

## THE IMPACT OF THE CZECH NEW CIVIL CODE ON DOMAIN NAMES – LEGAL (DE)TRASHING OF NOT ONLY DOMAIN NAMES

Radka MacGregor Pelikánová\*

**Abstract:** *The recent Czech re-codification of the Private law is a massive legislative move performed through a set of statutes and other instruments. The flagship of this flotilla, the Act No. 89/2012 Coll., the Czech New Civil Code has significantly re-shaped the Czech private legal framework and reached even the fundamental principles and concepts. For instance, the reinforced mandate of good morals and the reviewed delineation of in rem rights have the potential to change the meaning and regime of virtually all assets, including virtual domain names. The former discussion whether the domain name is an item, a right, something else or nothing and whether a domain name can be owned or held or neither is not expressly resolved by the New Civil Code. There are at least two opinion streams – one interpreting the new regulation as an endorsement of the in rem regime of domain names and another interpreting the new regulation as a clear rejection of the in rem regime of domain names. What exactly does the New Civil Code tell us and how should we interpret it? A consistent and open-minded approach leads to a set of (semi)conclusions bringing light in this extremely important and confusing arena and advocating for placing domain names, as well as the Roman law ownership triad, from the shadow to the sunny side.*

**Keywords:** *czech new Civil Code, domain name, item, property*

### INTRODUCTION

The phenomenon of the 21<sup>st</sup> century, the Internet, is an international, world-wide and free system built up by knots, such as personal computers and comparable devices as well as server computers for hosting sites, and their networks, which communicate based upon standards called Transmission Control Protocol (TCP) and Internet Protocol (IP), i.e. TCP/IP protocol. Each knot in this “*network of networks*” is identified by a unique numeric code and its verbal equivalent. Thus a word transcription, a domain name, of an IP numeric address is used to allow for identification and interaction. This entire communication and conversion system is called the domain name system (DNS) and its existence and smooth operation is absolutely vital for the Internet and its use.<sup>1</sup> Structurally, the Internet universe is hierarchically composed of top level domains (TLDs) and their sub-domains. Each and every domain or sub-domain must belong to a TLD, regardless whether to a generic TLD or national TLD or regional TLD or even new generic TLD, and its domain name is composed by a fancy part before the dot and the abbreviation referring to the pertinent TLD after the dot.<sup>2</sup>

Despite its significance and global nature, the determination and regulation of the DNS and domain names is seldom covered by explicit legal provisions. As a matter of fact, international law, in general, requires a consensus, and both of the evenly strong legal sources of international law, meaning customs and treaties, still remain not codified and

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\* JUDr. Radka MacGregor Pelikánová, Ph.D., LL.M., MBA, Metropolitan University Prague, Czech Republic. This contribution was supported by GA ČR No. 13-02203S “Domain Names and their significance for Business”.

<sup>1</sup> MacGREGOR PELIKÁNOVÁ, R. European Integration and Top Level Domain in 2013. *The Lawyer Quarterly*. 2013, Vol. 3, No. 4, pp. 311–323.

<sup>2</sup> MacGREGOR PELIKÁNOVÁ, R. New top level domains – pending success or disaster? *Journal on Legal and Economic Issues of Central Europe*. 2012, Vol. 3. No. 1, pp. 75–81.

even, at least partially, unwritten<sup>3</sup> and definitely not addressing the DNS and domain names. In addition, the post-Snowden effect and heated debate over Internet governance makes it clear that no international law instruments in this field are readily pending. Thus, the express definitions, regime settings and rules with respect to the DNS, TLDs and domain names are to be identified at the national level.

Before addressing the approach of the Czech law to domain names, it is indispensable to describe the technical and logistic nature of domain names as pre-requirements for any legal setting (1.) and to observe the approach to domain names abroad. As a matter of fact, a true *lex specialis* about domain names, or more precisely about certain aspects of domain names, includes only a few of the national, federal, or regional laws, such as Slovak, Finnish, EU and federal USA law. (2.) The Czech law does not have a *lex specialis* for domain names and thus their regime is predominantly set by the brand New Czech Civil Code which recently replaced the Czech prior, old Civil Code (3.) Keeping in mind the technical and logistic nature of domain names and the fragmental foreign *lex specialis* information, a complex interpretation issue emerges and, at least preliminary, statements regarding the Czech legal approach to domain names need to be presented to reduce any inappropriate confusion and speculation (4.) The conclusions attempt to move the discourse about the nature and regime of domain names to a new stage and to sharpen the focus on several still very open issues.

