGISTRATION OF DOMAIN NAMES

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ABSTRACT

This study aims at highlighting the approved rules related to the assigning and registration of domain names; the study explores the registration mechanism and conditions as the registration process may affect the intellectual property rights of others, especially the trademarks and tradenames, particularly when we know that there are some rules that are being developed in order to contribute to regulating the process of registering the domain names both at the national and global levels. The Study attempted to answer a question of paramount importance: "what are the controls of registering the domain names and what is the impact of such registration on the future of movement of technological development?" in addition, this Study reached some conclusions the most important of which state that the process of registering domain names is subject to the principle of *first come, first served* which gives priority of registration to the first comers. As for the recommendations of the Study, the most important recommendation of the Study is that the Jordanian legislator should interfere in developing explicit provisions to address the issue of domain names ownership, taking into account the particularity of this issue in the electronic environment.

Introduction

Before addressing the registration rules and procedures of domain names, some facts about the reality of the names of country code top-level domain (ccTLD) must be explained. These names are subject to rules and controls imposed by the relevant country; the code usually consists of two letters of that country's name as we explained earlier. However, the issue is different for the Generic top-level domain (gTLD) which is not subject to any central authority within any country; its registration is assumed only by the global-

nature US Internet Corporation for Assigned Names and Numbers (ICANN); it is a private corporation that is not subject to any country sovereignty; therefore, it has no powers nor does it have any legal orders to legislate a binding law to develop the process of domain names registration at the global level. This limitation is due to the fact that the ICANN is a private entity; it has no sovereign power; it is more a technical and technological regulator than a legal or legislative body.

On the other part, domain names registration process in most cases affect the rights of other intellectual property, especially trademarks and tradenames. Moreover, the great and increasing importance of internet in this era must be pointed out as the internet now constitutes an integral part of almost every aspect of life. In the context of our research on the domain names on the web, the controls and mechanisms are required to be somehow consistent with the function of internet as being backbone of life at the present time, so that such rules and controls do not restrict or affect the movement of technological development in the future.

Significance of the Study: the significance of this Study lies in shedding light on the rules adopted in assigning domain names and the process of registering these names, by exploring the legal provisions governing this process and showing the legal effect arising from it.

Study Problem & Questions: the problem of this Study focuses on the Jordanian legislator's reluctance to develop a special law that governs the issue of ownership of domain names. Thus, the Study addresses the ambiguity surrounding this issue in terms of the rules adopted in assigning ownership of domain names and the mechanisms of registration of those names. This problem will be the most common in the near future of internet because of the requirement imposed by e-commerce with respect to taking a unique domain name that symbolizes the e-merchant in the e-commerce environment. This Study also came to answer a number of questions the most important of which is: "what are the controls governing the registration and assignment of domain names? Are these controls flexible or inflexible towards the function of internet? What is the impact of these controls on the movement of technological development? What is meant by the principle of precedence in domain name registration?"

Study Methodology: the analytical methodology is adopted in order to analyze the legal provisions. The comparative methodology was also adopted to compare between the legislations subject of the Study.

Study topics: in light of the above introduction, the Study of this research is divided into two topics; the first topic addresses the general rules adopted in registration of domain names, and the second topic addresses the procedures of registering domain names.

First Topic: General Rules of Registering Domain Name

Domain name is like other intellectual property rights has some general rules related to the registration; however, domain names registration has unique rules which may be similar to other rules but not necessarily identical. One of these rules is "the principle of precedence of registration" and undertaking by registration applicant not to have bad faith which constitute the general rules of domain name registration.

I- Registration Precedence Principle

The process of domain names registration is subject to the principle of "First Come, first served". It is one of the most important basis upon which the registration of electronic addresses is based¹. The registration of domain names is subject to the precedence or priority principle of registration given the nature of domain name registration; if it is registered at a certain level, then it may not be registered in the same level for second time, irrespective of the content of such website or the nature of activity of the name holder, unlike the registration of trademarks which is subject to the principle of assignment. Registration of trademark is limited only to the goods or services by the emergence of which the relevant trademark was registered; it does not extend to cover other products i.e. registration of a trademark that resembles another trademark in the same field and for the same or similar products is prohibited once the first trademark is registered; this means that the registration of a trademark does not prevent others from registering or using the same mark to distinguish different goods or products that are not similar to the goods for which the first trademark is registered².

