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**RESOLUTION OF TRADEMARKS AND DOMAIN NAMES DISPUTES
ARMENIAN REGULATIONS AND INTERNATIONAL BEST PRACTICES**

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Introduction

Nowadays, most businesses advertise and sell their products and services and provide information to consumers mainly via Internet. That is the main reason why they prefer using their trademarks in domain names¹ in order to have a stable presence on the Internet and help consumers to find them easier. However, Internet and domain are also used by third parties for unlawful purposes to infringe trademarks, confuse and mislead consumers. Trademarks and domain names disputes intensify day by day. There are a number of reasons for and different types of such disputes. They include but are not limited to differences in trademark regulations in different countries; domain names involving trademarks may not be identical, while there may be a number of companies using identical or confusingly similar trademarks for different classes of goods and services in the same or different countries. The most common trademark and domain name disputes are as follows:

- As domain names are registered on a first-come, first-served basis, frequently, third parties register a particular domain name for the purpose of reselling it to the legal owner of a trademark. This process is known as “cybersquatting”.
- Another type of common dispute arises when a holder of a domain name (registrant) attempts to get commercial gain, through exploiting someone else’s trademark as a domain name and trying to attract consumers to his/her web site.
- In many cases, registrants use their competitors' trademarks in their domain names for the purposes of disrupting competitors' business. Sometimes, such domain names are not used for any active page/website (also known as “passive use”).
- There are also many cases of “Reverse Domain Name Hijacking”, when a trademark owner brings a complaint in bad faith in order to deprive a registered domain-name holder of a domain name.

¹ domain name is a human-friendly form of an Internet address that is both easy to identify and to remember, such as <yahoo.com>

All countries, including Armenia face similar issues. The objective of this Paper is to discuss the regulations of the Republic of Armenia Armenian in this field, identify the international best practices and make recommendations. The main issue of this Paper is to clarify: **“whether Armenian legislation provides sufficient legal means for resolving disputes involving trademarks and domain names and whether such regulations are in conformity with international best practices.”**

Chapter 1 is devoted to the study of the International Best Practices regulating trademarks and domain names disputes. In particular, the Paper concentrates on the regulations and practices of the World Intellectual Property Organization's Arbitration and Mediation Center, as well as the laws and practices of the United States of America and the United Kingdom.

Chapter 2 discusses the Armenian regulations related to trademarks and domain names.

Chapter 3 is devoted to the comparative legal analysis of the Armenian legislation with international best practices, followed by conclusion and recommendations for improving the existing gaps in the Armenian legislation.

CHAPTER 1

International Best Practices

Resolution of Trademarks and Domain Names Disputes by WIPO's Arbitration and Mediation Center

The abuse of trademarks in the domain name system reached to such a level, where it began undermining the legitimate commerce and harming consumers. Therefore, in order to support the credibility of commerce on the Internet and for the purposes of protection against fraudulent practices, the World Intellectual Property Organization initiated relevant regulations and forum for resolving disputes involving domain names and trademarks.

World Intellectual Property Organization (WIPO) and Uniform Domain Name Dispute Resolution Policy (UDRP)

WIPO is one of the oldest specialized agencies of the United Nations (UN) with 191 member states established in 1967. It is the global forum for intellectual property services, policy, information and cooperation. The primary mission of WIPO is to “lead the development of a balanced and effective international intellectual property (IP) system that enables innovation and creativity for the benefit of all”.²

² World Intellectual Property Organization (WIPO), *Inside WIPO*, available at <http://www.wipo.int/about-wipo/en/index.html> (last visited March 9, 2018)

Following WIPO's recommendations, the Internet Corporation for Assigned Names and Numbers (ICANN)³ adopted the Uniform Domain Name Dispute Resolution Policy (UDRP) in 1999. It is used for the majority of generic top-level domains (gTLDs), including the very popular .com, .net and .org domains.⁴ The UDRP provides holders of trademark rights with an administrative mechanism for the efficient resolution of disputes arising out of bad faith registration and use by third parties of domain names corresponding to those trademark rights.

Who decides trademarks disputes over domain names under the policy? There are currently five approved providers for the UDRP, and only approved providers may be used for disputes under the policy. They are:

The World Intellectual Property Organization (WIPO) - WIPO Arbitration and Mediation Center is internationally recognized as the leading dispute resolution service provider for challenges related to the abusive registration and use of Internet domain names.⁵ WIPO's Arbitration and Mediation Center has been a provider for UDRP disputes since December 1st, 1999.

The National Arbitration Forum

Asian Domain Name Dispute Resolution Centre

The Czech Arbitration Court Arbitration Centre for Internet Disputes

Arab Center for Domain Name Dispute Resolution (ACDR)⁶

Under the UDRP, trademark owners may submit disputes arising from alleged abusive registration of domain names to a mandatory expedited administrative proceeding, by filing a complaint with one of approved dispute resolution service providers above.⁷ In case, the Provider refuses the submission of a complaint due to capacity constraints or for other reasons, the person

³ Internet Corporation for Assigned Names and Numbers (ICANN), *available at* <https://www.icann.org/> (last visited March 9, 2018)

⁴ IANA, *Root Zone Database*, *available at* <https://www.iana.org/domains/root/db> (last visited March 9, 2018)

⁵ WIPO Arbitration and Mediation Center, *Guide to WIPO Domain Name Dispute Resolution*, *available at* <http://www.wipo.int/export/sites/www/amc/en/docs/guide-en-web.pdf> (last visited March 9, 2018)

⁶ ICANN, *List of Approved Dispute Resolution Service Providers*, *available at*, <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en> (last visited March 9, 2018)