## 1. TECHNICAL AND LOGISTIC NATURE OF DOMAIN NAMES

The administration of Internet domains is clearly and strongly hierarchic, but it does not belong under the competency of a state and it uses a decentralized and multi-stakeholder model operated by a private law entity called the Internet Corporation for Assigned Names and Numbers (ICANN) established under the national law of California. ICANN is a not-for-profit public benefit corporation which entered into contracts with the U.S. government, namely with the Department of Commerce and generally private Registries and Registrants, established under national laws. Model contractual documents prepared by ICANN need to be entered into by the Registrars and ultimate Registrants.<sup>4</sup>

ICANN presents itself as “a critical global body that works to assure that the Internet remains open, unified and global.”<sup>5</sup> The principal tasks of ICANN are the coordination of the DNS, IP, root system functions and the assigning of gTLDs as well as ccTLDs, and even new gTLDs. Thus, the states exercise little or no influence with respect to the DNS,<sup>6</sup> and at most cover registration and conflict resolution with respect to the domain names from their won ccTLD.

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<sup>3</sup> ŠTURMA, P. The International Law Commission and the Perspectives of its Codification activities. *The Lawyer Quarterly*. 2011, Vol. 1, No. 3, pp. 145–156.

<sup>4</sup> MacGREGOR PELIKÁNOVÁ, R. European Integration and Top Level Domain in 2013. *The Lawyer Quarterly*. 2013, Vol. 3, No. 4, pp. 311–323.

<sup>5</sup> BECKSTROM, R. Speech. *The London Conference on Cyberspace*. 2<sup>nd</sup> November 2011, London, UK, p. 1. <http://www.icann.org/en/presentations/beckstrom-speech-cybersecurity-london-02nov11-en.pdf>.

<sup>6</sup> As a matter of fact, traditionally the only state directly involved in these types of issues, the USA, has been criticized for the inherence and requested to withdraw. Even the recent involvement of the EU has a rather moderate extent.

According to the general consensus, a domain name is, in effect, mainly a word identification of an IP resource, a name and/or address of a personal computer, a server computer or a website.<sup>7</sup> It is suggested that the domain name is a misleading term and more correctly should be instead used a designation of a domain.<sup>8</sup> The explanation for it is easy and convincing, the domain is a space with an internet address in a number format converted into a letter format. Therefore, the domain is not a person and thus should not be labeled by names but rather by denominations or designations.<sup>9</sup>

Further, the domain name (or domain designation or domain denomination) is no mere grouping together of random signs. A precise and pre-determined tree structure, with several letters formations separated by dots and positioned via the level of generality and speciality, constitutes it. Basically, the first letters in the formation, placed leftmost, are appurtenant to a concrete computer and the rightmost last letters formation relates to a large group of computers, networks and websites – a TLD.<sup>10</sup>

Since the domain name has a *prima facie* appearance of a term, it can serve for a myriad of reasons and perform abundant tasks. In addition to its original function of the convertible identification address, a domain name has a referencing, advertising, marketing and information potential that can exceed trademarks and other conventional pieces of the intellectual property. There are well presented studies explaining the importance of these functions and even translating them into the calculation of the domain name price.<sup>11</sup> In addition, domain names are perceived as intellectual property assets, the closest to which are trademarks, and it is clearly established that trademarks have been playing two key roles, i.e. consumer-information signifier and producer-investment asset.<sup>12</sup> Originally, trademarks were perceived as mere identifiers of the producer, provider, or distributor and the trademark regime ultimately contributed to a certain regulation of the market and competition in it. Later on, the “*propertized*” trend with respect to trademarks made them a recognized investment outcome, i.e. made them extremely valuable assets rather than merely a simple customer information tool.<sup>13</sup> Modern information-assets trademarks have significant issues with the distinctiveness test and with the competition law mandating against the (abuse of) monopolization, and are first cousins, if not directly siblings, of domain names.

The characteristic features of intellectual property assets are their uniqueness, intangibility, omnipresence, business significance, capacity of simultaneous use and creativity

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<sup>7</sup> MacGREGOR PELIKÁNOVÁ, R. New top level domains – pending success or disaster? *Journal on Legal and Economic Issues of Central Europe*. 2012, Vol. 3, No. 1, pp. 75–81.

