

LATEST DEVELOPMENTS IN THE REGULATION OF CCTLDS: COMPARATIVE ANALYSIS OF <.LT>, <.SK> AND <.KZ>

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Introduction

The current situation in the regulation of country code top level domain names (ccTLDs) worldwide is still far from settled. The deeply rooted problem of domain name hijacking, otherwise known as ‘cybersquatting’, has been plaguing the World Wide Web up until today¹. Cybersquatting basically means using of trade names of world-famous companies or just “high-value” titles in the domain names for sale or advertisement purposes. Although the domain names have been in existence for a considerable time, even so often new ways are sought to ensure that the system

1 World Intellectual Property Organisation Arbitration and Mediation Center. *2012 Review. Press Article No PR/2013/733*. Geneva, March 28, 2013 [interactive]. [accessed on 10-02-2014]. <http://www.wipo.int/pressroom/en/articles/2013/article_0007.html>.

of domain name registration and use would be as streamlined as possible to enable the natural and legal persons to implement rights to a domain name and protect them from illegal exploitation without much difficulty. This is where national legal regulation comes into play. A majority of world countries use a variety of mechanisms to protect their national domain from undesirable registrations, which are most of the time a part of the national legislation. For example, in some countries, such as Ireland, an arbitrary choice of domain name by a registrant is prohibited, i.e. a domain name should exactly correspond to the name of the registrant².

The latest statistical data show the growth in the number of the registrations of European ccTLDs, while the global gTLDs (e.g., <.com>, <.net>, <.info>, etc.) are in the decline³. This leads to the prediction that cybersquatting inevitably is going to spread from the global to the national level. Therefore, in this article, the author aims to look at the latest trends of domain name concept and its definition in several European countries, discover its differences and common trends of country code domain names and make a comparison of them. Further on, the author will be examining the domain name registration in Lithuania, Slovakia and Kazakhstan. Attention will be paid to the recent changes in legislative framework and the conclusions will be drawn of the differences and similarities focusing on the recent case law, showing the latest trends of domain name regulation and protection. Where available, the author of this article will provide the views of the most recent scholarly writings.

The object of this research is the country code domain name legislation and case law of Lithuania, Slovakia and Kazakhstan. Having separate legal acts that aim at regulating country code domain names is still an exception rather than a usual method of domain name regulation (e.g., Finland, partly the USA, etc.). All of those countries, including Lithuania, do not have their special legal acts regulating the use of domain names.

The author presents his research based on the wide spread methods of research: historical, logical analytical, systematic, comparative and statistical methods.

1. Legal definition of domain names in national legislation

The first step of protecting the legitimate owners of domain names and related trademarks in all three countries comes from national legislation. In neither of the three countries, Lithuania, Slovakia or Kazakhstan, separate legal acts are dedicated specifically to domain names. However, there are numerous unsolved

2 See: *.ie Registrations Policy* [interactive]. [accessed on 10-02-2014]. <<https://www.iedr.ie/registrations-policy/>>.

3 Domainwire Stat Report by CENTR, issued December 3, 2012 [interactive]. [accessed on 10-02-2014]. <https://centr.org/system/files/share/domainwire_stat_report_2012_2.pdf>.

and problematic areas regarding the domain names, such as the legal classification of the definition, use and relationship with other legal institutes⁴. Apparently, legal definition of domain names is one of such areas. A separate legislation could assist in that matter, attributing domain names to a particular type of intellectual or industrial property. However, the legal status and definition of domain names is left to the national courts and scholars to agree upon. There is still a lack of settled case law applying some particular provisions on this matter, which could provide us with legally binding definitions and clarify this institute. Fortunately, there are a few recent court decisions, which give some important clues on the matter.

In Slovakia, Article 2(1)(d) of the Act No. 22/2004 Coll. on electronic commerce⁵ (which is primarily dealing with the consumer protection connected to e-shops and international co-operation in electronic commerce) provides for a rather poor and non-exhaustive definition of “domain” as a “symbolic address in electronic communication network”. The domain name is a certain code, a devised set of symbols representing a particular location on the Internet. It allows for the identification of the computer concerned connected to the structure of the computer network and the communication among these computers. In order to perform its function, it has to be saved in the DNS database server. Technically, it exists physically in a bipolar form as a set of electromagnetic notes created by a man, and thus, from a legal perspective some authors consider it being a thing/object. The problem is that there is no exact definition of the word “thing/object” in the Slovak legal system: the major civil legislation, division of things into movable and immovable is only given in the Civil Code of the Slovak Republic (hereinafter referred to as the Slovak Civil Code). The courts are inclined to interpreting things as “physical objects provided that they are manageable and useful thus they do serve people’s needs”⁶. The main emphasis is put on the fact that the thing has to be a physical object. In the opinion of the academic authors, a domain name is certainly not a physical object. For quite a few years until now, the majority of Slovak academic community and respected authors of Slovak and Czech legal science⁷ have been sharing the notion that it would be too extensive and not very accurate to consider a domain name as a thing/object; it would subsequently go against the settled case law and legislation. In their view, a domain name is de facto effective vis-à-vis every other entity in the manner that without

4 See: Introduction at Bettinger, Torsten. *Domain Name Law and Practice: An International Handbook*. Oxford University Press, Inc., 2005.

5 Act No. 22/2004 Coll. on Electronic Commerce of the Republic of Slovakia (legally binding from 1 February 2004).

6 Decision of Prešov Regional Court of November 14th, 2013, in the civil case No 19Co/202/2013 [interactive]. [accessed on 10-02-2014]. <<http://www.itpravo.sk/>>.

7 E.g., JUDr. Trapl, V. *International Commercial Arbitration – Arbitration in Czech Republic and in EU (actual stage)* [interactive]. [accessed on 10-02-2014]. <http://www.trapl.cz/files/2008_01.pdf>.

the consent/expression of consent of the person for whom it has been registered everyone is excluded from using such domain name. The person concerned has a quasi-ownership, however, de jure do not possess any absolute rights regarding the domain name, but is merely entitled to use it, give consent to another person to use it, either for free or for remuneration, cancel the registration or transfer the above-mentioned rights. From this point of view, the domain name is a subject of the rights and is capable of being a subject of possession. Under Article 129 of the Slovak Civil Code, things/objects and rights, including relative rights, are subject to possession.