⁷ WIPO Arbitration and Mediation Center, *Guide to WIPO Domain Name Dispute Resolution*, *available at* <http://www.wipo.int/export/sites/www/amc/en/docs/guide-en-web.pdf> (last visited March 9, 2018)

or entity may submit the complaint to another Provider.⁸ Each Provider shall maintain and publish a publicly available list of panelists and their qualifications. Depending on the discretion of the parties the dispute may be decided by a single-member Panel or a three-member Panel. In the event that either the Complainant or the Respondent elects a three-member Panel, the Provider shall endeavor to appoint one Panelist from the list of candidates provided by each of the Complainant and the Respondent. The third Panelist shall be appointed by the Provider from a list of five candidates submitted by the Provider to the Parties. If neither the Complainant nor the Respondent has elected a three-member Panel, the Provider shall appoint a single Panelist from its list of panelists. A Panelist shall be impartial and independent and shall have, before accepting appointment, disclosed to the Provider any circumstances giving rise to justifiable doubt as to the Panelist's impartiality or independence.

There are three primary sets of rules that Panel shall follow to decide a domain name dispute:

The Uniform Domain Name Dispute Resolution Policy (UDRP)

The Rules for the UDRP (“The Rules” or “Uniform Rules”) set out by ICANN

Supplemental rules set down by the individual dispute resolution provider. Each provider has a set of supplemental rules that also apply for the cases they handle.

These rules are closely interconnected as proceedings under the UDRP policy are conducted according to the Rules and the selected administrative-dispute-resolution service provider's supplemental rules.⁹

The UDRP is an international arbitration forum that is generally preferred by disputants because the decisions are delivered relatively quickly and it is typically more inexpensive than litigating in a national court or in multiple national courts, depending on the nature of the dispute.¹⁰ However, the mandatory administrative proceeding shall not prevent either the

⁸ ICANN, *Uniform Domain Name Dispute Resolution Policy*, available at <https://www.icann.org/resources/pages/policy-2012-02-25-en> (last visited March 9, 2018)

⁹ ICANN, *Uniform Domain Name Dispute Resolution Policy*, available at <https://www.icann.org/resources/pages/policy-2012-02-25-en> (last visited March 9, 2018)

¹⁰ Adam Dunn, *The Relationship between Domain Names and Trademark Law* 4 (last visited March 9, 2018)

respondent or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded.¹¹

Since the WIPO Arbitration and Mediation Center administered its first UDRP case in 1999, total WIPO case filings passed the 39,000 mark in 2017, encompassing over 73,000 domain names. The U.S. remained the country where most WIPO UDRP cases originated, with 920 cases filed in 2017, followed by France (462), the U.K. (276), Germany (222), and Switzerland (143).¹²

Under the UDRP, a complaint filed by a trademark owner with one of the dispute resolution service providers shall meet certain requirements specified in the policy. According to paragraph 4(a) of the UDRP, the complainant must prove that each of these three elements are present in order to be successful in a dispute:

(i) the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and

(ii) the Respondent has no rights or legitimate interests in respect of the domain name; and

(iii) the domain name has been registered and is being used in bad faith.¹³

In the first point, the complainant can establish the ownership of the mark or rights in mark by providing proof of registration and other materials from the relevant trademark offices. In case of marks or words that are not registered, the complainant shall provide some proof that

¹¹ ICANN, *Uniform Domain Name Dispute Resolution Policy*, available at <https://www.icann.org/resources/pages/policy-2012-02-25-en> (last visited March 9, 2018)

¹² World Intellectual Property Organization, *WIPO Cybersquatting Cases Reach New Record in 2017*, available at http://www.wipo.int/pressroom/en/articles/2018/article_0001.html?utm_source=WIPO+Newsletters&utm_campaign=b7a433ad1a-EMAIL_CAMPAIGN_2018_03_13&utm_medium=email&utm_term=0_bcb3de19b4-b7a433ad1a-256652453 (last visited March 10, 2018)

¹³ ICANN, *Uniform Domain Name Dispute Resolution Policy*, available at <https://www.icann.org/resources/pages/policy-2012-02-25-en> (last visited March 10, 2018)

the mark is used commercially and that it has become a distinctive identifier associated with the complainant or its goods and services. In addition, Complainants must prove the domain name is “identical or confusingly similar” to their mark. Deleting spaces, deleting or adding punctuation or adding a TLD such as .com have all been found not to prevent a panelist from finding the domain name to be identical to the Complainant’s mark. Adding words to a mark or reversing the order of words in a mark have both been found to meet the “confusingly similar” element.

Concerning the second point, since it is difficult for a complainant to show that the respondent does not have rights or legitimate interest and, especially, because such evidence would be in the possession of the Respondent, the burden on the complainant for this element is relatively light. It is essential to take into consideration the fact whether or not the complainant has authorized or licensed the use of the mark to the respondent and if they have had any kind of past relationship. So, the main obligation is on the respondent to prove legitimate interest in the domain name.¹⁴

As to the third point, the UDRP goes much deeper into the problem by taking into consideration the purpose of the registration and use of a particular domain name by a domain name holder. In what kind of situations will the registration and use of a domain name be considered to be in bad faith? The UDRP provides a non-exhaustive list of circumstances which shall be evidence of the registration and use of a domain name in bad faith:

- (i) Evidence that the Respondent has registered or has acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant for a profit (“cybersquatting”).

