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PROTECTION OF INTERNET DOMAIN NAME IN TURKISH PRIVATE LAW (IN POINT OF TURKISH CIVIL LAW)

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Abstract

The domain name used to connect to any website on the Internet, in time has gained importance and led to legal problems. In the case of using a domain name, a brand may have been a violation of the right to a name. The use of a domain name may sometimes lead to an unjustified breach of the competition and brand right surname rights have been violated many times. Domain names on the legal aspects of issues that may a rise, injustice is collected at the point where the use of the same or similar to the domain name. The solution of the problem requires of focusing on trade mark law, unfair competition law and civil law. This study tackles the issues only about Turkish Civil Law.

Keywords: Domain name, Turkish Civil Law, Name Right, Personal Rights

1. WHAT IS DOMAIN NAME?

Every computer is assigned a number specific to itself when connected to the internet. This number is called "Internet Protocol (IP)" number¹. In other words, IP number is a number that enables computer connecting to internet to be identified and it can be expressed as an IP address. Owing to this, the computer through which internet is accessed, can be detected. While internet connection is being established, numbers may pose a problem and they may not be catchy. As a result of this, "Domain Name" (Domain Name System) which expresses the same steps with words and provides correct access when these words are written to relevant space of computer, has been developed and IP numbers have been transformed into symbolic names². Domain name

Işıklı, Hasibe, İnternet Alan İsimleri Sistemi Markalar ve Alan İsimleri Arasındaki İlişki, DPT Yayınları, Ankara 2001, p. 10.

Bozbel, Savaş, İnternet Alan Adlarının (Domain Names) Korunmasında ICANN Tahkim Usulü, Ankara 2006, p. 24; Işıklı, p. 10; Memiş, Tekin, İnternette Cins ve Meslek İsimlerinin Alan İsmi Olarak Kullanılması ve Ortaya Çıkan Hukuki Sorunlar, AÜEHFD, Year: 2000, Vol. 4, N. 1-2, p. 464; Memiş, Tekin, İnternette Alan İsimleri Uyuşmazlıklarında Çözüm Arayışları ve WIPO Ara Raporu, MHB, Prof. Dr. Aysel Çelikel'e Armağan, Year: 19 – 20, N. 1 – 2, p. 514; Özdilek, Ali Osman, İnternet ve Hukuk, İstanbul 2002, p. 128; Sarıakçalı, Turgay, İnternet Üzerinden Akdedilen Sözleşmeler, Ankara 2008, p. 28; Sırabaşı, Volkan, İnternet ve Radyo Televizyon Aracılığıyla Kişilik Haklarına Tecavüz (İnternet Hukuku), Press 2, Ankara 2007, s. 64; Uyanık Çavuşoğlu, Ayfer, İnternet Ortamında İşlenen Haksız Fiil Sorumluluğuna Uygulanacak Hukuk, Prof. Dr. Engin Nomer'e Armağan, p. 992; Yıldırım, Mustafa Fadıl, İnternet Alan İsimlerini Tescil Eden Kuruluşların Sorumluluğu, Prof. Dr. Fehiman Tekil'in Anısına Armağan, İstanbul 2003 (Alan), p. 684; Yıldırım, Mustafa Fadıl, Kişi İsimlerinin İnternet Alan İsmi Olarak

is defined in Electronic Communication Law in Turkey as "The names, defining internet protocol number and used in order to determine computers on the internet or addresses of websites" (Electronic Communication Law, Article 3/V).

A person who wants to get in contact with a computer in the internet environment and access information on such computer, must know Server name and write this precisely. Domain name which is written in this way, is converted into numerical codes (IP) and thus, communication is realized³.

Internet domain names comprise at least two sections consisting of "top level domain names" and "second level domain names". For example, "edu.tr" is top level domain name and "selcuk" is second level domain name in www.selcuk.edu.tr. As can be understood from the explanations, in order to mention applicable domain name, there must be at least two parts separated by dots after "www". The important point is the fact that registration of a domain name which is same as one of second level domain names, is not possible.

Top level domain names are also classified as generic top level domains and country-code top level domains. Generic top level domains show the nature of the domain name only. For example, ".edu" refers to educational institutions while ".com" refers to organizations related to trade⁴. Also, country-code top level domains indicates the country of domain name. For example, ".tr" is Turkey ", ".de" is Germany⁵.

