

Domains & Domain Names 2021

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Domains & Domain Names*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on France and Germany.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Flip Petillion of Petillion, for his continued assistance with this volume.



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REGISTRATION AND USE OF DOMAINS AT CCTLD REGISTRY

Registry

1 | Which entity is responsible for registration of domain names in the country code top-level domain (ccTLD)?

The administration authority (registry) for the ccTLD .ru (and for the Cyrillic .р) is a non-profit organisation called the ANO Coordination Center for TLD RU (the Coordinator). It ensures the reliable and stable domain name system infrastructure operation of the Russian internet sector. The Coordinator accredits domain registrars (private companies), which provide commercial services – the registration and maintenance of domain names – to registrants. In this role, the Coordinator performs targeted functions controlling the activities of local registrars. Similar functions have been given to the Russian Fund of Internet Development, which is both a watchdog and another registry of the .su domain and related registration proceedings.

Method

2 | How are domain names registered?

To register a domain name, a prospective registrant files a registration application and enters into a contract with a registrar. Any person, either domestic or foreign, can apply for and own a domain name in the .ru, .р and .su digital zones. There is no need for trademark registration to file for domain name registration in Russia, although trademark registration before domain name registration may provide certain additional benefits.

Duration

3 | For how long is registration effective?

Registration is generally effective for one year. Unlimited registration renewals are possible if the registrant sends renewal applications in due course. Failure to renew a domain name registration will result in the loss of rights related to the domain name at issue.

Cost

4 | What is the cost of registration?

The cost of registration varies from one registration to another. Usually, it ranges from approximately US\$5 to US\$30. Registrars sometimes provide rewards, bonuses or discounts associated with domain name registrations.

Transfer

5 | Are registered domain names transferable? If so, how? Can the use of a domain name be licensed?

Domain names are transferable. For transfer purposes, the current registrant must send the relevant application to the registrar, while the new registrant must enter into a contract with the registrar and consent to the transfer. Once the application is filed, the contract is entered into by the parties and consent is given – the registrar has three days to complete the domain name transfer process.

Transfer of the .ru domain name is not allowed under the following conditions:

- upon expiry of a one-year registration term;
- within 30 days from the moment the new registrant acquired the right to the domain name from the previous registrant;
- if the domain name is the same as one included in the blacklist;
- if the registrant fails to provide the registrar with the requested documents or information in the course of the registrar's monitoring process; and
- if there are certain restrictions imposed on the domain name (eg, a preliminary injunction granted by a court).

Strictly speaking, a domain name licence is not possible according to Russian law, since this particular legal tool applies to transactions involving intellectual property (IP) assets under the provisions of the Civil Code, while domain names are not within the list of protected IP rights. That does not mean, however, that the registrant cannot commercialise the domain name by allowing third parties to use it on the agreed terms.

Owing to the freedom-of-contract principle, the registrant may lease the domain name in favour of a third party. At the same time, in the case of an IP infringement dispute, the registrant will be engaged as the first defendant, while the actual user of the domain name (lessee) may stand as the co-defendant. In any event, the imposition of liability on a registrant that has leased the domain name to a third party, associated with the occurrence of an IP infringement, will depend on various factors and the facts of the case.

According to a ruling of the Russian IP Court, the registrant of the domain name cannot escape liability for IP infringement, or shift this liability to another person, by entering into a contract (including a domain name lease contract) (case reference A40-206553/2015). This position may be applied to all related domain name disputes where the registrant registers an infringing domain name and then, in the case of a dispute, argues in court that another person uses the domain.

Crucially, if it has been proven that the registrant in no way contributed to the IP infringement committed by the lessee of the domain name (eg, if the lessee publishes an offer for sale of counterfeit products without the registrant's knowledge), the court may dismiss the claim against the registrant by holding liable only the lessee (the actual user of the domain name) (case reference A40-136427/2012).

ccTLD versus gTLD registration

- 6 | What are the differences, if any, with registration in the ccTLD as compared with a generic top-level domain (gTLD)?

The rules for the .ru ccTLD do not contain specific eligibility requirements for registrants. However, since domain name registration is exercised based on a contract between a registrar and a registrant, the registrant must have legal capacity and be in good standing.