The French legislator also addressed the rule of precedence of registration in the provisions of Article (L.45-1) of the Postal and Electronic Communications Law amended by Decree No. (329) of (2014). Selecting and administrating domain names is carried out for the public interest on indiscriminative and transparent basis that ensures the attainment of free communication and protection of intellectual property rights. Selection of domain names is done for a definite renewable term. However, when a dispute arises, the license is granted to the domain name which took precedence in submitting the application³. This is the very provision used by the French legislator in the Article (20-44-39) of the Implementing

¹ Ilham Muhammad Hamid Ibrahim, Ilham Muhammad Hamid Ibrahim, the online store, PhD thesis, unpublished, Mansoura University, 2016, p. 411.

² Abdul Hadi Muhammad Al-Ghamdi, The Unified ICANN Rules (UDRP) for Settlement of Domain Name and Trademark Names Disputes, a research published in King Abdulaziz University Journal - Economics and Management, Volume 28, Second Issue of 2014, p. 210.

³ Voir L'Art 45 -1 du Code des postes et des communications électroniques modifié par Ordonnance n°2014-329 Les noms de domaine sont attribués et gérés dans l'intérêt général selon des règles non discriminatoires et transparentes, garantissant le respect de la liberté de communication, de la liberté d'entreprendre et des droits de propriété intellectuelle.

Regulation of the Law, as well as in the Article (3) of the French Domain Name Charter⁴.

In one of its reports, the World Intellectual Property Organization (WIPO) stressed this principle stating "the possibility to register these identifiers as domain names is a natural result of the registration nature; those who come first are served first and they are more deserving of the service⁵, as also confirmed by the ICANN which specializes in the registration of public domain names.

As is the case with electronic addresses, the registration of trademark also recognizes the principle of precedence in applying for such registration; if a project owner applied for registration of trademark, then no other person may apply for the registration of a similar trademark⁶. The trademarks registrar basically refuses to register a subsequent similar application. If two or more parties requested the registration of two similar trademarks that are associated with the same goods or services, the commercial register department will suspend the registration process pending waiver by one of them in favor of the other party, or it will be deemed an applicable provision as we mentioned earlier⁷.

Evidently, the first party who takes precedence in submission of registration application deserves the domain name so long as such party satisfies the registration requirements. In this regard, the French Appeal Court of Mans adjudicated that the appeal filed by the plaintiff claiming that he submitted the application to register a digital or electronic mark (Oceanet); however, the registration requirements imposed by the legislator and required to be met by the applicant were not satisfied by the applicant since there is already a registered domain name with the same trademark which is claimed to have precedence in application⁸.

II- Undertaking by the Registration Applicant not to have a bad faith

It is known that the fraud spoils everything around it. This also applies to the registration of domain name; if the registration incident is based on bad faith or fraud, such as the registration of domain name for a similar famous trademark in order to secure a financial advantage from the owner of such famous trademark, then the registration in such case will be deemed invalid. Some examples on bad faith include the case of provoking the owner of famous trademark or tradename, or making a barter with him/her after

⁴ voir L' Art 3.1 de la chart de nommage de l'Association Française pour le Nommage Internet en Coopération (L'AFNIC), Règles d'enregistrement des domaines de premier niveau de l'internet correspondant aux codes pays du territoire national.

⁵ See the WIPO website www.wipo.int/amc/en/processes/process2/html/report/html

⁶ Sherif Mohamed Ghannam, Trademark Protection through its relation to the electronic address Domain name (First Section), Op. cit, p. 381.

⁷ See the Article 76 of the Egyptian Intellectual Property Protection Law No. 82 of 2002, published in the Official Gazette, No. 22 bis, on 6/2/2002, and Article 17 of the Jordanian Trademarks Law, No. 33 of 1952 and its amendments, published in the Official Gazette, Page 243, Issue 1110, dated 1 5/5/1952.

