DOMAIN NAMES AS JURISDICTION-CREATING PROPERTY IN SWEDEN

by

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1. INTRODUCTORY REMARKS

In the first sentence of section 3 of Chapter 10 of the Swedish Code of Judicial Procedure there is a rule on the so-called general property forum, which is understood to mean that in cases regarding payment liability it is possible to sue the debtor, who is not domiciled in Sweden, in a Swedish court if he has property located within the country. The property in question need not be connected in any way with the monetary claim behind the claimant's action, and the plaintiff (the creditor) does not have to be a Swedish national or resident. Such use for jurisdictional purposes of the presence of assets is not unproblematic, which is illustrated by the fact that it is not permitted whenever the defendant is domiciled in an EU member state or a state party to the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Still the rule on the general property forum is deemed necessary due to the Swedish reluctance to recognize and enforce foreign money judgments rendered outside of the EU/Lugano area; to the extent such foreign judgments are not valid in Sweden it is necessary to allow creditors (both Swedish and foreign) to initiate court proceedings in Sweden in order to obtain a judgment that can be used to levy execution on the Swedish assets of the debtor. In the increasingly global society of today, it is not unusual that persons domiciled abroad own real or movable property in Sweden and it would certainly be unacceptable if that property, due to the Swedish unwillingness to enforce foreign judgments in combination with the lack of Swedish jurisdiction, would stay beyond the reach of bona fide creditors, turning Sweden into a haven where disloyal foreign debtors could hide their assets.

The application of the rule on general property forum presupposes, however, that two conditions are fulfilled. First, the asset in question must be

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"property" and, second, it must be localized in Sweden. Both conditions can potentially give rise to difficulties with regard to Internet domain names.

2. DOMAIN NAMES AS PROPERTY

Most of the daily users of the Internet regard domain names as mere addresses making it possible to locate and access various webpages on the Web. The standard way of searching for a business site on the Net is either to use a search engine (like Google) or to fill in the name of the business and a generic or national top domain (for instance a generic top domain like ".com" or a national top domain like ".se" for Sweden) in the address space, hoping that this will lead to the webpage of the business in question. These methods are often successful and are normally used without much thought being given to the domain names' legal nature. The majority of users would probably define domain names as addresses. However, a totally different definition would probably be given by the businesses that have registered a domain name. For the registered holders of domain names those names are more than addresses. From their point of view, domain names are valuable assets. It is actually possible to trade with domain names and there is a functioning domain name market. Still nobody seems to know with certainty how to legally define the asset that is traded.

The original purpose of the domain name system (DNS), when it was launched in the beginning of the eighties, was to make communications between computers safer and faster. In this context, domain names were used as labels covering the actual numerical addresses (the IP-numbers) that must be used to make it possible for computers to communicate on the Internet. The task of the label is to make the address more human-friendly and easier to remember. Domain names are even today normally used as a tool for finding webpages. However, during the eighties nobody could foresee the rapid development of the Internet into a commercial marketplace and nobody could imagine the commercial value of a marketable domain name. This value gives rise to several legal questions, for instance how this new type of asset should be represented in business accounting, how it should be taxed and how it should be dealt with in insolvency proceedings of its owner. This is not the place to answer all such questions. For the purpose of this paper it is enough to conclude that there is no established legal definition of domain names and that there is considerable uncertainty as to what kind of asset a domain name actually is.

It is an undeniable fact that domain names are bought and sold. They are not only addresses but remind rather of some kind of transferable trademarks. It is generally accepted that trademarks are property (intangible in-

dustrial property). Nevertheless, the fact that there is a domain name market and the other apparent similarities with trademarks are not enough to prove that domain names equal trademarks in respect of their status as "property". Even though a domain name normally can fulfil the functions of a trademark (to serve as a proof of origin, warrant quality, individualize a certain product, etc.), there is no direct legal protection for domain names, as is the case with trademarks. A domain name can be legally protected, but only if and to the extent such protection can be derived from a trademark it encompasses or imitates. There is no domain name law stating that domain names are protected as such.