As for the selection of specific domain names, the rules for the .ru ccTLD do not allow the registration or use of domains that are contrary to the public interest and humane and moral principles (such as abusive words).

WHOIS records do not describe specific eligibility requirements.

Registrants' privacy

- 7 | Is the registrant's contact information freely available? Can the registrant use a privacy service to hide its contact information?

The registrant is obliged to provide the registrar with correct and up-to-date personal data (ie, full name, date of birth, residential address, passport details and contact information). Submission of fake or false information is not allowed under the rules for the .ru ccTLD. Owing to personal data legal restrictions, registrars will not publicly display this (personal) information. Therefore, the actual personally identifiable information is not always available for public access, including in WHOIS records.

PRE-LITIGATION ACTIONS

Disclosure of registrants' private details

- 8 | If a registrant's contact information is hidden, under what circumstances will it be disclosed? What processes are available to lift a registrant's privacy shield?

The registrar is entitled to disclose a registrant's privacy-protected contact information (eg, full name and address) in the case of a written well-grounded request by a third party wishing to use the obtained information exclusively for filing a lawsuit.

In practice, the registrar provides the privacy-protected contact information based upon:

- a request by an attorney (an advocate);
- a request from a law enforcement agency (eg, the police); or
- a request from the court.

Therefore, registrants would not usually be able to hide this information from the prospective litigation action. Also, this information shall be obtained at the pre-trial stage.

In cases where there are grounds to believe that the registrant has used fake or incorrect information to hide its identity, it is possible to launch a special verification procedure under which the registrar will ask the registrant to confirm the submitted information and documentation (otherwise, the delegation of the domain name may be terminated).

Third-party notification

- 9 | Are third parties (such as trademark holders) notified of a domain name registration or attempt to register a domain name? If so, how? If not, how can third parties receive notice?

Third parties (including a trademark holder) are not automatically notified of domain name registrations or attempts to register domain names. Therefore, third parties may either monitor WHOIS themselves or hire commercial monitoring services. For new-era domains, the best option would be to use a reliable brand protection system.

Notice to the registrant

- 10 | Is there a need to notify the domain name registrant before launching a complaint or initiating court proceedings?

There is no need to notify the domain name registrant (infringer) about infringement before filing a lawsuit with the competent court if there are no monetary claims raised against the infringer in a commercial court.

Other rules will apply if a claim for reimbursement is made against the infringer, and the subject matter case is filed with a commercial court. In this case, the plaintiff is obliged to send a cease-and-desist letter to the domain name registrant, and only upon the expiry of 30 calendar days from the date of the letter may the plaintiff bring the intellectual property (IP) infringement or unfair competition case to the commercial court.

Provisional measures

- 11 | What provisional measures are available to prevent a domain name being transferred or cancelled during proceedings?

The plaintiff may use a pretrial option – to 'freeze' the transfer and other activities concerning the domain name – by approaching the registrar (including by filling in the form at the ANO Coordination Center for TLD RU's website and sending the original of the completed application to the registrar). The application must list the information on the applicant and the enforced trademark and must contain a commitment to reimburse damages if the application contains false information. The annex to the application should be the evidence of the application's incorporation, a copy of the relevant trademark certificate and a copy of the postal document proving that the original application was sent to the registrar. Upon consideration of the application, the registrar is entitled to take restrictive measures regarding the use of the domain name that will last about 14 days.

Further, the plaintiff has a further procedural option to claim a preliminary injunction (PI) (eg, a court-granted restrictive order prohibiting the transfer of the domain name pending the adjudication of the proceedings) in court. In submitting the relevant PI motion, the plaintiff must explain that not granting the PI will make it impossible to enforce or create complications in the enforcement of the court decision on the merits or will result in significant damage to the plaintiff. There are frequent cases for the court to grant a PI in domain name disputes.

- 12 | Can domain names be seized? If so, under what conditions?

Domestic conventions provide that domain names may be seized by the competent state authority in cases of phishing, use for harmful activities (control of a botnet), dissemination of pornographic materials involving minors and in other cases (eg, not receiving the requested information from the registrant).