While ICANN⁶ is responsible for the management of Internet domain names in the international arena, Ministry of Communications and Information and Communication Technologies Authority have been assigned for management of domain names having extension "tr" in Turkey.

Easiness of using domain name as person, organization or product names instead of a numerical names has accompanied by many problems. The reason of these problems is the fact that the same domain name can be taken just once⁷. Therefore, there are very strict requirements in the allocation of domain name ending with ".tr".

2. IMPORTANCE OF DOMAIN NAME

Domain names gain importance beyond its function as a web address with globalization of trade by improving and being transferred to a virtual environment. As a result of the rapid development of trade conducted in a virtual environment, domain names have become distinctive such as titles or brands of merchants. Also, domain names are considerable advertisement and market places

Tescili Karşısında İsim Üzerindeki Hakkın Korunması, MHB, Year: 19 – 20, N. 1 – 2 (Kişi), p. 1006; **Yılmaz,** Ceren; Domain Name (Alan Adı) Nedir?, Bilişim ve Hukuk Dergisi, N. 2007/2, p.38.

³ Yıldırım, Alan, p. 684–685.

For detailed information related to this topic, see **Zorlu**, Süheyla, İnternet Yoluyla Kişilik Hakkının İhlâli ve Korunması (Unpublished Master's Thesis), Konya 2010, p. 16; http://archive.icann.org/en/tlds/.

Bozbel, p. 2, footnote 15.

It was managed by "Internet Organizations Federation (ISOC = Internet Society)" and IANA (= Internet Assigned Numbers Authority) at Federal Networking Council in USA until October, 1998 and transferred to ICANN then. (Yıldırım, Alan, p. 688)

Yıldırım, Alan, p. 685.

⁸ "Internet Domain Names Regulation" which was published in the Official Gazette dated 7.11.2010 and number 27752, is applied in said allocations.

today⁹. People or institutions may use their websites for not only commercial purposes but also introducing themselves.

Domain name has a nature like brand, company name or commercial name for merchants at the same time. There are many merchants acting with distinctive signs such as same brand, company name, etc. in different areas. When they want to register that distinctive sign they use as a domain name, they can't do this because of the uniqueness of the domain name. However, this function of domain name in commercial life and its protection within the scope of commercial law and trademark patent law will be out of our study.

A domain name may have a function of introducing a real or legal person outside of commercial function. For example, name of a famous artist can be registered as a domain name in an unjust manner and webcast can be performed by using this artist's name. In this case, protection of domain name within the scope of provisions of civil law for protecting rights of people and personal values will be discussed.

3. PROTECTION OF DOMAIN NAME WITHIN THE SCOPE OF PERSONAL RIGHTS

Because names of real and legal persons in the internet environment are within the scope of personal rights, they might be registered by a third person as a domain name and some violations of personal rights arise as a result. A domain name, introducing a person or an establishment and allowing it to be distinguished from others, is worth to be protected as much as name. However, in order to request legal protection here, domain name's function of introducing a person should be damaged. In addition, an exclusive protection for protection of domain name has not been granted like commercial name. Therefore, a person whose name is registered as a domain name in an unjust manner, may seek protection within the framework of Article 24¹⁰ and 25¹¹ of Turkish Civil Code. Within the scope of said provisions, a person who loses his/her personal values and is assaulted by use of his/her name as a domain name, may request from court to prevent, end or declare this assault. If the person is harmed as a result of unjust use of his/her name, he/she may also request for pecuniary and non-pecuniary damages. If the requirements are met besides these, a lawsuit might be filed because of acting without authority or unjust enrichment.

Nomer, Füsun, İnternet Alan Adının (Domain name) Hukuki Niteliği ve Marka ve Ticaret Unvanı Gibi Ayırt Edici Ad ve İşaretler İle Arasında Benzerlik Bulunması Sebebiyle Doğabilecek Hukuki Sorunlar, Prof. Dr. Hayri Domaniç'e 80. Yaş Günü Armağanı, Vol. I, İstanbul 2001, p. 400.

According to Article 24 of the Turkish Civil Code, "A person whose personal rights are violated unlawfully may request from judge for protection against people who violate his/her rights.

Unless consent of person whose personal rights are violated is legitimated due to private or public interests having more priority or using the authority granted by the law, every attack on personal rights is against the law."