⁸ Le tribunal confère donc au nom de domaine une valeur inédite dès lors que celui-ci détruit la nouveauté revendiquée par une marque sur un signe. Or «selon l'article L. 711-4 =du Code de la propriété intellectuelle « seul un droit peut constituer une antériorité opposable à une marqu.

reserving similar domain name and asking him/her to pay a financial consideration, or offering the name for sale after a brief period of registering it. Therefore, the Egyptian legislator added a further restriction to the principle of "first come, first served" in that it imposed the good faith requirement⁹, which is a well-done addition. However, this requirement is absent from the Lebanese Electronic Transactions and Personal Data Law No. 81 of 2018.

The principle of good faith is also considered one of the principles governing legal relations. The French legislator in the Postal and Electronic Communications Law addressed this principle in Article (2/45) thereof by requiring that the registration or renewal of domain names may be subject to rejection or cancellation in the following cases:

1. If the registration of domain name will result in an infringement of the public order or public morals stipulated in the constitution or the law;
2. If the registration of domain name will result in an infringement of the intellectual property rights or personal rights, unless the applicant has proven that he/she has the legitimate interest in that evidenced his/her good faith;
3. If the registration of the domain name will result in an attack on the French Republic, one of its local regions, or one of the national or local authorities or facilities, unless the applicant has proven that he has a legitimate interest in that and evidenced his/her good faith¹⁰.

The researcher believes that inclusion of this requirement achieves mutual interest that protects the companies specialized in the registration of domain names from registration any name discordantly, and on the other hand it constitutes protection for the rights of others. The imposition by the Egyptian legislator of the good faith requirement is a masterstroke, especially in light of the electronic piracy that the technology around the world is facing. This requirement constituted deterrent for anyone who tries to register the domain name in bad faith or by fraud.

Second Topic: Procedures Carried Out by the Center of Registration of Domain Names

In Jordan, the National Information Technology Center is the entity responsible for the management and registration of domain names marked as (.Jo) or any related branching under the name of Jordan. The Center has a policy that points out to the mutual rights and obligations between the National Information Technology Center and the registrar of the domain name. The Policy aims at determining the controls which govern the Jordanian domain names registration process issued by the Center¹¹.

⁹ Article 12 of the Egyptian E-Commerce Law.

¹⁰ Voir L' Art 45 -2du Code des postes et des communications électroniques modifié par Ordonnance n°2014-329.

¹¹ See the National Information Technology Center: www.nitc.gov.jo

In order to benefit from its advantages, the domain name must be registered, and the registration process is carried out by concluding the registration contract; it is the most common contract in the world today. The statistics indicate that more than 50 million contracts of this kind are concluded in one decade¹².

Domain registration process consists of several stages, including:

First - Name selection stage:

The first stage of registration is the selection of domain name in accordance with the aforementioned formal and substantial requirements; the name must have not been selected before in accordance with the principle of precedence, after making sure that the name is not used or not reserved for another person. Such ascertaining procedure is carried out through accessing the website (networksolutions.com), inserting the name subject of registration or reservation, and then the result will appear immediately.

Second: Submission of the Required Documents¹³

There is a set of documents that must be submitted upon starting the procedures of registering the domain name, including:

- a. Registration application which must show the name of domain chosen, and the managing director and technical director must be identified;
- b. Registration form and attachments required for the registration. This form is different from one name to the other; if the name ends with (.com), then a copy of the commercial register and tax registration deed must be submitted. however, if the name ends with (.gov), then a document proving affiliation with one of the government entities must be provided. If the name ends with (edu), then a copy of official document must be submitted to prove affiliation with the ministry of education, and the so on and so forth.

Third - Conclusion of a Contract for the Name Registration

Once the documents required for registration, a contract is signed whereby the rights and obligations of both parties are determined. The two parties are the client who applied for registration and the registration body authorized to do so by the ICANN. Such contract is called "contract for creation of website" (contrat le creation de site) under which the client is granted the access to the internet by such authorized body in return for the payment of a subscription fee for the agreed upon term¹⁴.