Domestic conventions also provide for the special register to which domain names may be included if they breach Russian legislation, and that may result in blocking access to the website at the domain name address.

Restrictions on the domain name use may be applied within a pretrial procedure and court-granted PI measures. As a result of the court hearing on the merits, the domain name infringing the IP rights may be terminated, and the IP rights owner may register that domain name.

TRANSFER OR CANCELLATION

Procedure

13 | What is the typical format for a cancellation or transfer action in court litigation (domains registered in either a ccTLD or a gTLD) and through ADR (ccTLD only)?

Alternative Dispute Resolution (ADR), such as the Uniform Domain Name Dispute Resolution Policy (UDRP) or the Uniform Rapid Suspension System (URS), does not apply to .ru ccTLDs and related infringement matters. Thus, domain name cancellations or transfers – in the case of disputes – are usually achieved based on the effective intellectual property (IP) infringement or unfair competition court decision.

In this regard, the forum will be a commercial court.

The IP infringement or unfair competition case must be filed in the court located at the residence of the defendant (the registrant). If there are several defendants (eg, the registrant and the person who uses the domain or website) resident in different regions (ie, giving rise to several courts potentially competent over the dispute), the plaintiff may choose one of them to establish jurisdiction.

Once the competent court institutes proceedings, there will be preliminary hearings and hearings on the merits. Each party is obliged to prove its arguments, and the court may ignore all pieces of evidence that were not provided in a timely fashion or duly provided during proceedings. Discovery proceedings at the pretrial stage are not available.

If the court acknowledges an IP infringement or unfair competition, the domain name is subject to cancellation based on the court decision, and the plaintiff has priority (pre-emptive right) to register the litigious domain name in its own name within 30 days from the moment the court decision has become effective.

For various gTLDs, including new-era domains, ADR proceedings (such as UDRP and URS) are generally available; however, it is also possible to litigate gTLDs in the Russian courts.

Choosing a forum

14 | What are the pros and cons of litigation and ADR in domain name disputes? What are the pros and cons of choosing a local forum to litigate a gTLD dispute compared with the ICANN ADR format for the gTLD?

ADR does not apply to disputes involving .ru ccTLDs. However, 'non-traditional' ADR proceedings (cease-and-desist letters, amicable (non-judicial) settlements, domain name transfer negotiations, etc) have proven to be quite effective brand protection mechanisms in terms of timing and costs in certain instances. Local forum and court proceedings are usually a more efficient and stronger enforcement option compared with other international ICANN or ADR proceedings, especially in terms of the ability to recapture the litigious domain name and obtain monetary relief from an infringer (domain name registrant).

Appeal

15 | What avenues of appeal are available?

The following appeal venues are generally available in consideration of the case by a commercial court:

- appellate courts, which review the evidence in the court files and new evidence if there is a reasonable excuse for not submitting it in the first-instance court;
- first cassation appeal – the Russian IP Court, which hears cases on the existing case records and does not re-evaluate the evidence and facts located in the court files;

- second cassation appeal – the Economic Board of the Russian Supreme Court, which has no power to re-evaluate evidence and facts located in the court files; and
- supervision appeal – the Supreme Court of the Russian Federation, which is entitled to review and ascertain whether there has been a substantial breach in law enforcement.

Who may claim

16 | Who is entitled to seek a remedy and under what conditions?

Generally, the valid rights holder (eg, trademark owner), its recorded assignee or recorded exclusive licensee are entitled to seek injunctive and monetary relief, provided their rights and legitimate interests are affected owing to the domain name registration or use. Non-exclusive licensees, distributors or other authorised IP users do not have the same privilege.

Who acts as defendant

17 | Who may act as defendant in an action to cancel or transfer a gTLD in local courts?

The first defendant in such an action will be the registrant. The actual domain name user (eg, website owner) may be the second defendant and will bear the joint and several liability associated with the IP infringement or unfair competition. Hosting providers and local registrars may also stand as co-defendants in certain exceptional cases (eg, a case involving a foreign registrant).

Burden of proof

18 | What is the burden of proof to establish infringement and obtain a remedy?