<sup>8</sup> TELEČ, I., TŮMA, P. Licenční smlouva v pojetí nového občanského zákoníku. In: Ladislav Jakl (ed.). *Nový občanský zákoník a duševní vlastnictví*. Prague: Metropolitan University Prague, 2012, p. 82.

<sup>9</sup> TELEČ, I. Nový občanský zákoník ve společnosti sítí. *Právní rozhledy*. 2012, Vol. 20, No. 23/24, pp. 853–855.

<sup>10</sup> MacGREGOR PELIKÁNOVÁ, R. New top level domains – pending success or disaster? *Journal on Legal and Economic Issues of Central Europe*. 2012, Vol. 3, No. 1, pp. 75–81.

<sup>11</sup> BRANSON, Ch. L. Was \$ 7.5 Million a Good Deal for Business.com: The difficulties of Obtaining Trademark protection and Registration for Generic and Descriptive Domain Names. *Santa Clara Computer & High Technology Law Journal*. 2000, Vol. 17, No. 2, pp. 286–314.

<sup>12</sup> LONG, D. E. Resolving Trademark Duality in the Twenty-first Century: Making Trademarks Internet-Ready. *Acta MUP*. 2013, Vol. 4, No. 1, pp. 31–42.

<sup>13</sup> LONG, D. E. Resolving Trademark Duality in the Twenty-first Century: Making Trademarks Internet-Ready. *Acta MUP*. 2013, Vol. 4, No. 1, pp. 31–42.

or designation capacity, etc. Domain names can meet all of them, and actually they truly do it in praxis, in the most intense manner. With but slight exaggeration, it can be stated that domain names are the clearest and cleanest examples of intellectual property assets and at the same time the most legislatively ignored. However, this ignorance is definitely better than a wrong, centralized and old-fashioned state regulation focusing more on form, including compulsory registrations by a public authority than on content. Thus the current rather passive approach of state legislators and the reliance on fundamental law principles and general regulations should be rather supported than rejected.

## 2. THE SPECIAL LEGISLATIVE PERCEPTION AND REGIME OF DOMAIN NAMES ABROAD – LEX SPECIALIS IN SLOVAKIA, FINLAND, THE EU AND IN THE USA

Just a minority of national or quasi-national laws specifically focus on domains. The closest to the Czech law, the Slovak law, includes an explicit definition of the domain in Art. 2 letter d) of the Act No. 22/2004 Coll., on e-commerce,<sup>14</sup> but it does it by confusing the domain and the domain name and without providing any information about the pertinent regime.<sup>15</sup> The Slovak new Act No. 351/2011 Coll., on e-communication is not dealing with domain names in particular.

Similarly, the Finnish Act No. 228/2003 Coll., Domain Name Act does not provide us with concise information about the domain name, its nature and legal regime. As a matter of fact, this Act is rather an Act about the registration of domain names within two “Finnish” TLDs, .fi and .ax. So, the EU and Finland do not follow the main stream of the majority of countries, which decided to stay away and leave the regulation of ccTLD registration to the general legal framework and to private contracts. Nevertheless, it should be pointed out that despite the silence of the Act No. 228/2003 Coll., Domain Name Act about the *in rem v. in personam* nature of domain names and their regime, a short definition of a domain name as an Internet address information for the purposes of this Act is included in Art. 3(1).<sup>16</sup> According to the Finnish Domain Name Act, a domain name in TLD .fi or TLD .ax is applied for by the applicant before the agency FICORA, is granted by FICORA to its holder for max. 5 years, can be transferred and renewed and the decisions entered by FICORA can be appealed before the Administrative Court in Helsinki.

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<sup>14</sup> d) komerčnou komunikáciou informácie o tovare, službe, podnikateľovi alebo o osobe, ktorá vykonáva povolanie alebo regulované povolanie podľa osobitného zákona, 10) vrátane reklamy, 11) ponuky a predaja tovaru okrem 1. informácií umožňujúcich priamy styk s poskytovateľom služieb prostredníctvom elektronického zariadenia, najmä o názve domény alebo o adrese elektronickej pošty; doménou sa rozumie symbolická adresa v elektronickej komunikačnej sieti... [d) commercial communication of the information about goods or services, an entrepreneur or a person performing a job or a regulated job according to special statute, 10) including advertisements, 11) offering and selling goods except 1. Information allowing direct contact with the provider of services through an electronic device, especially about a domain name or an address of electronic mail; the domain is understood as a symbolic address in the electronic communication network...].