One of the outstanding examples of cybersquatting is the case of *World Wrestling Federation Entertainment, Inc. v. Michael Bosman*, which is also the first matter decided under the UDRP. The Complainant is World Wrestling Federation Entertainment, Inc., using its service mark in connection with entertainment services, namely the provision of sporting events such as

¹⁴ International Intellectual Property Institute, *The UDRP: A Guide for SMEs and Consumers on Domain Names and Domain Name Disputes* §4.0 (2007), available at http://iipi.org/wp-content/uploads/2010/07/The_UDRP_-_A_Guide_for_SMEs.pdf (last visited March 10, 2018)

wrestling exhibitions for television. Three days after registering the domain name <worldwrestlingfederation.com>, Respondent contacts Complainant by e-mail and offers to sell the domain name for the sum of US\$1,000. Moreover, the Respondent has not developed a Web site using the domain name at issue or made any other good faith use of the domain name. The Panel holds that the domain name is identical or confusingly similar to the trademark and service mark registered and used by the Complainant and the Respondent has no rights or legitimate interests in respect of the domain name. Since the Respondent has offered to sell the domain name to the Complainant three days after the registration, the Panel decides that the name is registered and used in bad faith. So, the Panel requires to transfer the domain name <worldwrestlingfederation.com> to the Complainant.¹⁵

- (ii) “Engaging in a pattern” of registering a domain name in order to prevent the owner of the mark or service mark from procuring a domain name with the mark included in it.

Such action is well expressed in *eBay Inc., PayPal, Inc. v. Rene Rene/Wuxi Yilian LLC*. The first Complainant (“eBay Inc.”) is a global leader in the field of online commerce and shopping, and the second Complainant (“PayPal, Inc.”) is a global leader in the field of online payment and money transfers. The second Complainant is a wholly owned subsidiary of the first Complainant (hereinafter both Complainants are collectively referred to as the “Complainant”). The disputed domain names registered by the Respondent do not resolve to active websites. The Complainant provides evidence that some of the disputed domain names previously pointed to a website prominently displaying the PAYPAL trademark and falsely suggesting an affiliation with the Complainant. The Panel finds that the Respondent’s registration of such a number of domain names incorporating the Complainant’s marks is a “pattern of conduct” designed to prevent the Complainant from reflecting its mark in a corresponding domain name and such conduct is an

¹⁵ WIPO, *World Wrestling Federation Entertainment, Inc. v. Michael Bosman*, Case No. D99-000, available at <http://www.wipo.int/amc/en/domains/decisions/html/1999/d1999-0001.html> (last visited March 10, 2018)

evidence of bad faith registration and use. For that reason, the Panel orders to transfer the disputed domain names to the first Complainant, eBay Inc.¹⁶

- (iii) Evidence that the registration of the domain name was for the primary purpose of “disrupting the business of a competitor”.

The striking example of such action can be found in *Andrey Ternovskiy dba Chatroulette v. Alexander Ochkin*, in which the Complainant is the owner of trademark CHATROULETTE registrations across various jurisdictions. Complainant's extensive and continuous use of the CHATROULETTE trademarks, and the fact that the Complainant has made significant investments over the years to promote and protect these trademarks and the Complainant's business across the Internet, demonstrate that the Complainant enjoys a substantial degree of public recognition in CHATROULETTE and has seen this mark become uniquely and distinctly associated with the Complainant. The disputed domain names <chatroulette.vg> and <chatruletka.chat> redirect Internet users to websites providing online video chat services and online video social introduction and networking services. The Panel finds that the Respondent's use of the disputed domain names constitutes a disruption of the Complainant's business and qualifies as bad faith registration and use because the disputed domain names are confusingly similar to the Complainant's trademarks and the websites at the disputed domain names feature multiple links to Complainant's competitors. For the foregoing reasons, the Panel orders that the disputed domain names <chatroulette.vg> and <chatruletka.chat> be transferred to the Complainant.¹⁷

- (iv) Evidence of using the domain name to attract, for commercial gain, Internet users to the site by creating a “likelihood of confusion” on the part of users as to the relationship of the site with the Complainant’s mark.

¹⁶ WIPO, *eBay Inc., PayPal, Inc. v. Rene Rene/Wuxi Yilian LLC*, Case No. D201-0010, available at <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2015-0010> (last visited March 11, 2018)

¹⁷ WIPO, *Andrey Ternovskiy dba Chatroulette v. Alexander Ochkin*, Case No. D2017-0334, available at <http://www.wipo.int/amc/en/domains/decisions/text/2017/d2017-0334.html> (last visited March 11, 2018)

An apparent example of such action is the case *Casumo Media Limited v. Frank Zielkowski, Wingtree Consulting FZE*. According to the facts, the Complainant is a gaming company owning numerous trademarks relating to the designation "Casumo". CASUMO mark is widely known in the casino and gaming business and exclusively distinctive of the Complainant. The Panel finds that the Complainant's CASUMO Mark is widely known in the online gambling industry and solely associated with the Complainant's products and services. Since the disputed domain name <casumo.discount> resolves to a PPC web page at which competitive services are offered, the Panel concludes that by using the disputed domain name, the Respondent has intentionally attempted to attract, for commercial gain, Internet users to its website, by creating a likelihood of confusion with the Complainant's CASUMO mark as to the source, sponsorship, affiliation, or endorsement of its website. Accordingly, the Panel orders that the disputed domain name, <casumo.discount> be transferred to the Complainant.¹⁸

There are only two remedies that Complainants can ask for under the policy:

1. *Cancellation of the registration*. This means that the person who originally registered the domain name has lost that domain name and it is now available for registration. Normally Complainants wishing to prevent the use of a domain name by anyone other than themselves would not seek this remedy, as the name can be registered on a first-come, first-served basis by anyone after the cancellation.