According to Article 25 of Turkish Civil Code, "Plaintiff may request from judge to prevent the threat of attack, to end existing attack, to declare affects of attack that continue even if attack is ended.

Besides these, the plaintiff may request for notification of correction or decision to third parties or request them to be published.

Plaintiff's rights to request for receiving profit gained as a result of illegal attack according to provisions of acting without authority with pecuniary and non-pecuniary damages are reserved.

Claim for spiritual damages can't be transferred unless it is accepted by other party; it can't be transferred to inheritor unless it is put forward by legator.

Plaintiff may file a lawsuit in a court located in his/her place of residence or defendant's place of residence for the protection of his/her personal rights.

In order to file a lawsuit for prevention, there must be an attack on personal rights of person, which has not happened yet, but has a high probability. Because this lawsuit is filed for prevention of attack¹². Therefore, this is a protective lawsuit¹³. For example, a person who has learned that his/her name has been requested to be registered as a domain name may file a "lawsuit for prevention". Despite that, if his/her name was begun to be used as a domain name, in other words, if attack on the personal rights already continues, he/she may file a lawsuit for "ending attack" "Declaratory lawsuit" is also filed in order to determine whether there is attack on personal rights by unjust use of domain name with court order 15.

Someone who has suffered damage as a result of the unlawful use of domain names, can be sued for compensation. This action may be both material compensation or/ and moral damages cases. Lawsuit for monetary damages is a lawsuit that may be filed for compensation of material losses experienced by victim whose personal rights are violated by unjust and unlawful use of domain name, in other words, compensation of decrease in asset of this person, which occur because of attack. A person whose personal rights are violated may file a "lawsuit for spiritual damages" for compensation of spiritual damages experienced. If the person who uses another person's name as a domain name in an unjust manner has not made any profit from this, a request can be made based of provisions of acting without authority.

However, in case of unjust use of the domain name, victim may benefit from the provisions of the Turkish Civil Code for particularly protection of name. If domain name is indeed based on a name in broad terms such as real person's name, commercial name, company name or has a power of identification such as nick name, it will be protected pursuant to Article 26 of Civil Code¹⁶.

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¹² Akipek, Jale G./ Akıntürk, Turgut, Türk Medeni Hukuku, Birinci Cilt, Yeni Medeni Kanuna Uyarlanmış Başlangıç Hükümleri, Kişiler Hukuku, 6. Bası, İstanbul 2007, p. 397; Çelebi, Funda, Kişilik Haklarından Kişinin Özel Yaşamının ve Gizliliklerinin İhlâli ve Korunması, KÜHFD, Year:1997, N. 1, p. 293; Doğan, Murat, Şahsiyet Hakkına Tecavüzün Önlenmesi Davası, AÜEHFD, Year: 2001, Vol. V, N. 1-4 (Şahsiyet), p. 375; Ayan, Mehmet/ Ayan, Nursen, Kisiler Hukuku, Press 5, Konya 2014, p. 92; Dural, Mustafa / Öğüz, Tufan, Türk Özel Hukuku, Vol.2, Kisiler Hukuku, İstanbul 2004, p. 142; Özsunay, Ergun, Gerçek Kisilerin Hukukî Durumu, Press 4, İstanbul 1979, p. 154; Oğuzman, M. Kemal/ Seliçi, Özer/ Oktay Özdemir, Saibe, Kişiler Hukuku, Press 9, İstanbul 2009, p. 173-174; Veldet, Hıfzı, Türk Medenî Hukuku, C. I, Başlangıç ve Şahsın Hukuku, Press 3, İstanbul 1948, p. 178; Ataay, Aytekin, Sahıslar Hukuku Birinci Yarım Giris- Hakiki Sahıslar, Press 3, İstanbul 1978, p. 152; Serozan, Rona, Medeni Hukuk Genel Bölüm/ Kişiler Hukuku, Press 6, İstanbul 2015, p. 476; Zevkliler, Aydın/ Acabay, M. Beşir/ Gökyayla, K. Emre, Medeni Hukuk Giriş Başlangıç Hükümleri Kişiler Hukuku Aile Hukuku, Press 5, Ankara 1995, s. 498- 499; Kaplan, İbrahim, Kişilik Haklarının Kitle Haberleşme Araçları (Basın Radyo ve Televizyon) Karşısında Korunması, AD, Year: 1979, N. 3-4, p. 222; Kılıçoğlu, Ahmet, Kişilik Haklarına Basın Yoluyla Saldırılar Bakımından Medeni ve Borçlar Kanunumuzda Yapılan Değişiklikler, TBBD, Year:1990, Vol. 3, p. 388.