There are very few cases where courts have touched the problem of how to define domain names. One early example is the UMBRO-case that was decided by the Supreme Court of Virginia in April 2000 (529 S.E.2d 80 (2000)). The case concerned the domain name "umbro.com" which was registered in bad faith by a user other than the company UMBRO Inc. that was the holder of the UMBRO trademark. The court of first instance held that the domain name should be transferred to UMBRO Inc. and that the defendant (the losing party) should pay all expenses. The problem was that the defendant did not own any visible assets other than loads of other registered domain names. To secure the payment, the court issued an order sequestrating the defendant's remaining domain names. Apparently the court considered domain names to be property. Although the decision was appealed and reversed, the Supreme Court did not disagree as regards the proprietary nature of domain names. It reversed the decision because there was no statutory support in Virginia for considering domain names sequestrable (i.e. property that can be subjected to execution of a money judgment). The case gives no clear answer as to what kind of property a domain name might be.

It can be concluded that domain names are similar but not equal to trademarks, but this conclusion does not say what rights are inherent in a domain name. A trademark can be owned and it can, within the borders of trademark law, be used as the owner wishes. He may, for instance, transfer or mortgage the trademark. But can you own a domain name? The registered holder of domain names would probably answer that question with a clear and loud yes, but the matter is more complicated than that.

As mentioned above, a domain name is part of a two-layer structure. The IP-number is the numerical technical layer used to make communication between computers possible and then there is the alphabetical layer (that we usually think of as the domain name) that forms the label that for human users distinguishes the address and makes it comprehensible. As regards the first layer, it is quite clear that there can be no ownership of the

technical IP-number. It is more like a phone number and phone numbers are parts of an overall number structure that is independent of the various individual users. In the same way as it is possible (at least in Sweden) to change, even without the consent of the individual user, a phone number if the overall plan is changed (for example due to changes of technology or an increased number of users), it must be possible to change the IP-numbers behind the domain names. On the other hand, regarding the second layer with its trademark-like character it can be concluded that domain names should reasonably be capable of being owned. The problem is that both layers are necessary in order to form a functional domain name (even though the IP-number can technically be used without the alphabetical layer) and therefore the question of ownership must be raised in relation to both layers as a whole. In this context it is of interest to examine the principal features of the domain name administration.

The registration of domain names is administered by private organizations or individuals who among themselves decide about the rules governing the names registered under "their" top level domain (tld). In Sweden the Swedish tld (".se") is administered by the II-foundation (www.iis.se) and in other countries similar persons or bodies administer the tld:s of those countries. There are no universally binding rules on the administration of the various tld:s and there is no requirement that a national tld (a so-called country code tld – cc:tld) be administered by an administrator domiciled in the country in question. On the other hand, the domain name system must work on the global level and the hierarchical structure of the DNS unavoidably results in the need of a global consensus and a certain coordination. It must not happen, for example, that two different users are given the same address on the Internet.

During the first 15 years of the DNS there was little interest in domain names and the administration of the different cc:tld therefore was "delegated" in an informal way, often to private persons who declared themselves willing to assume the responsibility for administrating a certain tld. It was at the end of the nineties that domain names became commercially interesting but at that time most of the different tld:s were already informally delegated to various administrators, sometimes having interests conflicting with those of the country that the cc:tld was originally aimed for. Today the DNS it governed on the global level by an international non-profit organisation called ICANN (Internet Cooperation for Assigned Names and Numbers) but the structure of the DNS was settled before ICANN entered the stage.