2. *Transfer of the registration to the Complainant*. The registration of the domain name is transferred to the Complainant, who must then pay the registration fee and now owns the domain name.¹⁹

The UDRP also provides protection for domain name holders' rights by outlining certain grounds on which Respondents can demonstrate their *rights* to and *legitimate interests* in domain

¹⁸ WIPO, *Casumo Media Limited v. Frank Zielkowski, Wingtree Consulting FZE*, Case No. D2017-1764, available at

<http://www.wipo.int/amc/en/domains/decisions/text/2017/d2017-1764.html> (last visited March 11, 2018)

¹⁹ International Intellectual Property Institute, *The UDRP: A Guide for SMEs and Consumers on Domain Names and Domain Name Disputes* §3.6 (2007), available at

http://iipi.org/wp-content/uploads/2010/07/The_UDRP_-_A_Guide_for_SMEs.pdf (last visited March 11, 2018)

names. Any of the following circumstances, in particular but without limitation, shall be evidence of such demonstration:

(i) Before the Respondent knew about the dispute, the use, or demonstrable preparations for use, of the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services by the Respondent; or

(ii) The Respondent (as an individual, business, or other organization) has been commonly known by the domain name, even if he/she has acquired no trademark or service mark rights; or

(iii) The Respondent is making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.²⁰

Legitimate use by Respondents has been found in the following cases: *EAuto, Inc. v. E Auto Parts, Inc. (use by a business of the name before receiving notice of dispute)*,²¹ *2001 White Castle Way, Inc. v. Glyn O. Jacobs (they run a non-commercial fan site)*,²² *Oki Data Americas, Inc. v. ASD, Inc. (they are a reseller of the goods or services of the Complainant/mark holder)*.²³

Under the policy, domain name holders also enjoy a proper protection for their rights in cases of Reverse Domain Name Hijacking (RDNH). RDNH means using the Policy in bad faith to attempt to deprive a registered domain-name holder of a domain name. If after considering the submissions the Panel finds that the complaint was brought in bad faith to attempt to deprive a registered domain name holder of a domain name or was brought primarily to harass the domain-name holder, the Panel shall declare in its decision that the complaint was brought in bad faith and constitutes an abuse of the administrative proceeding.²⁴ Such decision was made by the

²⁰ ICANN, *Uniform Domain Name Dispute Resolution Policy*, available at <https://www.icann.org/resources/pages/policy-2012-02-25-en> (last visited March 11, 2018)

²¹ WIPO, *EAuto, Inc. v. E Auto Parts, Inc.*, Case No. D2000-0121, available at <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0121.html> (last visited March 12, 2018)

²² WIPO, *2001 White Castle Way, Inc. v. Glyn O. Jacobs*, Case No. D2004-0001, available at <http://www.wipo.int/amc/en/domains/decisions/html/2004/d2004-0001.html> (last visited March 12, 2018)

²³ WIPO, *Oki Data Americas, Inc. v. ASD, Inc.*, Case No. D2001-0903, available at <http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0903.html> (last visited March 12, 2018)

²⁴ ICANN, *Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules")*, available at

Panel in *M/s. Core Diagnostics v. Herr Guenter Keul*. The Complainant first started business in 2011 and registered its trademarks in 2012. The Respondent registered the disputed domain name <corediagnostics.com> in 2001 and has been using it since then to promote various medical diagnostic products. Because the Respondent's registration of the disputed domain name predates the Complainant's mark, the Panel finds that the Respondent could not have registered the disputed domain name in bad faith. The Complainant knew this because it produced the WhoIs record for the disputed domain name as an attachment to its Complaint. Thus the Complainant should have known that it was unable to prove that the Respondent registered and is using the disputed domain name in bad faith. This suffices to establish Reverse Domain Name Hijacking. Consequently, the Panel finds that the Complaint was submitted in an attempt to hijack the Respondent's domain name.²⁵

It becomes apparent from the foregoing discussion that complaints filed under the UDRP do not include the domain name Registrar as a party to the dispute. This is mainly due to the fact that the policy clearly defines that the Registrar will not participate in any way in any dispute between the parties regarding the registration and use of a domain name. The Registrar shall not be named as a party or otherwise be included in any such proceeding.²⁶

Resolution of Trademarks and Domain Names Disputes in the United States of America

Cases of cybersquatting often cause the most concern to trademark holders and have been the subject of the majority of litigated disputes.²⁷ The practice of cybersquatting harms consumers, electronic commerce, and the goodwill equity of valuable brand names, upon which consumers increasingly rely to locate the true source of genuine goods and services on the Internet. The US response to this problem is Anti-cybersquatting Consumer Protection Act, 15

<https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en> (last visited March 13, 2018)

²⁵ WIPO, *M/s. Core Diagnostics v. Herr Guenter Keu*, Case No. D2013-1238, available at <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-1238> (last visited March 13, 2018)

²⁶ ICANN, *Uniform Domain Name Dispute Resolution Policy*, available at <https://www.icann.org/resources/pages/policy-2012-02-25-en> (last visited March 13, 2018)

²⁷ Domain Name Case Law, available at <http://cyber.harvard.edu/property00/domain/CaseLaw.html> (last visited March 15, 2018)