Doğan, Şahsiyet, p. 378; **Kaya**, Mine, Özel Hukukta Özel Hayatın Korunması, Yargıtay Dergisi, Year: 2006, Vol. 32, N.1-2, p. 56.

Ayan/ Ayan, p. 93; Özsunay, p. 154; Dural/ Öğüz, p. 142; Oğuzman/ Seliçi/ Oktay-Özdemir, p. 171; Zevkliler/ Acabey/ Gökyayla, p. 496- 497; Serozan, p. 476; Ataay, p. 151; Veldet, p. 177.

Ayan/ Ayan, p. 94-95; Veldet, p. 178; Ataay, p. 152; Serozan, p. 476; Zevkliler/ Acabey/ Gökyayla, p. 499-500; Oğuzman/ Seliçi/ Oktay-Özdemir, p. 175-176; Dural/ Öğüz, p. 144-145.

According to Article 26 of Turkish Civil Code titled "Protection of the Name", "The person who is subject to controversial use of his/her name may litigate for establishment of his/her respective rights.

A person subject to unjust use of his/her name may claim discontinuation of such act; where the person is in default due to use of the name unjustifiably, then he/she may demand recovery his/her tangible losses as well as indemnification of moral damages whichever the case may require."

When a name is registered as a domain name, violation of right on name within the scope of personal rights appears in two different ways. These are "usurpation of name" and "controversial name". If a name is used unjustifiably, there is usurpation of name. In use of names of celebrated, socially prominent, loved and respected people by a person not even close to them, in case of use these name as a domain name which enables access to websites consisting of specially racist or ideological propaganda, violent or pornographic publications or advertisements of some products, there is a usurpation of name and in this case, discontinuation of such use of name can be provided by claiming for protection in accordance with article 26/2 of Civil Code of name, the name might be controversial in case of appeal (Article 26/I of Turkish Civil Code).

Controversial domain name appers in two ways. In the first one, it is situation of a person who registers someone else's name without having right. In the second one of controversial names, there are two people who have right to use same name and there is a dispute between them. Although more than one person may carry same name, one name can be registered by only one person on the internet²⁰. Indeed, one name can be desired to be used by more than one person justifiably. For example, people having same name and surname may want to open website in their own name. But, it is not possible to use same domain name for website more than once on the internet technically because a domain name which is registered, can't be registered again²¹. Therefore, the right of person who registers the name for the first must be protected in such a case. In addition to this, other person must be given to right to use and register that name with suffixes or with other possible ways and also, an access to their own presentations of owners of the name from common page may be enabled by links given²². But, one of the people with the same name has more benefit than the other, it is right to comply with principle "first come first served". For example, one of the people with same name is a celebrity, said principle must be applied.

4. RESULT

Internet domain names have a function beyond being website address today. Because domain names are important in terms of commerce. Besides this function, domain names also allow people or institutions to express themselves correctly. However, if a person's name is registered as a domain name unjustifiably and opened to access for internet users, personal rights will be violated. A person whose name is used as a domain name unjustifiably, may request for protection within the scope of general provisions of Turkish Civil Code protecting personal rights. This legal protection may also be provided through lawsuits for the outcome of the attack as it may be provided through lawsuits for attacks.

Doğan, Murat, İnternette Şahsiyet Hakkının İhlali ve Korunması, Bilgi Toplumunda Hukuk Ünal Tekinalp' e Armağan, Vol. II, İstanbul 2003 (İhlâl), p. 476.

If a person's name is used in a very similar way, there is usurpation of name even if same name is not used. The issue to be considered in usurpation of name is the fact that the person who registers a name as a domain name doesn't have any right on this name (**Doğan**, İhlal, p. 477).

Nomer, p. 410.

Doğan, İhlal, p. 477.

Yıldırım, Alan, p. 685.

²² **Doğan**, İhlal, s. 479.

²³ **Doğan**, İhlal, s. 479.

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