The DNS is constructed hierarchically and consists of different levels. The responsibility for securing the communication is divided among the administrators responsible for their respective levels. For example, if an Inter-

net user in the Czech Republic is interested in accessing the site of the Faculty of Law at the University of Lund, the Internet address/domain name www.jur.lu.se must be used. However, when the user asks for www.jur.lu.se, his request is not forwarded directly to the Faculty of Law in Lund. Instead, the communication is divided into the same different levels as the DNS. This means that the request will first be dealt with by one of the so-called root name servers, which directs it to the next level, which is ".se". On this level the previously mentioned II-foundation, and its top level domain servers, will take care of the request and direct it further, to the ".lu" level. It is first thereafter that the servers operating under the control of the University of Lund will provide the requesting user with access to the site of the Faculty of Law. This may sound unnecessarily long-winded, but in fact all communication on the Internet is totally dependent on the hierarchically built structure of the addresses. The advantage is primarily that the domain name server on the Internet needs only to be loaded with information sufficient for forwarding the request to the next level, which makes communication both faster and safer. At the same time, it makes responsibility issues more complicated. On each level there are various actors, among them many private entities, that are responsible for assuring communication involving domain names registered in their respective part of the DNS. The value of domain names is dependent on the functioning of this communication. If, for instance, Lund University mismanages its domain name servers, it may lead to a situation where all the domain names in the ".lu.se" part of the DNS will be cut off the Internet and in practice made useless. This may sound like an unrealistic and technical problem, but there are actually illustrative examples. One such example is the story of Pitcairn Island.

Pitcairn Island (a small island situated in the South Pacific) maintains the country code "pt" and consequently the cc:tld ".pt" was constructed to represent it. During the years before ICANN the right to administer the cc:tld ".pt" was delegated to a private person with negligible affiliation to Pitcairn Island. When the Internet became of general interest during the last years of the nineties, the inhabitants of Pitcairn demanded that IANA (which was the organisation in charge of domain names and IP-numbers before ICANN was established) should re-delegate the responsibility to administer the cc:tld to a person chosen by the decision-makers on Pitcairn Island. IANA decided to approve the request. Technically this is a simple procedure. All that has to be done is to change the information in the root name servers, after which those servers will direct communication regarding ".pt" domains to another top level domain server. From a practical perspective this

leads to a situation where all domain names registered in the old top level domain server become, within seconds, cut off the Internet.

Of course one could argue that the previously registered domain name should be transferred to the new servers without any delay but there are legal problems. Due to the sui generis right to databases afforded by copyright law, the previous owner of the domain name database might be entitled to oppose the transfer.

There are thus some inherent problems with the DNS that can make the legal foundation of the right to a registered domain name rather unstable. It seems therefore unlikely that one can actually directly own a domain name in the same manner as you can own a tangible object or a trademark. It is submitted that what the holder of a domain name actually "owns" is the right to use and have the enjoyment of the name during the period of validity of the registration agreement. This does not necessarily mean, however, that such a contractual right cannot constitute property for the purposes of establishing jurisdiction pursuant to the Swedish rule on general property forum described above.

3. DOMAIN NAMES AS GROUND FOR JURISDICTION

The Swedish general property forum rule gives creditors the right to sue in Sweden in actions regarding payment, when the defendant debtor, who is not domiciled in Sweden (and is not domiciled in any EU/Lugano country either), has property in Sweden. The question is whether a registered domain name can be such a property. At a superficial glance the answer would be an immediate yes, as the rule does not differentiate between various types of assets. Any assets with a sequestrable economic value may in principle provide ground for jurisdiction, even though there are some exceptions (see the Supreme Court judgments NJA 1966 s. 450, 1981 s. 386 and 2004 s. 891). The intention of the Swedish legislator was that this rule would protect creditors by giving them an easier access to justice. From this point of view it seems likely that domain names can constitute property on which a court can base its competence. One has to bear in mind though that the general property rule has a very practical purpose, to secure payment, and that it would be quite pointless to initiate an action based on property that is not sequestrable. In contrast to Virginia where sequestrable types of assets seem to be exhaustively enumerated in a statute (see the above-mentioned UMBRO-case), in Sweden it normally suffices that the property (a) belongs to the debtor, (b) is transferable and (c) has an economic value (that exceeds the costs of the proceedings).