The most recent scholarly writings show the popularity of the *sui generis* theory of property as regards the legal nature of domain names. Konstantinos Komaitis, the Swiss researcher of domain name law, has recently discussed the domain names as *sui generis* “e-property” rights based upon the experience of the cases resolved under the Uniform Domain Name Dispute Resolution Policy (UDRP)⁸. This theory of property was also previously advocated by Lithuanian scholars⁹. It is evident that the domain name is, first of all, a name, and a name ought to be protected by the law. Legislative bodies are still not sure about the legal nature of domain names, but the latest developments in the courts and panels indicate that proclaiming domain names as the *sui generis* industrial property is the right way for legislators to take.

As it was mentioned, there is an evident lack of legal regulation of rights to domain names and procedures of dispute resolution in Slovakia. Therefore, taking into account the nature of the registration process and legal relationships arising out of the agreement for the registration of a domain name, any rights related to the domain name, falling within the scope of the civil law, are based solely on contractual grounds. Article 118(1) of the Slovak Civil Code specifies that “things/objects, rights and other assets (value in property) shall be considered a subject of the civil legal relationships.” It was mentioned that there is a general consent that the domain name shall not be considered as a “thing” in legal terms. Finally, acknowledging that the domain name is not a right (since there is a difference between the domain name as a set of symbols expressly identifying a certain area in the Internet and the contractual rights arising out of the agreement on registration), it might be concluded that in accordance with the afore-mentioned section of the Slovak Civil Code the domain name shall be considered as “other asset” (value in possession).

The same issue has been dealt with in Kazakhstan, mainly in the case law of national courts as well as in the works of legal scholars. In the Decision, the judge Ms. Zh. S. Zhumabaeva considered the domain name to be related to tangible benefit and property rights¹⁰. As a component of company’s activities, used for identification

8 See: Komaitis, K. *The Current State of the Domain Name Regulation*. London and New York: Routledge, 2010.

9 Sauliūnas, D. Problems of the Legal Nature of Internet Domain Names. *Jurisprudencija*. 2004, 47 (39): 29–37.

10 Decision of Almaty Regional Court of July 16, 2007, LRK Almaty, No 422-IV (found and provided to an author by the local lawyer Ms. Gulnaz Osipova).

of the company and its products in traditional business and electronic trade, a domain name has become one of the forms of intellectual property in accordance with subparagraph Article 961(4)(3) of the Civil Code of the Republic of Kazakhstan (hereinafter referred to the Kazakh Civil Code), and therefore, the registration of it, being similar to trademarks, company's names, tangible profits with all derivative property rights, is necessary. Only the registration of a domain name as a trademark would give the object of intellectual rights mandatory court protection and would help to resolve disputes regarding compensation of damages.

In the opinion of the author of numerous publications on legal issues of the Republic of Kazakhstan, Mr. I. Loskutov, it is necessary to evaluate the relationship between the concepts of “trademark” and “domain name”¹¹. Herewith, it is noteworthy that according to the effective legislation of Kazakhstan, the domain name is not an object of intellectual property rights, unlike a trademark, which is protected by the related legislation on intellectual property rights and used as the means of individualization in the entity's activity. Mr. Loskutov considers that in the framework of Internet-based relationships the principle of separation of objects providing key information loses clarity by reason of newly formed objects, such as domain names, which share many similarities with traditional objects of intellectual property. In his opinion, such relations require special legal regulation (of the top level rather than subordinate legislation, as it is now), as it was done in regards of other objects of intellectual property. Currently, the registration of objects of intellectual property rights is regulated by the Law of Republic of Kazakhstan No. 456-I of 26 July 1999 “On Trademarks, Service Marks and Appellations of Origin”¹², whereas the registration of domain names is regulated by the Order of the Minister of Communications and Information of the Republic of Kazakhstan No. 220 of 7 September 2010 “On approval of rules of registration, use and distribution of the domain space of Kazakhstan segment of Internet”; the registration of trademarks is done by the Committee on intellectual property rights of the Ministry of Justice of the Republic of Kazakhstan, whereas the registration of domain names is carried out by the institution “Kazakhstan Network Information Center”, which is not a governmental body, and it is done in the same way in Lithuania or Slovakia.

Thus, on the basis of all the above stated, and in particularly taking into account the Decision No.2-9819/10 of Almaty Specialized Interdistrict Economic Court of

11 Emrich, F.; Plakhina, Y., and Tsyrenzhapova, D. *Mapping Digital Media: Kazakhstan. A Report by the Open Society Foundations*. March 29, 2013, based on the interview with Mr. I. Loskutov.

12 Law of Republic of Kazakhstan No. 456-I of 26 July 1999 “On Trademarks, Service Marks and Appellations of Origin”, Astana 456-I LRK (English translation) [interactive]. [accessed on 30-07-2012]. <<http://www.google.lt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CGMQFjAB&url=http%3A%2F%2Fwww.lexadin.nl%2Fwlg%2Flegis%2Fnofr%2Foeur%2Farc%2Fkaz%2FTrademarks.pdf&ei=bWAWULe1Fqbl4QSepYC4Dg&usg=AFQjCjNH83IYSBmuvVHL5f0NF9G8F0lnanA>>.

11 October 2010, in which it was decided that a domain name should follow the trademark, it seems that further development of case law should take direction of providing protection of trademark owner's rights against the unsolicited use of the trademark in domain names of other individuals.

Kazakhstan is also a member of the World Intellectual Property Organization (WIPO). Thus, it can be assumed that the plaintiffs in claiming against trademark use in domain name may refer to the Article 10-bis of the Paris Convention for the Protection of Industrial Property of 20 March, 1883 (the Paris Convention). In accordance with Article 10-bis of the Paris Convention, "any actions that could create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor shall be prohibited". The Application of Paris Convention is enforceable within the territory of the Republic of Kazakhstan in accordance with Article 3(8) of the Kazakh Civil Code¹³.

According to Paragraph 1.05 of the Model provisions of the WIPO on protection against unfair competition¹⁴, "the term "industrial or commercial activities" should be understood in the broad sense that covers not only the activities of enterprises providing products or services, in particular the buying and selling of such products of services...So, for the purposes of these Model Provisions, it does not matter whether the activities of a person or enterprise are for profit or not".