U.S.C. § 1125(d) (the "ACPA"). Before enactment of the ACPA, trademark owners relied mainly on Lanham Act, to combat cybersquatting by bringing a claim for trademark dilution under 15 U.S.C. § 1125(c). However, Congress perceived that anti-dilution claims could not adequately address the harm caused by the growing activities of cybersquatters. In 1999, Congress passed the ACPA, 15 U.S.C. § 1125(d), an amendment to the Lanham Act.²⁸ The purpose of the ACPA is to protect American consumers and businesses, to promote the growth of online commerce, and to provide clarity in trademark law by prohibiting "cybersquatting," or the deliberate, bad faith, and abusive registration of distinctive marks as Internet domain names with the intent to profit from the marks' goodwill.²⁹ The Act, in its principal part, provides that a person shall be liable in a civil action by the owner of a mark, including a famous personal name which is protected under this section, if, without regard to the goods or services of the parties, that person:

‘(i) has a *bad faith* intent to profit from that mark, including a famous personal name which is protected under this section; and

‘(ii) registers, traffics in, or uses a domain name that:

‘(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark;

‘(II) in the case of a famous mark that is famous at the time of registration of the domain name, is dilutive of that mark; or

²⁸ Carl C. Butzer and Jason P. Reinsch, *Cybersquatting, Typosquatting, and Domaining: Ten years under the Anti-cybersquatting Consumer Protection Act §1*, available at <https://www.jw.com/wp-content/uploads/2016/05/1276.pdf> (last visited March 15, 2018)

²⁹ The John Marshall Journal of Information Technology & Privacy Law, *The Anticybersquatting Consumer Protection Act*, available at <https://repository.jmls.edu/cgi/viewcontent.cgi?article=1120&context=jitpl> (last visited March 15, 2018)

‘(III) is a trademark, word, or name protected by reason of section 706 of title 18³⁰, United States Code, or section 220506 of title 36³¹, United States Code.³²

Using the term ‘*traffics in*’ the ACPA refers to transactions that include, but are not limited to, sales, purchases, loans, pledges, licenses, exchanges of currency, and any other transfer for consideration or receipt in exchange for consideration.³³ Both the UDRP and ACPA turn on whether the registrant acted in bad faith. Once a plaintiff shows a bad faith intent to profit from use of the mark, the plaintiff must then demonstrate that the defendant's domain name is "identical or confusingly similar" to a "distinctive" or "famous" mark owned by the plaintiff, as would be necessary to reclaim a domain name under a UDRP administrative hearing, or that the domain name is dilutive of a famous mark. The ACPA expressly excludes any requirement that the defendant use the domain name in connection with "goods or services".³⁴ Also, the ACPA does not require the “use of the mark in commerce”. Such regulation provides stronger and wider protection for trademark owners’ rights against wrongful and illegal actions.

In determining the “*bad faith*” intent described above, the ACPA gives a lengthy but nonexclusive list of factors to consider:

- (i) the trademark or other intellectual property rights of the person, if any, in the domain name;
- (ii) the extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;
- (iii) the person’s prior lawful use, if any, of the domain name in connection with the bona fide offering of any goods or services;

³⁰ Legal Information Institute, *18 U.S. Code §706*, available at <https://www.law.cornell.edu/uscode/text/18/706> (last visited March 17, 2018)

³¹ Legal Information Institute, *36 U.S. Code §220506*, available at <https://www.law.cornell.edu/uscode/text/36/220506> (last visited March 17, 2018)

³² Anticybersquatting Consumer Protection Act ("ACPA"), *15 U.S.C. § 1125(d) (1) (A)*, available at <https://www.govtrack.us/congress/bills/106/s1255/text> (last visited March 17, 2018)

³³ Anticybersquatting Consumer Protection Act ("ACPA"), *15 U.S.C. § 1125(d) (1) (E)*, available at <https://www.govtrack.us/congress/bills/106/s1255/text> (last visited March 17, 2018)

³⁴ Jason M. Osborn, *Effective and Complementary Solutions to Domain Name Disputes* 229, available at <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1541&context=ndlr> (last visited March 17, 2018)

(iv) the person's lawful noncommercial or fair use of the mark in a site accessible under the domain name;

(v) the person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;

(vi) the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services;

(vii) the person's provision of material and misleading false contact information when applying for the registration of the domain name or the person's intentional failure to maintain accurate contact information;

(viii) the person's registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of such persons;

(ix) the person's history of offering to transfer, sell, or otherwise assign domain names incorporating marks of others to the mark owners or any third party for consideration without having used, or having an intent to use, the domain names in the bona fide offering of any goods and services;

(x) the person's history of providing material and misleading false contact information when applying for the registration of other domain names which incorporate marks, or the person's history of using aliases in the registration of domain names which incorporate marks of others;
and

(xi) the extent to which the mark incorporated in the person's domain name registration is distinctive and famous within the meaning of subsection (c)(1) of section 43 of the Trademark Act of 1946 (15 U.S.C. §1125).³⁵

The bad faith use has been found in *Sporty's Farm v. Sportsman's Market*, which is the first appellate case to rule upon the ACPA. Sportsman's Market (defendant) is a mail order catalog company that is quite well-known among pilots and aviation enthusiasts for selling products tailored to their needs. In the 1960s, Sportsman's began using the logo "sporty" to identify its catalogs and products. Omega is a mail order catalog company that sells mainly scientific process measurement and control instruments. In late 1994, the owners of Omega decided to enter the aviation catalog business. Omega registered the domain name sportys.com. In January 1996, nine months after registering sportys.com, Omega formed another wholly-owned subsidiary called Sporty's Farm (plaintiff) and sold it the rights to sportys.com. Sporty's Farm brought a declaratory judgment action against Sportsman's Market, and Sportsman's Market counterclaimed for trademark infringement, trademark dilution and unfair competition.