The national court system supports the international principle of unfair competition repression and applies the three-factor UDRP test through the implementation of article 10-bis of the Paris Convention for the Protection of Industrial Property. In other words, in a clear-cut IP infringement or unfair competition matter, the following factors must be proven by the plaintiff:

- the domain name is identical or confusingly similar to a trademark in which the claimant has rights;
- the respondent has no rights or legitimate interests in respect of the domain name; and
- the respondent's domain name has been registered and is being used in bad faith.

Importantly, in a classic domain name dispute, the plaintiff must prove the following three fundamental factors:

- the priority of the trademark over the domain name;
- the similarity between the trademark and the domain name; and
- the similarity of the trademarked (registered) goods and the goods offered for sale (sold) on the website under the domain name.

If one of these factors is not properly demonstrated by the plaintiff – whether under the first or the second scenario – IP infringement or unfair behaviour will not be established by the court, and remedies will not be awarded.

Essentially, in asserting an IP infringement or unfair competition claim, the plaintiff must act in good faith to avoid unfair hijacking of the conflicting domain name. Abuse of rights will lead to dismissal of the case.

Remedies

19 | What remedies are available to a successful party in an infringement action?

In terms of remedies, an injunction would be the most appropriate legal relief according to local practice. Statutory damages (ie, compensation) are popular remedies as well. Publication of the court order is also regarded as a feasible relief, but it is not usually sought in domain name actions. Seizure and forfeiture of counterfeit or grey-market goods (in certain instances) will be available for serious IP infringements or unfair competition matters on the internet in cases involving domain name disputes.

Injunctive relief

20 | Is injunctive relief available, preliminarily or permanently, and in what circumstances and under what conditions?

Procedurally, the plaintiff is entitled, before filing a lawsuit or simultaneously with filing the lawsuit, to file a preliminary injunction motion with the court to block the potential transfer or cancellation of the domain name. The plaintiff must condition the granting of the preliminary injunction by arguing that not granting it may make it harder or even impossible to enforce the effective court decision. Prevention of substantial damages will also be regarded as a valid condition to obtain a preliminary injunction. Permanent injunctive relief will be awarded by the court if the plaintiff is able to evidence and prove IP infringement or unfair competition. The pre-litigation procedure taken before the respective domain registrar and aimed at freezing or locking the conflicting domain name is effective for 14 calendar days and will also be feasible, provided that a warranty for indemnification is given by the rights holder in the corresponding motion.

Calculating damages

21 | How is monetary relief calculated?

Monetary relief is normally claimed and awarded in domain name conflicts. While regular damages are rarely used in practice, statutory damages (ie, compensation) are very popular.

Indeed, to get regular damages the plaintiff (ie, trademark or company name owner) must prove the following factors:

- the amount of damage sustained (eg, lost profits) by disclosing the appropriate method of calculating them;
- the fact of the IP infringement by proving the illegal activities of the infringer; and
- the nexus between the calculated damages and illegal activities of the infringer.

If one of these factors is omitted or is not demonstrated by the plaintiff, damages will not be awarded by the court. At the same time, to receive statutory damages the plaintiff needs to prove only the fact of the claimed trademark infringement. In addition, it is not required to disclose any evidence by showing the method of calculation of losses, even though it may be useful to a certain extent, when large amounts are claimed.

Legally, there are three different avenues that trademark owners can select and follow when seeking to obtain monetary relief in domain name disputes:

- an amount between 10,000 and 5 million roubles;
- double the cost of the counterfeit goods; or
- double the cost of the lawful (licensed) trademark usage.

In practice, the choice of the appropriate monetary compensation formula will be vested with the trademark owner, although in the absence of a large quantity of counterfeits or grey-market goods (if applicable)

being offered or purchased from the conflicting websites under litigious domain names, or the underlying recorded trademark licences with the stipulated licence fees, trademark owners will normally have to rely on the first scenario described above, while the court will finally decide on the concrete amount of the award based on the nature of the IP infringement (if established).

Company name owners are not entitled to seek statutory damages, although they can remedy regular damages (eg, lost profits).

Criminal remedies

22 | What criminal remedies exist, if any?