According to Paragraph 1.06 of the Model provisions of the WIPO on protection against unfair competition, the model provisions shall be also applied in situations where there is no direct competition between the party who commits the act and the party whose interests are affected by this act. When the act was not directed against a competitor of a person who committed this act, he may, nevertheless, affect competition in the market as a result of strengthening the competitiveness of this person in relation to its competitors. For example, when a well-known trademark is used for completely different products by a person who is not its owner, the user of a trademark does not compete, as a rule, with its owner, but the use of a trademark, however, relates to competition, since the user receives unfair advantage over their competitors who do not use a well-known trademark, which could facilitate the sale of goods to consumers.

According to the Lithuanian legislative framework, domain names should be considered as a special object of intellectual property, enjoying the protection similar to that of trademarks. The analysis of certain provisions of Lithuanian law suggests that the courts may decide the disputes on the basis of Articles of the Civil Code, Law

13 In accordance with Article 3(8) of the Civil Code of the Republic of Kazakhstan, international treaties, in which the Republic of Kazakhstan is signatory, are directly applied on the territory of the Republic of Kazakhstan.

14 *Model Provisions of WIPO on Protection against Unfair Competition*. Presented by the International Bureau of WIPO. Publication No 832(E). Geneva, 1996.

on Trademarks, as well as certain provisions of the Law on Competition and the Law on Advertising¹⁵.

2. Recent trends of the registration of domain names

There are no exclusive requirements or restrictions of registration of domain names in Lithuanian or Slovak legislation. The procedure has settled in many years of practice and has not been a subject to significant changes in recent years. Meanwhile, it would be of great interest to look at the solutions offered by Kazakhstan authorities, which could be seen as rather controversial.

In Kazakhstan, the registration of domain names is regulated by the Order of the Minister of Communications and Information of the Republic of Kazakhstan “On approval of rules of registration, use and distribution of the domain space of Kazakhstan segment of Internet”, dated as of September 7, 2010, No. 220 (hereinafter referred to as the Rules No. 220)¹⁶.

In accordance with Article 1(17) of the Rules No. 220, the registrant is an individual or legal entity, which submitted an application and necessary documents for registration (renewal, modification, transmission, transfer, cancellation) of the domain name to the registrar and the registrant has the rights and duties on information management of the registered domain name over the period of validity.

Furthermore, in accordance with Article 4 of the Rules No. 220, in order to register the domain name, it is required that server equipment (hardware) would have a physical location in the territory of the Republic of Kazakhstan. This requirement of physical presence of the service equipment on the territory of the Republic of Kazakhstan caused controversies in Kazakh scholars and population. As a matter of fact, there are no analogies of it neither in the Slovak, nor in the Lithuanian legislation.

Rules for Distribution of Domain Space of Kazakhstan Segment of Internet, adopted in 2005 (Order of the Chairman of the Agency of the Republic of Kazakhstan for Informatization and Communication No. 88-b, dated as of 5 April 2005) originally contained a ban on outside location of web servers with domain names <.kz>. In accordance with the Order dated as of February 1, 2010 No. 30, this ban was lifted. It turned out that the sites with the domain name <.kz> could be placed on servers (hosting) in other countries, but they had not been considered as Kazakhstani (belonging to the Kazakh segment of Internet). However, in the current Rules No.

15 Polish author J. Antoniuk is of a similar opinion in the context of the Polish law, as presented in his recent study. See: Antoniuk, J. *Ochrona znaków towarowych w Internecie*. Wydawnictwo Prawnicze LexisNexis, 2006.

16 Order of the Minister of Communications and Information of the Republic of Kazakhstan “On approval of rules of registration, use and distribution of the domain space of Kazakhstan segment of Internet” of September 7, 2010, No. 220.

220, the requirement of physical location of server equipment on the territory of the Republic of Kazakhstan was reintroduced.

Internet Association of Kazakhstan expressed the following opinion in their letter to the National Economic Chamber of Kazakhstan “Soyuz Atameken” dated July, 2010: “*The requirement of location of an Internet resource on the territory of Kazakhstan automatically puts Internet resources of international corporations who have registered domain names in the zone <.kz>” (Google, Microsoft, Hewlett-Packard, Yandex, etc.) beyond the law. Moreover, this requirement will cause negative public reaction...*”¹⁷.

Google Corporation, the owner of the domain name <www.google.kz>, was one of the first major participants of Kaznet affected by the Rules No. 220. As it was expected, it happened because of the necessity to extend the registration of the domain name. Google had decided to abandon the use of the site with the domain name <www.google.kz> from July 8, 2011, and all requests for this web-site have been redirected to <www.google.com>¹⁸.

The requirement of physical location of server equipment on the territory of Kazakhstan was explained by the Ministry of communication and information in the letter dated as of 15 June, 2011¹⁹ with the following reasoning:

1) Development of the market of hosting services;

Currently, many companies and nonprofit organizations prefer to register a domain name <.kz> without using a hosting service within the country. The previous mass outflow of customers did not stimulate the development of domestic market of hosting. In fact, besides JSC “Kazakhtelecom”, there are no independent companies providing hosting services. Thus, the requirement of physical location of servers with the domain name <.kz> in the territory of Kazakhstan is one of the drivers of development of hosting services market.

2) Promoting the development of domestic content and lowering costs of providers on payments of international communication lines in view of location of majority of Kazakhstan’s resources abroad;

3) The principle of national jurisdiction;

17 The Inquiry of Member of the Parliament Mr. Abenov to the Ministry of Communication and Information of the Republic of Kazakhstan dated as of June 8, 2011 “Whether the Rules of registration, use and distribution of the domain space of Kazakhstan segment of Internet are correct?”.

18 Changes to the Open Internet in Kazakhstan. *Official Google Blog*. June 7, 2011 [interactive]. [accessed on 10-02-2014]. <<http://googleblog.blogspot.com/2011/06/changes-to-open-internet-in-kazakhstan.html>>.

19 The answer of the Ministry of Communication and Information of the Republic of Kazakhstan on Inquiry of Member of the Parliament Mr. Abenov, dated as of June 15, 2011 № DZ-307 “Whether the Rules of registration, use and distribution of the domain space of Kazakhstan segment of Internet are correct?”.

The random location of servers of Internet resources all over the world gives the possibility to use the Kazakh national domain <.kz> for any purpose. Being physically outside of Kazakhstan, internet resources of various types (from pornographic to terrorist and extremist content) will be able to use domain <.kz> for dissemination of information without any punishment. In this regard, this situation is not conducive to a positive reputation of Kazakhstan domain <.kz>.