The Second Circuit determined that defendant's "Sporty's" mark, as used in connection with Sportsman's catalogue of merchandise and advertising, is inherently distinctive and that plaintiff had used defendant's mark in the domain name with a "bad faith intent to profit" within the meaning of the ACPA. The court concluded that Omega registered sportys.com for the primary purpose of keeping Sportsman's from using that domain name. Finding that plaintiff had violated the statute, the court affirmed the injunction issued by the District Court, which directed plaintiff to stop using the domain name, and transfer it to the defendant.³⁶

According to ACPA, in any civil action involving the registration, trafficking, or use of a domain name, a court may order the forfeiture or cancellation of the domain name or the

³⁵ Anticybersquatting Consumer Protection Act ("ACPA"), 15 U.S.C. § 1125(d) (1) (B), available at <https://www.govtrack.us/congress/bills/106/s1255/text> (last visited March 17, 2018)

³⁶ Internet Library of Law and Court Decisions, *Sporty's Farm LLC v. Sportsman's Market, Inc.*, 202 F.3d 489 (2nd Cir. Feb. 2 2000), available at http://www.internetlibrary.com/cases/lib_case115.cfm (last visited March 18, 2018)

transfer of the domain name to the owner of the mark. And a person shall be liable for using a domain name only if that person is the domain name registrant or that registrant's authorized licensee. So, like UDRP, ACPA also defines liability for those who actually use the domain names. Particularly, the ACPA establishes that the domain name registrar or registry or other domain name authority shall not be liable for injunctive or monetary relief, except in the case of bad faith or reckless disregard, which includes a willful failure to comply with any such court order. Furthermore, the ACPA provides trademark holders with an offensive weapon, as it allows them to obtain statutory damages in the amount of not less than \$1,000 and not more than \$100,000 per domain name, as the court considers just. It is apparent that the legislator completely realizes the seriousness of the problem and provides such a strong regulation that will definitely resolve domain name disputes.³⁷

Resolution of Trademarks and Domain Names Disputes in the United Kingdom

Compared with the US, UK does not have a specific law resolving trademarks and domain names conflicts. The basic law which somehow regulates those cases is the Trade Marks Act of 1994. However, it cannot resist the problem properly as it only provides protection for unregistered trademarks. Particularly, Section 10 of the Trade Mark Act defines that:

1) a person infringes a registered trade mark if he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.

(2) a person infringes a registered trade mark if he uses in the course of trade a sign, which

(a) is identical with the trade mark and is used in relation to goods or services similar to those for which the trade mark is registered, or

³⁷ Anticybersquatting Consumer Protection Act ("ACPA"), 15 U.S.C. § 1125, available at <https://www.govtrack.us/congress/bills/106/s1255/text> (last visited March 18, 2018)

(b) is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the trade mark.

(3) a person infringes a registered trade mark if he uses in the course of trade a sign which is identical with or similar to the trade mark, where the trade mark has a reputation in the United Kingdom and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.³⁸

So, the action will constitute a trademark infringement under Trade Marks Act if it contains the use of a registered trademark in the course of trade and meets with one of the above-mentioned requirements. However, many questions remain unclear regarding the 'use in the course of trade'. The law does not clarify whether mere registration of a domain name in the absence of a website providing goods and services is sufficient to satisfy the test of 'use in the course of trade'.³⁹ The approach of English courts to such actions is well-expressed in the landmark case of *British telecommunications Plc and others v. one in a Million Ltd and others*.

The plaintiffs in this case were well known companies (Marks & Spencer Plc, J Sainsbury Plc, Virgin Enterprises Ltd, British Telecommunications Plc, Telecom Securior Cellular Radio Ltd and Ladbrokes Plc), each possessing considerable goodwill. The defendants were dealers in Internet domain names specialized in registering domain names identical or similar to the names of well-known companies without their consent. They registered domain names comprising the trademarks of the plaintiffs such as 'j.sainsbury.com'; 'virgin.org'; 'ladbrokes.com'; 'bt.org'; 'cellnet.net'; and 'marksandspencer.co.uk'. All but one of the domain names involved in the action were not active Internet sites. The plaintiffs brought five actions for summary judgement against the defendants in the High Court. They alleged that the activities of

³⁸ Trade Marks Act 1994 §10, *available at* <https://www.legislation.gov.uk/ukpga/1994/26> (last visited March 19, 2018)

³⁹ Mohammad S. Al Ramahi, *Internet Domain Names & Trademark Law* §2.2.2, *available at* <http://www.bileta.ac.uk/content/files/conference%20papers/2006/Internet%20domain%20names%20and%20trademark%20law%20-%20does%20the%20current%20legal%20scheme%20provide%20an%20adequate%20protection%20to%20domain%20names.pdf> (last visited March 19, 2018)

the defendants amounted to passing-off and to infringement of their well-known registered trademarks.

The High Court noted that the plaintiffs were well-known companies and each of them had established a reputation in their mark under section 10(3) of the Trade Marks Act. That is why, the Court held that the defendants had committed passing off, as anyone visiting one of their websites would assume that they were associated with the established businesses. Moreover, it was held that the use of a trademark-based domain name in the course of the business of a professional dealer for the purpose of making it more valuable and extracting money from the trademark owner amounted to 'use in the course of trade'.⁴⁰

This case is a good illustration of the willingness of English courts to protect the rights of trademark owners from third parties' unscrupulous actions. They duly understand the seriousness of the problem and go beyond the scope of the Law to find a proper and sufficient solution to the problem.