<sup>15</sup> MacGREGOR PELIKÁNOVÁ, R. *Ekonomické, právni a technické aspekty doménových jmen v globální perspektivě*. Ostrava: Key Publishing, 2012, p. 57.

<sup>16</sup> (1) For the purposes of this Act: 1) domain name means second-level address information on the Internet under the national country code Top Level Domain. fi or the region code Top Level Domain .ax consisting of letters, digits or other characters or their combination in the form of a name.

Relatively comparable to the domain name legislative approach of Finland was the approach taken by the EU. The importance of information technologies, of the Internet, for European integration was clearly stated by the eEurope initiatives, as indicated in the key Council Decision 2002/835/EC<sup>17</sup> as well as other documents.<sup>18</sup> The secondary EU law explicitly and concisely deals with domain names from TLD .eu and their registration via the Regulation (EC) No 733/2002 of the European Parliament and of the Council on the implementation of the .eu Top Level Domain (Regulation 733/2002)<sup>19</sup> and Commission Regulation (EC) No 874/2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration (Regulation 874/2004).<sup>20</sup> The Regulation 733/2002 was critical for the establishment of the triangle around TLD .eu, i.e. Registry (EURid) - Registrar - Registrant, and generally for the creation of TLD .eu as the accelerator of e-commerce pursuant to the e-Europe initiative, since TLDs are an integral part of the Internet structure and essential for the global interoperability of the World Wide Web and for the Internet e-mail communication as well as for the visibility of the Internal market. The Regulation 874/2004 describes in more detail requirements and the entire regime regarding the registration of a domain name within TLD .eu, indicates that speculative and abusive domain name registrations are subject to revocation in an extra-judicial, ADR, procedure or in a judicial procedure and interestingly allows regular court reviews of such ADR decisions.<sup>21</sup> However, neither the Slovak legislation, nor the Finnish legislation, nor the EU legislation clearly deals with the fundamental classification and categorization of the domain name and addresses the *in rem v. in personam* dichotomy. Probably at this point, the only regulation dealing with it at least partially is found in the country of the cradle of the Internet and the DNS.

The federal law of the USA approaches the domain name only from the angle of a potential violation of (trade)mark rights. Namely, the famous 15 U.S.C. § 1125, the Anti-cybersquatting Consumer Protection Act (ACPA), focuses on false designations, descriptions and dilution within the use in commerce and provides the protection of trademarks and other designations through civil actions, injunctive reliefs, additional remedies, etc. Specifically, a part of this provision, 15 U.S.C. § 1125 d) deals with cybersquatter prevention against cybersquatters registering domain names in a bad faith intent to profit from the mark. The owner of a trademark can file either an *in personam* civil action against the cybersquatter who registered an identical or similar domain name and abusively wants to make business with it or an *in rem* civil action against the do-

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<sup>17</sup> Council Decision 2002/835/EC of 30 September 2002 adopting a specific programme for research, technological development and demonstration: “Integrating and strengthening the European Research Area” (2002–2006) [Official Journal L 294 of 29.10.2002].

<sup>18</sup> MacGREGOR PELIKÁNOVÁ, R. The best TLD for European Enterprises is ... *International and Comparative Law Review*. 2012, Vol. 12, No. 2, pp. 41–58.

<sup>19</sup> Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1401354036609&uri=CELEX:02002R0733-20081211>.

<sup>20</sup> Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1401355220978&uri=CELEX:02004R0874-20090630>.