Against the backdrop of rapidly growing Internet crimes (phishing, cybersquatting, spread of grayware, spyware, etc.), the requirement for the location of a web server in the territory of the Republic of Kazakhstan allows putting the national segment under the jurisdiction of the Republic of Kazakhstan and preventing intruders to use national domains for illegal purposes without opportunity to change the host or destroy information from their servers.

Compared to the recent situation in Kazakhstan, the registration procedures in Lithuania and Slovakia, being rather similar, remain equally liberal.

3. Recent trends in country code domain name dispute resolution

3.1. Case law of Kazakhstan

As it was already mentioned, in the Kazakh legal framework there is no single legislative instrument of the highest rank which would directly provide for legal stipulation of relationships related to use of domain name. Therefore, the area of legal relationships related to the domain name and subsequently various disputes connected to it will be governed by general rules of civil and commercial code (cases dealing with intellectual property will be decided also according to the provisions on the special legislation regarding IP), thus, general legal institutes will be applied. With regard to cybersquatting or domain grabbing, there are a couple of possibilities of infringement of rights and legitimate interests, depending on which a particular right is being breached.

The Judgment of Almaty District Court of Astana city No. 2-3223/09²⁰ dated as of 2 June, 2009 (which was left unchanged by the Judgment of the Civil Panel of Astana City Court No. 2A-1870/2009 dated as of 7 September 2009 and the Judgment of the Supervisory Panel of Astana City Court No. 1228-2N-09 dated as of 10 December 2009) is a significant case in this respect.

The company “Inter IKEA Systems BV”, with reference to the fact that it is the owner of the trademark IKEA registered in the territory of Kazakhstan, claimed against the defendant Mr. M. D. Aytmaganbet and requested to recognize the registration of

20 Judgment of Almaty District Court of Astana city dated as of June 2, 2009 № 2-3223/09 on the case of the company «Inter IKEA Systems BV» vs. Aytmaganbet M.D. (found and provided to the author by the local lawyer Ms. Gulnaz Osipova).

the domain name <ikea.kz> in the name of Mr. M. D. Aytmaganbet, containing the trademark IKEA, as an action which put at stake the right of the company “Inter IKEA Systems BV” on the trademark and as an act of unfair competition. The company asked to prohibit the defendant to use the trademark IKEA in the domain name in any combination and form; oblige Mr. M. D. Aytmaganbet and the institution “Kazakhstan Network Information Center” to cancel the registration of the domain name <ikea.kz> in the name of M. D. Aytmaganbet; demand the institution “Kazakhstan Network Information Center” to register (transfer) the domain name <ikea.kz> in the name of the company “Inter IKEA Systems BV”.

The defendant M. D. Aytmaganbat disagreed with the claim. He explained that the domain name <ikea.kz> is an abbreviation of International Kazakh-English Association, created by him and his colleagues from the student community of Kazakhstan and England. The activities of the organization were not connected with the activity of the company on the sale of goods and services and it was aimed at increasing cooperation between students and the youth of Kazakhstan and Great Britain.

As regards violations and restrictions of the rights of the plaintiff to use the domain name relevant to the name of the company “Inter IKEA Systems BV”, the defendant explained that the different domain name <ikea.com.kz> was registered in the territory of Kazakhstan, which could be used by the plaintiff in the Internet in order to advertise and sell goods and services. In the court proceedings, it was also found that M. D. Aytmaganbet registered the domain name <ikea.kz> in May, 2004 in compliance with the laws of the Republic of Kazakhstan and paid monthly fees for permanent capability on the Internet as the owner of this domain name.

Doctor of legal sciences in Kazakhstan, T. E. Kaudyrov, who participated in the court proceedings as an expert, pointed out that the domain name was not an object of intellectual property. It referred to goods and property rights covered by the term “other property” and it was evidenced by the refundable character of acquisition of the right on the domain name.

As a result, the court found that the activities of the defendant M. D. Aytmaganbet were not aimed at provision of goods and services defined in the certificate No. 25450 on the registration of the trademark IKEA. In the court’s opinion, the actions of M. D. Aytmaganbet on registration of the domain name <ikea.kz> and its subsequent maintenance were in good faith. The use and registration of the domain name <ikea.kz> clearly were not intended to mislead the public concerning relations between the owner of the domain name M. D. Aytmaganbet and the company “Inter IKEA Systems BV”.

Thus, taking into account the fact that the defendant registered the domain name before the registration of the trademark IKEA, as well as the fact that M.D. Aytmaganbet had not been engaged in any commercial activities similar to those of the company “Inter IKEA Systems BV”, the court rejected the claim.

Another judgment of note is the ruling of the Almaty City Court dated as of June 16, 2006²¹ (left unchanged by the Civil Panel of the Supreme Court of the Republic of Kazakhstan No. 3a-90/2-06 dated as of 22 August 2006), where it was decided about the general use of a domain name similar to a trademark.

In this case, the plaintiff CJSC “Yerevan Brandy Factory” claimed against the Kazakh LLP Joint Venture “Ararat” with the requirement to prohibit the LLP JV “Ararat” from illegally using the verbal mark “ararat”, which is identical to the trademark “Ararat” and owned by the CJSC “Yerevan Brandy Factory” in accordance with the certificate of the Republic of Kazakhstan No. 10951, in the domain name <www.ararat.kz> and the website. The plaintiff believed that the respondent had violated the exclusive right on trademark and illegally used the verbal mark “Ararat” identical to the trademark “Ararat” in the domain name <www.ararat.kz> and in the name of the legal entity LLP JV “Ararat”. In the plaintiff’s opinion, this act was in violation of the right of the trademark owner in accordance with Article 4(4) of the Law of Republic of Kazakhstan No. 456-I dated as of 26 July, 1999 “On Trademarks, Service Marks and Appellations of Origin”. According to the Law No. 456-I, no one can use the trademark patented in the Republic of Kazakhstan without the consent of the owner.

