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### **THE ROLE OF THE DOMAIN NAME SYSTEM AND ITS OPERATORS IN ONLINE COPYRIGHT ENFORCEMENT – EXECUTIVE SUMMARY\***

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#### **ABSTRACT**

This study focuses on the various operators of the domain name system and the responsibility of such operators and service providers with respect to online enforcement of copyright. It examines the various regulatory regimes applicable to domain name service providers. Further, it describes how different national laws have provided for remedies for online copyright infringement that require domain name service providers to take action, whether on a liability basis, a “no-fault” injunctive relief basis or pursuant to criminal seizure orders, to disable or block domain names under which copyright infringing websites operate. The study also examines what actions domain name service providers can undertake to discourage online copyright infringement. In addition, the study describes voluntary trusted notifier/trusted flagger arrangements that have been adopted by a limited number of domain name service providers to specifically address websites engaged in pervasive copyright infringement.

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\*\* The views expressed in this document are those of the authors and not necessarily those of the Secretariat or of the Member States of WIPO.

## **I. INTRODUCTION**

1. The domain name system (DNS) associates numerical internet addresses with alphabetical names that are readily recognizable. It is a hierarchical, distributed and decentralized system that is extensible. The main DNS service providers that are the focus of this study are registries, registrars and DNS resolvers.

2. There is no single international treaty, organization or legal regime that regulates the DNS. The Internet Corporation for Assigned Names and Numbers (ICANN) governs generic top-level domains (gTLDs), and individual governments are responsible for policies and regulation of their particular country code top-level domains (ccTLDs).

## **II. DNS PROVIDERS AND THE PREVENTION OF COPYRIGHT INFRINGEMENTS**

3. Article 8 of the WIPO Copyright Treaty provides authors and copyright owners the right to prevent third parties from making their works available online without their authorization. National governments that are contracting parties to the WIPO Copyright Treaty have taken a variety of approaches in implementing this making available right.

4. Typically, users navigate to a website engaged in online copyright infringements by entering the domain name of the website in their browser or clicking on the domain name in search results. Because they enable Internet users to locate and access online sources of infringing content, DNS service providers, in particular registries, registrars and DNS resolvers, play a functional role in online copyright infringement.

5. Different approaches exist across jurisdictions with respect to the potential liability of domain name service providers for the unauthorized making available of copyright works by websites operating under domain names that these service providers, under contract, assign or administer. In general, however, the case law is not well developed and those courts that have considered the issue take the view that knowledge of the infringing activity and/or possibly some sort of bad faith is necessary to trigger the liability of domain name service providers. Courts in several jurisdictions have ordered that domain names be suspended and/or transferred pursuant to criminal seizure orders.

6. In contrast, in several jurisdictions case law exists with respect to the application of no-fault injunctive relief against domain name service providers to require them to disable or block resolution of domain names under which copyright-infringing websites operate. In considering any no-fault duty for DNS service providers, the principle of proportionality should evidently be applicable. It is necessary to find an adequate balance among the fundamental right to property (copyright holder), fundamental right to conduct a business (DNS service provider) and the right to access information (Internet user).

7. Remedies against DNS service providers have in particular met the proportionality test in cases of domain names that are used for websites which follow a copyright-infringing business model, systematically generating copyright infringements (so-called structurally copyright infringing websites). Under no-fault injunctive relief, for example, registries and registrars have been ordered to suspend or disable (disconnect) such websites' domain names, and registrars have been obliged also to freeze them (the registrar must not participate in transferring the domain to another registrar). DNS resolver providers have been ordered by courts not to resolve the respective domain name of such websites.

### **III. CONTRACTUAL POSITION OF DNS SERVICE PROVIDERS**

8. Domain name service providers, both for gTLDs and ccTLDs, operate under contractual arrangements. For gTLDs, both registries and registrars must enter into accreditation agreements with ICANN. Whether for gTLDs or ccTLDs, these contractual arrangements usually contain provisions that obligate registrants of domain names (i.e., the domain name holders) to refrain from using the domain names in conjunction with illegal activity, including copyright infringement. Under these contractual arrangements, domain name service providers have the authority to suspend or disable and freeze domain names under which websites engaged in pervasive copyright infringement operate. Despite having the contractual authority to suspend or disable such domain names, most domain name service providers will not do so upon notification by copyright owners. Instead, they will require either a court order or instruction from a government authority.

9. Suspending, disabling or blocking resolution of domain names is the only reactive measure domain name service providers can undertake with respect to websites and online services engaged in copyright infringement. However, domain name service providers can implement preventative measures to limit the misuse of domain names for websites engaged in illegal activity of all kinds, including copyright infringement. Such preventative, pro-active measures include, among others: (i) verifying the accuracy of the identity and contact information supplied by registrants and refusing to register domain names where such information is not accurate and (ii) implementing post-registration checks and reviews for the continued accuracy of identity and contact information and suspending domain names of registrants that do not correct inaccurate information.

10. Domain name service providers can undertake voluntary measures in the form of trusted notifier/trusted flagger arrangements with organizations having expertise in identifying copyright-infringing websites. Two leading gTLD registries, Donuts and Radix, have entered into such trusted notifier/flagger arrangements to address websites engaged in pervasive copyright infringement of films, television programs and sound/music recordings. These trusted notifier arrangements were put into place in 2016 and are still operational.

### **IV. CONCLUSION**

11. The role of domain name service providers in addressing online copyright infringement is still in a state of development in terms of legal obligations and remedies (both liability and no-fault based) and voluntary actions. With respect to combating online copyright infringement, domain name service providers are capable of undertaking both preventative measures, as well as reactive measures.

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