¹² Mahmoud Ismail, Les contrats relatifs aux noms de domaine, these, Strasbourg III, (2008) p. 36.

¹³ See the website for domain names registration in Egypt, www.egregistry.eg, and in Jordan, the Information Technology Center at www.jordan.gov.jo.

¹⁴ The total number of domain names registered in Jordan reached 4987 domains up to 11/9/2018, as per the statistics on domain names in Jordan, see: www.dns.jo/stat.aspx.

In France, the body responsible for the registration of domain names is the French Association for Internet Names (l'Association Française pour le nommage internet en coopération) which was established in 1997 and affiliated with the Ministry of Industry and Ministry of Communications. The Decree no. 162 of 2007 provided for the terms of reference¹⁵ of the said Association with respect to assignment of domain names.

The terms of reference were then included in the provisions of Article (L.45) of the French Postal and Electronic Communications Law. The selection and management of the domain names in the systems of dealing with the clients of web is carried out a unified body to be provided by the Law, and the offices for registration of domain names are determined by the Minister responsible for Electronic Communications. Each of the domain names registration offices prepares an annual report on its activity with respect to the registration business, and such report is then submitted to the Minister responsible for the Electronic Communications¹⁶.

It is worth noting that an appeal was made before the French Council of State regarding the unconstitutionality of Article (45) of the Postal and Electronic Communications Law, given that the Law granted the French Association the exclusive right to assign domain names (.Fr) constitutes a restriction on the freedom of individuals to communicate¹⁷.

The matter was referred to the French Constitutional Council which concluded that granting the exclusive right to the French Association for Domain Names to govern the code (.Fr) is unconstitutional right. The Council further decided that the exclusive right granted by the Minister of Communications constitutes an infringement to the communication freedom approved by the Declaration of Human and Citizen Rights. Consequently, the Article (45) was amended so that it took its current form¹⁸.

In the end, it is time for the enactment of legislation to settle the issue of ownership of domain names and to attain the security of information on the Internet, by adopting explicit provisions that recognize the validity of the right of ownership over domain names. The particularity of domain name should be taken into account as one of the most important informational assets in the virtual world. Such domain name or virtual address entitles its owner to all the powers assigned to the owner of anything else, but in a manner consistent with this asset's intangible nature and informational environment¹⁹.

¹⁵ Décret n° 2007-162 du 6 février 2007 relatif à l'attribution et à la gestion des noms de domaine de l'internet et modifiant le code des postes et des communications électroniques.

¹⁶ L'Art L.45 du Code des postes et des communications électroniques modifié par Ordonnance n°2014-329

¹⁷ Le Conseil d'État en 1998 dans son rapport : « Internet et les réseaux numériques » « cité à la page 338 du rapport de la mission conduite par Jean-Michel Yolin en 2004 (Ministère de l'Economie des Finances et de l'Industrie).

¹⁸ Conseil constitutionnel « Décision n° 2010-45 QPC du 06 octobre 2010 « L'article L. 45 du code des postes et des communications électroniques est déclaré contraire à la Constitution.

¹⁹ Alaa Al-Tamimi Abdo, the legal regulation of the electronic address (DOMAIN NAME) as an element of industrial property, Arab Renaissance House, no edition number, 2017, p. 130.

Conclusion

In the end, a number of results and recommendations were reached, the most important of which are as follows:

I- Results:

1. The absence of an electronic link mechanism between domain name registration and other commercial property registration; it seems that both systems operate independently of each other;
2. Domain name registration is subject to the principle of precedence or priority in registration due to the nature of domain name registration; if a name is registered at a certain level this prevents it from being registered again at the same level regardless of the content of the website or the nature of the name registrant's activity.

II- Recommendations

1. It would be desirable if the Jordanian and Egyptian legislators require the obligatory linkage between the registration of trademarks and domain names to one government agency, and to impose prior control over the registration of domain names, to ensure that the trademark is protected on one side and that no disputes arise on the other side; and
2. The Jordanian legislator must intervene in developing explicit provisions that address the issue of domain name ownership, taking into account the particularity of this issue in the electronic environment.

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