The defendant argued that the trade name of a legal entity LLP JV “Ararat” and the domain name “www.ararat.kz” was not a trademark, and therefore, the plaintiff’s claim on renaming of a legal entity and changing the address on the Internet were unfounded. Thus, in accordance with Article 38(2) of the Civil Code of the Republic of Kazakhstan, “*After registration of legal entity the name of the legal entity which is a commercial organization becomes its trade (brand) name*”. Under a certain trade name, legal entity is included in a unified register of legal entities. The legal entity shall have the exclusive right to use its trade name. Besides, the domain name is neither a product, nor a service. The defendant only registered his address under the same name as the name of its legal entity, rather than advertising the brandy under the name “Ararat”. Therefore, the defendant believed that the plaintiff’s reference to Article 43 of the Law No. 456-I was not relevant to this case.

The registrar involved in this case indicated that the domain name was not a trademark, as it served as an address of the registrant only. In addition, the registrant was not the owner of the domain name, but he was a kind of a leaseholder thereof: he was obliged to pay fees in order to use it on a permanent basis.

The court upheld the defendant’s arguments, pointing to the invalidity of reference to Article 43 of the Law No. 456-I (prohibiting the use of the trademark in public telecommunication networks (Internet)) by the reason of incorrect interpretation of

21 Judgment of Almaty City Court dated as of June 16, 2006 on the case of CJSC “Yerevan Brandy Factory” vs. LLC JV “Ararat” (found and provided to the author by the local lawyer Ms. Gulnaz Osipova).

provision by the plaintiff. The consumers should be able to distinguish the goods/services of one manufacturer from the goods/services of other manufacturers from the trademarks. Defendant did not use the trademark “Ararat” on his products and did not have the aim to mislead consumers as regards to a manufacturer of the goods.

It is worth considering the case on the website “Center of Gravity” (Центр тяжести), as well. In the Judgment of the Specialized Interdistrict Economic Court of Almaty No. 2-5536/10²² of 28 June, 2010 (which was later reversed by the Judgment of the appellate judicial panel of Almaty City Court No. 3723-2a-2010 dated 23 August, 2010), it was pointed out that “*The plaintiff unjustifiably identifies the domain name <ct.kz> as trademark in his claim. Article 2(3) of the Law on Informatization states that this Law does not regulate the relations which covered by legislation on copyright and related rights, industrial property, selection achievements, integrated circuits, means of individualization of participants of civil circulation, works, goods, services and media. Thus, the domain name <ct.kz> which was registered by a non-profit institution “the Kazakh network information center” is not a trademark registered by the Committee on Intellectual Property Rights of the Ministry of Justice, as it was pointed by the plaintiff*”.

The expert-specialist of the State Enterprise “National Institute of Intellectual Property” of the Committee on Intellectual Property of Ministry of Justice of the Republic of Kazakhstan was involved in the court session. The expert was inquired by the court whether the use of a second level domain name <www.ct.kz> by Mr. D. A. Zimin would be in violation of the trademark rights of the LLP “New Line Media”. The answer was that the use of the domain name <www.ct.kz> did not violate the rights of the trademark owner LLP “New Line Media” as the LLP “Line Media” had registered the combined trademark with a graphic part and two letters <ct>, which is not covered under Article 6(8)(1) of the Law No. 456-I. In accordance with Article 6(8)(1) of the Law No. 456-I, the designations that do not have a verbal nature, which made by usual letters and consisting of a combination of at least three separate language units (letters (or) numbers, punctuation) and <.kz> may not be registered. As a result, the registration of the trademark “ct” is not prohibitive for usage in domain names, such as <www.ct.kz> or <www.ct.com.kz>. Moreover, <www.ct.kz> and <www.ct.com.kz> had been registered by another organization – “Kazakh Network Information Center”. Domain names and trademarks can potentially exist in parallel to each other.

Nevertheless, it was decided in the subsequent Judgment of the Specialized Interdistrict Economic Court of Almaty²³ that the domain name should follow the

22 Judgment of the Specialized Interdistrict Economic Court of Almaty dated as of June 28, 2010 № 2-5536/10 in the case of “Center of Gravity” («Центр тяжести») (found and provided to the author by the local lawyer Ms. Gulnaz Osipova).

23 Judgment of the Specialized Interdistrict Economic Court of Almaty No. 2-9819/10 dated as of

trademark, stating that “*In case if the web site “Center of gravity” is not supposed to be transferred to the ownership of LLC “New Line Media”, then it also did not make sense to register trademarks associated with this internet resource”*”.

On the basis of the cited case law, it could be concluded that the Kazakh judicial practice is developing controversially. The same was also confirmed by the judge of Appeal Panel of Astana City Court, Mrs. Zh. S. Zhumabaeva, that the court practice on domain dispute settlement is developing controversially²⁴. It was decided in the judgments of the Almaty City Court dated as of 16 June 2006 and the Almaty District Court of Astana dated as of 2 June 2009 No. 2-3223/09 that trademarks and domain names may exist independently of each other, whereas in the last case on the web-site “Center of Gravity” of 11 October 2010 No. 2-9819/10 it was decided by the court that the domain name should follow the trademark.

3.2. Case law of Slovakia

The recent developments of Slovak case law present more interesting thoughts. In the case, dealing with the collision between the domain name and the trademark, heard in the court of the Republic of Slovakia, the plaintiff F s.r.o. (limited liability company) registered the trademark “F”, as of 7 October 2002²⁵. The Defendant No. 1 (registering authority) and the Defendant No. 2 (user/holder of the domain name) concluded an agreement on the domain name. The domain name was F, which was the same name as the registered trademark of the plaintiff F s.r.o. Therefore, the plaintiff could not register domain for his trademark “F” and subsequently provide his products or services under his trademark within the internet. He pointed out that according to the Rules (as described above) it shall be inadmissible to register as a domain name a name or words which contain a certain trademark. Plaintiff believed that the Defendant No. 1 breached these provisions of the Rules, and therefore, demanded the court to do the following: bind the Defendant No. 1 to terminate the domain name agreement, prevent the domain name containing “F” from being registered by any other entity and order to pay a sufficient pecuniary satisfaction to the plaintiff because of the unlawful use of his trademark.

In the case, the court decided that the trademark registration certificate is a sufficient evidence of the fact that at the time of the filing the claim the defendant was the owner of the trademark “F” priority right as of 21 August, 2000. Furthermore, it has been proven that the plaintiff is the owner of the trademark “F” for products and

October 11, 2010 (found and provided to the author by the local lawyer Ms. Gulnaz Osipova).