CHAPTER 2

Resolution of Trademarks and Domain Names Disputes in Armenia

Like other states, the Republic of Armenia (hereinafter "RA") also faces issues in resolving disputes involving trademarks and domain names, in particular, due to lack of

⁴⁰ James P. Hutchinson, *Can Trade Mark Protection Respond to the International Threat of Cybersquatting?* §4.2, available at https://warwick.ac.uk/fac/soc/law/elj/jilt/2001_1/hutchinson/#a4.1 (last visited March 20, 2018)

sufficient regulations. The only provision related to the relations of the owner of the trademark and the holder of an identical domain name is found in the RA Law on Trademarks and RA Civil Code (hereinafter “Code”), which are presented in this Chapter.

On April 29, 2010 the National Assembly of the Republic of Armenia adopted the RA Law on Trademarks. The purpose of this Law is the regulation of the relationships regarding the registration, legal protection and use of trademarks and service marks.

According to paragraph 2, point 5 of Article 12 the Trademark Law, the owner of a trademark may prevent third parties from using the trademark on the Internet or on other global computer telecommunication networks, in particular by any modes of addressing, including Internet domains.

The RA Civil Code was adopted by the National Assembly of Armenia in 1998. The Code also provides some regulation for the relationships between trademark owners and domain name holders. According to the Article 1172 of the Code the owner of a trademark has the exclusive right to possess, use and dispose of the mark belonging to it, as well as to allow or prohibit the use of it by other persons. The trademark owner has an exclusive right to prevent third parties to use any sign in the course of trade which 1) is identical to the registered trademark and is used in relation to goods and/or services for which the trademark is registered; 2) is identical or similar to the registered trademark, which is used in relation to the goods and/or services which are identical or similar to the goods and/or services for which the trademark is registered, where the use of such sign creates a likelihood of confusion on the part of public, including association with the registered trademark; 3) is identical or similar to the trademark registered for other goods and/or services, where the latter has a reputation in the Republic of Armenia and the use of that sign would cause unfair advantage for the trademark or be prejudicial to the distinctive feature or the reputation of the trademark. Paragraph 3(5) of the same Article clarifies that one of the ways of using a trademark is considered to be using the sign on the Internet or on other global computer telecommunication networks, in particular by any modes of addressing, including Internet domains.⁴¹

⁴¹ Armenian Legal Information System (“Arlis”), *Civil Code of the Republic of Armenia*, available at

It is obvious that both the Code and RA Law on Trademarks do furnish trademark owners with the same rights against domain names' holders. Moreover, none of them provides with legal protection for the rights of domain name holders against trademark owners' aggressive actions. Being adopted later, RA Law on Trademarks has not expanded the scope of legal regulation of trademarks and domain names cases.

Trademarks v. Domain Names Cases in Armenia

Are the regulations provided by RA Law on Trademarks and the Code enough to adequately deal with trademarks and domain names cases in practice?

In "*Softline International*" CJSC v. Samvel Zakaryan and "Dolphin" LLC, "Softline International" CJSC (hereinafter "plaintiff") brought the claim against defendants Samvel Zakaryan and "Dolphin" LLC. The latter is a registrar and registered the domain name "www.softline.am" based on the contract for providing paid services signed with Samvel Zakaryan. By registering the domain name Samvel Zakaryan became the owner of the domain name "www.softline.am". The plaintiff asked the Court to invalidate the contract between Samvel Zakaryan and "Dolphin" LLC and to cancel the registration of "www.softline.am" domain name.

The Court of First Instance of Kentron and Nork-Marash Administrative Districts of Yerevan found that the claim was subject to rejection by the following reasons:

According to Article 14(5) of RA Civil Code, the protection of civil law rights shall be conducted by recognizing an avoidable transaction as invalid and applying the consequences of its invalidity.

A claim for recognizing an avoidable transaction to be invalid can be brought by the persons indicated in the Code.

According to the Code, in this case "Softline International" CJSC is not a person to submit a claim for invalidation of the contract.

The registration of "www.softline.am" domain name has not been executed on the basis of a disputed contract that is why the domain name registration cannot be recognized as invalid as a result of invalidation of the contract.⁴²

Another example of trademarks and domain names disputes is the case of “*Top Motors*” LLC v. *Levon Khachatryan and “ABCDomain” LLC*. In this case, the “Top Motors” LLC (hereinafter “plaintiff”) filed a claim against defendants Levon Khachatryan and “ABCDomain” LLC asking the Court to prohibit Levon Khachatryan from using “mazda.am” domain name, which was registered by “ABCDomain” LLC (registrar) as a result of a contract signed with Levon Khachatryan.

The Court of First Instance of Avan and Nor Nork Administrative Districts of Yerevan rejected the claim of “Top Motors” LLC against Levon Khachatryan and “ABCDomain”. The Court decision was based on the reasoning that, in this case, according to RA Civil Procedure Code Article 48(1), the representative of “Top Motors” LLC - Arthur Ghazaryan has not proven that the licensor “Mazda Motor Corporation” gave a consent to the licensee “Top Motors” LLC to submit a claim to the court for the protection of the rights relating to the trademark.⁴³

From the analysis of the aforementioned two cases it is already clear that there are visible mistakes in practice due to gaps in domestic legislation. In both cases the plaintiffs filed the claims against domain names’ holders and registrars. However, according to RA Law on Trademarks and the Code, the trademark owner has an exclusive right to prohibit the use of the sign by those persons who actually used it in domain names. Registrars do not use the signs in domain names. They only register domain names based on contracts for providing paid services for registrants (domain name holders) and are not obliged to check whether registering domain name is identical or similar to any trademark or not. Moreover, there are potential grounds of cybersquatting in both cases. But in none of them courts refer to cybersquatting, because there are no legal bases for it in Armenian legislation. So, the rights of trademark owners and domain name holders would be constantly affected in case domestic legislation does not provide specific