When applying these requirements to domain names it can be assumed, to begin with, that a domain name belongs to its registered holder. Some years ago it may have been difficult to obtain information about the registered holder but today there are advanced rules regarding contact information, which shall be accessible in different domain name databases, making it possible to identify the holder of a specific domain name. The next prerequisite is that the domain name must be transferable. It is a fact that domain names are frequently transferred and that they consequently must be assumed to be transferable, but at the end of the day the question of transferability is answered by the administrator in charge of the domain concerned. Thus there may be differences as regards the transferability of various domain names. The practical consequence is that before relying on the general property forum rule one should check the transferability with the administrator in charge. As regards the situation in Sweden, the ".se" domains are transferable and the same can be said about the most important generic domains ".com", ".org" and ".net". The final prerequisite is that the domain name must have an economic value. The added requirement that the value must exceed the costs of the procedure is practically motivated. The main reason of the general property forum rule is to enable the creditors to obtain payment from the debtor's Swedish assets, in particular in those cases where a foreign judgement would not be recognized and enforced. In an action where the value of the Swedish assets is consumed by the cost of the proceedings there will be nothing left for the creditor and consequently such an action would be pointless. Of course, it is not always possible to estimate exactly the value of the assets, and it is often equally difficult to anticipate the costs of the proceedings. In view of the high costs of judicial proceedings, it is probable that only few domain names are so valuable that they can create jurisdiction pursuant to the general property forum rule. Here it may be useful to differentiate between generic domain names and user-specific domain names. As regards the latter (for instance www.jur.lu.se), very few, and possibly no, domain names have an economic value exceeding the cost of the procedure. The situation is different regarding generic domain names (for instance www.computers.se), as there are certainly some generic domain names that are so valuable that they can serve as bases for jurisdiction under the general property forum rule.

It is, however, not sufficient that a domain name is considered property for the purposes of the general property forum rule. It must, furthermore, be considered to be property situated in Sweden. The question of localization can be answered in various ways. One conceivable line of argument is that domain names are of a global nature and that it is impossible to localize

an Internet address as such in any single country. The opposite view is that a domain name can be considered as located in the country where it is registered. Neither of these two opinions, however, gives a correct answer to the question of localization. To localize domain names in the country of registration could sometimes work, but often it would be a hazardous enterprise. As mentioned above, there are great differences as regards the rules applied for different tld:s and there are many examples showing that it is possible for foreigners to register domain names under cc:tlds of various countries. One example is the ".nu" domain that has proven to be very popular in Sweden (where "nu" means "now" and makes it possible to construct creative domain names like "bytbil.nu" meaning "changecar.now"). In many cases, domain names that are used exclusively on the Swedish market are registered in other countries. Another argument against letting the place of registration be the sole factor determining the localization is that there is normally no requirement that a cc:tld must be administered from or by someone domiciled in the country of registration. For example, the above-mentioned ".nu" domain is not administered from the small South Pacific island of Niue but from the United States. It would be unfortunate if the answer to the important question of localization were made dependent on such a fortuitous connecting factor. This does not mean that the country of registration should be irrelevant, but merely that other factors should be taken into account as well.

In the U.S. Anticybersquatting Consumer Protection Act (15 U.S.C. § 1125(d)), the problem of localization is solved by providing for alternative grounds. Pursuant to this Act, a domain name shall be deemed to have its situs in the judicial district in which the domain name authority that registered the domain name is located or in the judicial district in which documents sufficient to establish control over the domain name are deposited with the court. The use of such alternative grounds opens for a more flexible localization method, taking into account the way the domain name is used and on what markets its registered holder is operating.

As regards the applicability of the Swedish general property forum rule, problems are not likely to arise with regard to domain names registered in Sweden but may arise concerning domain names registered under tld:s of other countries. It is submitted that if the plaintiff in such cases shows that the domain name in question is controlled from Sweden, so that the domain name administrator can be compelled to abide by a Swedish sequestration or execution order, then such a domain name can be considered to constitute property situated in Sweden.