24 Materials of the regional seminar on problems of intellectual property rights dated as of June 10-11, 2010, Shchuchinsk city (found and provided to the author by the local lawyer Ms. Dominika Bezakova).

25 Decision of the District Court Banská Bystrica of May 10, 2006 in the civil case No 16CbPv/11/2006 [interactive]. [accessed on 10-02-2014]. <<http://www.itpravo.sk/>>.

services provided in this certificate and subsequently as well as of the exclusive right to use the trademark “F” to provide respective products and services. This, however, does not mean the monopoly and exclusive right of the plaintiff to use “F” for any respective products and services, in accordance of Article (1)(24) of the Trademark Act. Thus, the plaintiff was not allowed to prevent everyone from using (within the legal boundaries) the word sign “F” for other products and services other than the products and services which are provided by the plaintiff.

It has been proven by the plaintiff that the Defendant No. 2 is a holder of the domain name “F”. However, it was not neither said, nor suggested what type of products and services was the Defendant No. 2 providing and whether these products or services were identical or similar to those which were marked by the plaintiff’s trademark. A mere existence of any trademark does not preclude legitimate existence of any same-word trademarks and the use of the word sign identical with this trademark for different products and services, provided the provisions of the Act on Trademark, especially in Article 1(25), are observed. This does not apply for the well-known trademark, which was not invoked by the plaintiff.

The court believed that a mere registration and existence of the domain names with identical wording with the trademark, which have been registered by the person other than the trademark owner, does not by itself (without anything further) constitute the infringement of the trademark owner’s rights. The court furthermore acknowledged that there could have been a violation of the Rules which, on the other hand, does not constitute a violation trademark and business name-related plaintiff’s rights. The court agreed with the plaintiff that the interchangeability is an objective category and a mere threat of confusion is sufficient. However, it is possible to evaluate the interchangeability only in relation to certain products and services and not abstractly in relation with undefined products and services as the main purpose of the trademark is to distinguish between products of one person and products and services of another.

Although the following decision on the breach of rights related to the business name, trademark and well-known trademark was taken by the Czech court, it is closely related to the Slovak case law, and therefore, it should be considered.

In the case, the Defendant No. 1 (holder of the domain name) registered a domain name <ceskapoistovna.cz> (literally, “Czech Insurance Company”) and the Defendant No. 2 (the registering authority) allowed for such registration. As of 1991, the plaintiff was the owner of a number of words and combined trademarks, all of them containing a word sign “Ceska poistovna”. Since 1991, it has been also registered in the commercial register as “Ceska poistovna” and it has protection of its business name (under both commercial and civil codes). After having found out that the domain <ceskapoistovna.cz> had been registered, the plaintiff contacted the Defendant No. 1 claiming for the breach of its rights. The defendant disagreed with the arguments and offered to transfer of the rights to the domain name <ceskapoistovna.

cz> for a symbolic fee of 100.000 KC (around 4080 EUR). Based on this, the plaintiff concluded that the Defendant's No. 1 conduct was against "good manners" and business practices since the domain name has become a subject of trade and the Defendant No. 1 has willingly entered the competition with a possibility to influence the results of the business and competition as such, it has abused the business name of the plaintiff and has intervened to the rights related to it.

The Court of First Instance found that the Defendant No. 1 has violated the plaintiff's rights related to his business name and trademarks. The Court was referring to the right of a trader (legal person) to use its business name when offering its products and services, including the right to use a business name to present oneself on the Internet, while it has to be noted that this form of internet presence has increased rapidly. The actions of the Defendant No. 1 have effectively prevented the plaintiff from presenting itself on the Internet. The Defendant No. 1 has offered the transfer of a domain name for consideration, which has been significantly higher than the expenses for the registration and administration of the domain name, and therefore, the Court concluded that when registering the domain name the Defendant No. 1 acted in bad faith. The plaintiff's claim should therefore be upheld. The Defendant No. 1 has seriously limited the plaintiff's rights to present oneself on the Internet using a domain name identical with the business name and trademarks of the plaintiff for the period of over 2 years. By this, the Defendant No. 1 has obstructed the Internet users' access to the plaintiff's website. According to the Court, the sufficient compensation for the damage caused was 100.000 KC. The Defendant No. 2 has not breached his obligations, as well as he has not breached the rights of the plaintiff. The Defendant No. 2 was a private entity and did not enjoy a position which would allow him to decide about the existence of the right to register a particular domain name.

The Defendant No. 1 has appealed against the decision of the Court of the First Instance regarding the compensation for damages in the amount of 100.000 KC. The appellate court did not approve the decision of the Court of the First Instance, concluding that the pre-condition for enforcement and admission of the claim for the compensation (satisfaction) is an existence of the immaterial detriment. The plaintiff has invoked the existence of such detriment but has kept it merely in general instance, arguing that his possibility to present on the internet through the domain name "ceskapoistovna.cz" was limited. The unlawful breach of rights as discussed and confirmed above was, however, not sufficient to provide for the satisfaction.

A Slovak court has dealt with another case and took a decision regarding domain grabbing under the scope of the protection against unfair competition²⁶. The plaintiff was providing services regarding untraditional presents (experience) and providing an "exceptional day" experience and was a subsidiary company of the Czech company

26 Decision of the Supreme Court of the Republic of Slovakia of December 9, 2009, in the civil case No 2 Obdo 35/2009 [interactive]. [accessed on 10-02-2014]. <<http://www.nsud.sk/rozhodnutia/>>.

D.J.S., s.r.o., which is the owner of the trademark D.J.S in the Czech Republic. A s.r.o. is a Czech company and a competitor of D.J.S., s.r.o. in the Czech Republic, the area of providing services regarding “experience”. The defendant has registered a domain name <D.sk>. This domain name redirected the user on the web-page <www.A-D.sk>, which was offering services of the Czech A s.r.o. company.

The plaintiff was seeking the protection against unfair competition and protection of his business name as well as gratuitous transfer of the domain name <D.sk> from the defendant on the plaintiff. The plaintiff believed that the defendant’s conduct was within the scope of unfair competition as well as unlawful use of his business name. The plaintiff has suffered both material and immaterial damage.