⁴² DataLex, *Court Case No: EKD/2944/02/12*, available at http://www.datalex.am/?app=AppCaseSearch&case_id=14355223812292813 (last visited March 7, 2018)

⁴³ DataLex, *Court Case No: EAND/0383/02/12*, available at http://www.datalex.am/?app=AppCaseSearch&case_id=1125899906861626 (last visited March 7, 2018)

and effective legal norms for the protection of their rights. The Court will be guided by the existing legal norms, which will define the outcome of the case. And if the legal norms provided by national legislation are not clearly defined or enough to deal with the problem, it is not excluded that the outcome of the case would be unfair one. This will inevitably lead to such situations where a person, who wants to protect his rights, will not rely on domestic regulation. Rather, he will prefer to obtain a particular domain name by paying the required amount of money to the domain name holder, than to wait for the Court decision.

CHAPTER 3

Comparative Legal Analysis

The research shows that unlike several other countries Armenia, does not have a separate law on cybersquatting or any other law/regulation that provide sufficient legal grounds for resolving disputes involving trademarks and domain names. Unlike the ACPA and the UDRP, Armenian legislation does not refer to bad faith. It does not provide a certain list of factors that will help to determine whether there is a bad faith use and/or registration of a particular domain name by third parties. Moreover, unlike Armenian regulation, the ACPA does not require the “use of the mark in commerce”, which provides stronger and wider protection for trademark owners’ rights against domain names’ holders unfair actions. The ACPA strengthens the protection of trademark holders’ rights allowing them to obtain statutory damages in the amount of not less than \$1,000 and not more than \$100,000 per domain name. Furthermore, compared to the UDRP, the RA Law on Trademarks does not absolutely cover the protection of domain name holders’ rights against trademark owners’ complaints filed in bad faith.

Conclusion

Along with the globalization of the Internet, many disputes arise over the use of trademarks in domain names. This problem has acquired huge significance as all countries face trademarks and domain names cases every day. Some countries have already taken steps to legally regulate this sector, to provide proper and adequate protection for trademark owners' and domain names holders' rights and to avoid the negative consequences of trademarks and domain names disputes.

WIPO's methods and experience in dealing with such disputes since 1999, are considered to be the best practices in this field. Being guided by UDRP policy and rules it provides sufficient protection for the legitimate rights and interests of both trademark owners and domain name holders.

The US has also gained an irreplaceable experience in this area. The Anti-cybersquatting Consumer Protection Act is a vivid example of US efforts combating cybersquatting. Congress has acknowledged that trademark holders are battling thousands of cases of cybersquatting each year, the vast majority of which cannot be resolved without a specific and proper domestic regulation. A strong and efficient regulation is needed to prohibit the bad-faith and abusive registration of distinctive marks as Internet domain names with the intent to profit from the goodwill associated with such marks.

Despite the fact that Trade Marks Act of 1994 provides a very limited scope of protection for trademark infringement cases, the UK courts realize the seriousness and importance of the emerging problem and take appropriate measures to overcome this challenge by addressing it in their decisions.

Compared with international best practices, the legal regulations provided by Armenia's current legislation is obviously weak. The practice shows that, due to gaps and shortcomings in the legislation, the only article "regulating" trademarks and domain names cases is being applied incorrectly by the Courts. Moreover, there is no tendency in courts' decisions to address such serious issues as "cybersquatting." It should be realized that by letting cybersquatting cases go unpunished, they harm consumers, electronic commerce, and the goodwill of businesses. Accordingly, it can be concluded that Armenian legislation does not provide sufficient legal means for resolving disputes involving trademarks and domain names and there is necessity to follow the experience of international best practices and make appropriate amendments to the domestic law.

Recommendations

According to the Article 12 (1) of the RA Law on Trademarks the owner of the registered trademark shall have an exclusive right to prevent third parties, without his consent, to use any sign in the course of trade in particular cases described by the Law.⁴⁴ This means that if the sign is not used in the course of trade it will not constitute an infringement. It limits the scope of protection of legitimate trademarks owners' rights, because the use of the sign may violate the trademark owner's right without being actually used in the course of trade. Accordingly, an appropriate amendment is needed in this article based on ACPA which does not require the "use of the mark in commerce". Such regulation will limit trademark infringement cases and will provide stronger and wider protection for trademark owners' rights against unfair actions.

It is crucial to have an article in the Law providing a list of possible circumstances that may lead to the bad-faith registration and use of the sign in domain names. The legislator can make such improvement based on non-exhaustive lists provided by the UDRP and ACPA. This regulation will limit the court's discretion of making biased decisions, and it will also serve as a guideline for trademarks' owners while filing complaint to the court.

⁴⁴ Armenian Legal Information System ("Arlis"), *The Law of the Republic of Armenia on Trademarks*, available at <http://www.arlis.am/DocumentView.aspx?DocID=119072> (last visited March 25, 2018)

The Law must also provide a definition of cybersquatting. It is necessary to have a strict regulation covering and referring to cases of cybersquatting, in order to anticipate and adequately prevent trademark infringement cases caused by cybersquatters' unlawful actions. It would be better to define accurate sanctions for cases of cybersquatting. For instance, it can be in the form of monetary penalty following the experience of ACPA.

As the practice shows the rights of domain name holders are also subject to infringement by trademark owners. The trademark holder may bring a complaint in bad faith for the purpose of depriving a registered domain-name holder of a domain name. Like UDRP, the RA Law on Trademarks should contain a proper protection for domain names holders' rights by providing a list of factors on which the domain names holders may prove their legitimate rights and interests in the relevant domain names.

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