Criminal remedies associated with trademark infringement matters do exist and may be sought by the rights holders. The usual sanctions will be any or all of:

- a criminal fine;
- forced labour; and
- corrective works.

In exceptional cases, imprisonment may be imposed by the court. In practice, criminal remedies are sought in cases that are more related to counterfeit trademarks, or goods and products offered for sale and sold by counterfeiters in large quantities or repeatedly, including online (ie, under the conflicting domain names). In other words, substantial damages or repeated trademark infringement must be shown in these types of action.

Limitation period

23 | Is there a time frame within which an action must be initiated?

The general limitation period is three years, starting from the moment the plaintiff became aware or should have become aware of the infringement of its IP rights or unfair competition. Domain name action is not an exception.

Expiry of rights and estoppel

24 | Can a registrant's rights in a domain name expire because of non-use? Can a registrant be estopped from bringing an infringement action? In what circumstances?

A registrant's rights in a domain name will not expire because of non-use. The registrant will keep domain-related rights for as long as the domain name registration is renewed. At the same time, a registrant cannot be recognised as an IP infringer on the grounds of expiry of the limitation period, abuse of the plaintiff's rights, non-extension of asserted trademark rights or in other material and procedural circumstances.

Time frame for actions

25 | What is the typical time frame for an infringement action at first instance and on appeal?

The typical time frame for an IP infringement action to be taken at the first-instance court may be around six months or more depending on the case circumstances. Appeal proceedings, if commenced later, will add another three to four months to the action. Further cassation or appeal proceedings, if continued, will make it a year for the domain name litigation.

Case law

26 | Is a case law overview available on procedural or substantive issues? Does the case law have a precedential value?

Russia is not a country where case law has precedential value. At the same time, the Supreme Court of the Russian Federation, and the former Supreme Commercial Court of the Russian Federation, has (or had) competence to issue clarifications, guidance and orders, which must be treated as binding for all lower courts. In practice, lower-instance courts prefer to follow the approaches developed and tested by the local supreme courts. Domain name litigation is a good example of this point.

Appointment of panellists

27 | Can parties choose a panellist in an ADR procedure involving a ccTLD? Can they oppose an appointment?

ADR procedures, such as UDRP or URS, are not applicable to .ru ccTLDs. Domain names involving .ru (or other local) zones must be litigated before the commercial courts or courts of general jurisdiction (as applicable). The appointment of a panellist (judge) by the parties is not applicable in either national commercial or civil dispute resolution procedure, although they can oppose this by trying to disqualify (recuse) the appointed judge during the court trials.

Costs

28 | What is the typical range of costs associated with an infringement action, including pre-litigation procedures, trial or ADR, and appeal? Can these costs be recovered?

There is no typical or standard range of costs associated with IP infringement actions, unfair competition claims and cases involving pre-litigation procedure or amicable settlements towards conflicting domain names. These costs will usually be based on court fees, professional lawyers' or attorneys' fees, expert fees (if any) and other disbursements (eg, travel and accommodation expenses). Each particular domain name case must be individually reviewed and assessed depending on the circumstances surrounding it. Legal costs (including attorneys' fees) are recoverable, although always within reasonable limits and at the discretion of the court.

UPDATE AND TRENDS**Hot topics**

29 | Are there any emerging trends or hot topics regarding domains and domain names in your jurisdiction?

The Supreme Court of the Russian Federation issued Resolution No. 10 'On enforcement of Part IV of the Russian Civil Code', on 23 April 2019. The Resolution provides that disputes involving a means of individualisation (that includes trademark enforcement cases including in domain name disputes) are subject to the competence of the commercial courts irrespective of whether the defendant has individual entrepreneur status or not, or whether it is a company. This provision introduces additional clarity in the determinations of the competent court in cases where the defendant does not have individual entrepreneur status.

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Coronavirus

30 | 30 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The covid-19 pandemic ignited further wider use of digital technologies in enforcement, for example, courts started using online hearings more frequently by using more effective tools for conducting online hearings.

Since online sales of goods became much more important during the covid-19 pandemic, constant monitoring of infringing domain names with the subsequent enforcement activities continues to be a must for brand owners across industries using Russian-language-tailored monitoring tools.

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