By deciding on the interim measures, the court has concluded that the defendant’s conduct exhibited signs of unfair competition, since his conduct to a great extent can be referred to as cybersquatting. The defendant was a holder of the domain name <D.sk>, which is technically identical with the business name of the plaintiff. Furthermore, the defendant was the owner of domain names <D.sk> and <A.sk>, under which he was offering the same products in the Czech Republic as the plaintiff. Furthermore, it is clear that it has used these domain names and respective websites to redirect the competitor’s customers to the website of a company, to which he, being a head of its branch office, was in a legal relationship. It has not been proven that by the way of registration of the domain name in question he was aiming anything else than blocking competition on the Internet.

Even though after the written notice of the plaintiff the redirection has stopped, the unlawful situation persisted as the defendant was an unlawful holder of the domain concerned under the rules of unfair competition. The defendant’s conduct can be attributed to unfair competition under the general clause of Section 44 of the Slovak Commercial Code. There is a competition relationship between both parties, which has to be interpreted as any conduct of the competitor regarding the competition, while it does not have to be in a relation with another person. The conduct of the defendant is related to the plaintiff; it is not in accordance with good manners of the competition and is capable of causing damage to a competitor – the plaintiff.

3.3. Lithuanian case law in the light of foreign judicial practice

In Lithuania, there have been no finally decided cases concerning the infringement of domain names in the Lithuanian courts until 2006, but their number has been growing steadily since then. So far, there have been more than 35 cases regarding domain names²⁷. In the situation where there are no direct legal provisions that define domain name and regulate them, legal protection against unauthorized use of

27 Seminar on Domain Names. Presentation of Mrs. Daiva Tamulionienė, Kaunas University of Technology, Information Technology Development Institute, February 15, 2011.

domain names and possible means of protection remains a complicated issue. Certain similarities can be easily found from the analysis of the case law of the two other countries: the protection of domain name rights is ensured by the help of trademark law and competition law in Lithuanian case law. In Lithuania, administrative liability applies for the misleading advertising. Thereby, remedies provided to trademark owners and contentions arising out of the use of domain names could be possibly governed in the Law on Advertising.

Lithuanian judicial practice shows that analogy of law is evidently used in domain name disputes and the legal rules stated above are clearly interpreted in favor of the company name and trademark owners. In the case “*Pieno žvaigždės*” v. *E. K.*²⁸, which appears to be a standard cybersquatting matter, the plaintiff UAB “*Pieno žvaigždės*” went to court seeking to prohibit the use of the internet domain name <pienozvaigzdes.lt> as well as to cancel the registration of the aforementioned domain name on the defendant’s name and the Vilnius County Court fully satisfied the claim. The situation here was very similar to the Czech case of classical cybersquatting case concerning the domain name <ceskapoistovna.cz>.

In the context of malicious trademark and domain use, the dispute between UAB “*Baltijos muzika*”, *Theater Mogul BV*, *E. J. P* and “*Baltijos reklamos projektai*” on the author’s moral and property rights infringement and unfair competition²⁹ is comparable to the Slovak case *D.J.S., s.r.o. vs. A, s.r.o.* In this case, the dispute arose between the plaintiff and the defendant for the rights of the domain name <urvinemoteris.lt>. “*Urvinė moteris*”³⁰ was used as a name of the play. Applicants have indicated that with such actions – application for the patent office to register the name “*Urvinė moteris*” as a trademark, the registration of web addresses, as well as using the applicant’s image (the logo of the play) – the defendant violated the copyright moral and economic rights as well as performed unfair competition actions. The case reached the Supreme Court, where the plaintiff’s claim was satisfied.

Nevertheless, Lithuanian judicial practice is more or less predictable and seems to be clearly in favor of the rightful owners of intellectual property. This case may affect all the further doctrine on domain names’ protection by applying the analogy of the trademark regulation.

Many disputes on the use of generic domain names as the practice of unfair competition may arise in Lithuania in the future, as well. In this context, the civil case between two furniture manufacturing companies UAB “*Baldų centras*” v. UAB “*Neiseris*” on the domain name <balducentras.lt> should be mentioned³¹.

28 Vilnius County Court. Decision in the civil case No. 2-1061-623/2008. October 1, 2008.

29 Lithuanian Court of Appeal. Judgment in the civil case No. 2-275/2008. April 24, 2008.

30 In English, it might be translated as a “cave woman”.

31 Lithuanian Supreme Court’s Civil Division. Ruling of June 22, 2009, in civil case No. 3K-3-272/2009.

The litigation started in Vilnius Regional Court, where the claimant UAB “Baldų centras” stated that the defendant violated its industrial property rights by using the phrase “baldų centras”³², which is identical to the applicant’s legal entity name, in his advertisements at the entrance of a shopping mall. The applicant also stated that the defendant uses the domain name <balducentras.lt> as its website address name, as well as the widely used consumer electronic search systems.

Vilnius Regional Court, as well as the Court of Appeal and the Lithuanian Supreme Court decided that UAB “Neiseris” has violated the owner’s “Baldų centras” exclusive rights by using his legal entity name in the advertisements without any other identifiers. In the context of this case, it is important to emphasize that the court hearing the case did not prohibit the use of the phrase “baldų centras” in general, but the use of this phrase without other distinguishing words on the advertisement at the entrance of one of the shopping malls and also in the company’s “Neiseris” work.

That is, the court did not ban to use this specific expression “baldų centras” as one of the elements of business identifiers of UAB “Neiseris”, but prohibited to use this phrase without any other identifiers. This case is similar to the Kazakh case <www.ararat.kz>, which was claimed by the company CJSC “Yerevan Brandy Factory”, where it was decided that a mere similarity to a trademark is not enough to cancel a prior registration of a domain name, identical to a company’s name of other entity.

The Supreme Court stated that like trademarks, individual and corporate names, depending on the constituent elements or combination of the elements of exclusivity, may be the so-called “strong” and “weak” ones. That means that some legal entities have stronger name’s distinguishing function, others – weaker. The “strength” of this distinguishing function determines criteria to the similarity evaluation of other brands and names of the entities. The so-called “strong” trademark or the name of the entity (i.e. made up of exclusive items) similarity evaluation will be more rigorous compared with the trademark or the name of the entity consisting of less exclusive items. A certain similarity threshold, which will be allowed to exceed the other entities belonging to the trademark or the name of legal entity, which protects the rights of their “strong” and “weak” mark or the name of the entity will be different³³. The same issues are faced by the Kazakhstan courts, leading to several controversial decisions about whether a trademark or a domain name should come first.

In this context, the Lithuanian civil case *D. Michejevas v. O. Silevičius*, concerning the domain name <arthouse.lt> and the trademark “ARTHOUSE.lt, kitokio kino

32 In English that might be translated as “Furniturecenter.lt”.

33 See, for example, The Lithuanian Supreme Court’s orders issued on January 7, 2003, in the civil proceedings *Zao Torgovyj Potomkov Postavšičika Dvor Dom Ego Imperatorskogo Veličestva Pa Smirnov (Russian Federation) v. UDV North America, Inc.* (now the company’s name is Guinness UDV North America, Inc.).

projektai”, shall be analyzed. The litigation started in the Vilnius Regional Court³⁴. In this particular case, alternative cinema and films produced outside Hollywood were promoted in the website. The defendant O. Silevičius has submitted an application to the State Patent Bureau on 21 February, 2002, on the registration of the trademark “ARTHOUSE.lt, kitokio kino projektai”. Although the application was accepted by the State Patent Bureau, during the consideration of the application the plaintiff D. Michejevas has brought a preventive action claiming for the prohibition of the use of the mark by O. Silevičius and obliging him to withdraw the application from VPB. Finally, if the case was to be resolved on a purely formal basis, it would have been resolved in favor of O. Silevičius since he was the first to apply for the registration of the disputed trademark. In the US case law as well as in the ICANN UDRP practice, such actions of O. Silevičius would be considered as reverse domain name hijacking and the ruling would certainly be against O. Silevičius as the bad faith applicant for the trademark identical to the domain name. The formula of reverse domain name hijacking could have been developed in the Lithuanian courts on the grounds of the existing laws, mainly on Article 1.5 of the Civil Code, the Law on Trademarks and Article 16 of the Law on Competition. Nevertheless, in the aforementioned case, not only the plaintiff’s determination, but the court’s readiness for the dispute of such kind were lacking³⁵.

Conclusions

Legal regulation of domain names in Lithuania, Kazakhstan and Slovakia has more common traits than differences. All of the countries have open registration systems, respecting the first come-first served principle. The legislators are equally reluctant to define domain names as objects of intellectual property, allowing the case law and legal science to come up to a common concept. Although a significant period of time has passed since the introduction of domain names, no specific domain name legislation exist in the analyzed countries. It contributes to confusion and, on the other hand, allows for the legal leeway.

Although none of the analyzed countries have embraced the ICANN UDRP procedures as a part of their national legislation for their country code domain names, the resolution of court disputes is remarkably similar to the decisions in <.com> cases. In all of the mentioned countries, the activity of cybersquatting has been unanimously recognized as being against the law, albeit lacking legal definition

34 Civil case *D. Michejevas v. O. Silevičius* (found and provided to the author by the lawyer Mr. A. Goštautas).

35 Also, see: Lithuanian Court of Appeal, Judgment of April 24, 2008, in the civil case No. 2-275/2008. The dispute might be qualified as an example of a reverse domain name hijacking.

in any official instrument. A greater variety of solutions can be found in the cases where a domain name is identical to a trademark. In many of them the decisions are weighted by various factors determining the winning party. The strength of a domain name or a company name, the knowledge of consumers, the similarity of activity and the intent of the first registrant are all relevant factors in court decisions. Those decisions, where a conflict between a company name, a trademark and any other identifiers arises, present the greatest variety of legal opinions in all cases.

In conclusion, it can be clearly seen that the legal regulation of domain names and the related case law are gravitating towards the common international rules and procedures pioneered by the ICANN UDRP in the <.com> cases.

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NAUJAUSI ŠALIES KODO DOMENŲ VARDŲ REGULIAVIMO POKYČIAI: <.LT>, <.SK> IR <.KZ> LYGINAMASIS TYRIMAS

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Anotacija. Viena didžiausių intelektinės nuosavybės teisės problemų išlieka žinomų tarptautinių korporacijų vardų ir kitokių vertingų žymenų neteisėtas naudojimas domenų varduose. Teisinėje literatūroje tai vadinama domenų vardų piratavimu, „kibernetine naujakuryste“ ir kt. Ši nesąžininga praktika tebėra rimtas iššūkis įstatymų leidėjams ir teismams. Straipsnyje pasitelkiant lyginamąjį aspektą pateikiamas trijų valstybių – Lietuvos, Slovakijos ir Kazachijos – pavyzdys sprendžiant šalies kodo domenų vardų ginčų esminius klausimus.

Reikšminiai žodžiai: internetas, domenų vardai, domenų vardų registravimas, domenų vardų apsauga, intelektinė nuosavybė, prekių ženklų apsauga.

LATEST DEVELOPMENTS IN THE REGULATION OF CCTLDS: COMPARATIVE ANALYSIS OF <.LT>, <.SK> AND <.KZ>

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Summary. Using trade names of world-famous companies or just “high-value” titles in the domain names for sale or advertisement purposes, otherwise known as cybersquatting, nowadays is a deeply rooted problem. Thus, the situation brings challenge to the legal regulation of domain names all over the world. After comparing the legal regulation of domain names in countries, such as Lithuania, Kazakhstan and Slovakia, it is to be noted that the common tendency reveals the following: the legislators in all these countries are equally reluctant to define domain names as objects of intellectual property, allowing the case law and legal science to come up to a common concept.

However, although a significant period of time has passed since the introduction of domain names, no specific domain name legislation exist in the analyzed countries. It contributes to confusion and, on the other hand, allows for the legal leeway.

Legal regulation of domain names in Lithuania, Kazakhstan and Slovakia has more common traits than differences. All of the countries have open registration systems, respecting the first come-first served principle.

Nevertheless, the author also revealed that the resolution of national court disputes is remarkably similar to the decisions in <.com> cases, which are resolved according to ICANN UDRP procedure. In all of the mentioned countries, the activity of cybersquatting has been unanimously recognized as being against the law, but in those decisions, where a conflict between a company name, a trademark and any other identifiers arises, a variety of legal opinions is also evident. Despite that, the good news is that the related national case law is approaching towards the common international rules and procedures pioneered by the ICANN UDRP in the <.com> cases.

Keywords: internet, domain names, country-code top level domain names, ccTLDs, cybersquatting, domain name registration, domain name protection, intellectual property, Kazak domain names .kz, Lithuanian domain names .lt, Slovak domain names .sk, trademark protection.

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