<sup>21</sup> Art. 22 ....13. *The results of ADR shall be binding on the parties and the Registry unless court proceedings are initiated within 30 calendar days of the notification of the result of the ADR procedure to the parties.*

main name in the judicial district of the domain name registrar or registry. Based on both, the *in personam* civil action and *in rem* civil action, the court may order the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.<sup>22</sup> Over the last 15 years, the ACPA has been updated without significantly changing the *in rem* – *in personam* regime and various official studies have been published, predominantly rather supporting it than criticizing it, such as e.g. the Study on Abusive Domain Name Registrations Involving Personal Names, prepared based on public comments by the United States Department of Commerce and the United States Patent and Trademark Office.<sup>23</sup>

### 3. WORDING AND TENOR OF THE NEW CIVIL CODE ON THE PRINCIPLES, ITEM, PROPERTY AND OWNERSHIP FROM THE DOMAIN NAME PERSPECTIVE

As with the large majority of national laws, the Czech law does not include a *lex specialis* about domain names in general or domain names from TLD .cz. The Czech national law belongs to the Continental, so called Civil or Roman-Germanic, law family, follows the tradition of the Roman law, and relies heavily on codices, and is relatively close to the Austrian national law and German national law.<sup>24</sup> Thus the law sources applicable to domain names are Constitutional Acts, special Acts dealing with intellectual property, and, most importantly, the Civil Code. Therefore the discussion about domain names, their nature

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<sup>22</sup> (d) Cyberpiracy prevention (1) (A) A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person (i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark under this section; and (ii) registers, traffics in, or uses a domain name that (I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark; (II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or (III) is a trademark, word, or name protected by reason of section 706 of title 18 or section 220506 of title 36. ... (C) In any civil action involving the registration, trafficking, or use of a domain name under this paragraph, a court may order the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark. (D) A person shall be liable for using a domain name under subparagraph (A) only if that person is the domain name registrant or that registrant's authorized licensee. ... (2) (A) The owner of a mark may file an *in rem* civil action against a domain name in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located if (i) the domain name violates any right of the owner of a mark ...; and (ii) the court finds that the owner (I) is not able to obtain *in personam* jurisdiction over a person who would have been a defendant in a civil action under paragraph (1); or (II) through due diligence was not able to find a person who would have been a defendant in a civil action under paragraph (1) ... (C) In an *in rem* action under this paragraph, a domain name shall be deemed to have its situs in the judicial district in which (i) the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located; or .. (D) (i) The remedies in an *in rem* action under this paragraph shall be limited to a court order for the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.. (3) The civil action established under paragraph (1) and the *in rem* action established under paragraph (2), and any remedy available under either such action, shall be in addition to any other civil action or remedy otherwise applicable... (4) The *in rem* jurisdiction established under paragraph (2) shall be in addition to any other jurisdiction that otherwise exists, whether *in rem* or *in personam*.

<sup>23</sup> The Study is available at <http://www.uspto.gov/web/offices/dcom/olia/domainnamerep.html>.

<sup>24</sup> MacGREGOR PELIKÁNOVÁ, R., ČISAŘOVÁ, J. An overview of the concept of good morals in Czech Codices. *AA Law Forum*. 2014, pp. 3–12. Available at 5AALawForum-14-04-09.pdf - Google Drive.

and legal aspects from the beginning of the millennium until the end of the last year, 2013, was fundamentally based on the provision of the Act No. 40/1964 Coll., the old Civil Code, especially its concept of item, ownership and property and its approach to granting the *in rem* and *in personam* regime.

However, on 1<sup>st</sup> January 2014 there took effect the Act No. 89/2012 Coll., New Civil Code which replaced the old Civil Code and along with other Acts enacted in 2012 and 2013 contributed to the re-codification of the Czech private law and to the dramatic resetting of the private law and even the public law scenery in the Czech Republic. It is beyond the scope of this article to cover, or at least to discuss, these more than 3 000 provisions. However, it is highly instructive to identify critical provisions with a potentially direct or indirect impact on the perception and regime of domain names.

The overview must start with the first three provisions covering fundamental principles, namely good morals and the proprietorship right. Art. 1 allows persons to freely arrange their rights and duties and the only limits are prohibitions given by a legislative Act, the observance of good morals, of public order and of the legal protection of status of persons. Regarding good morals, Art. 2 goes further and states that “*the interpretation and application of law provisions cannot be in contradiction with good morals.*” This is not about the mere performance of individual subjective rights and duties, this is about the objective law *per se!* Thus, it needs to be pointed out that the general criteria of justice, *ratio legis*, must be respected and neither the interpretation nor the application of each and every law provision can violate the concept of good morals.<sup>25</sup> The effects of a legal act are expanded by Art. 545 of the New Civil Code which states that any legal act does not generate just the expressed effects but also “*legal effects implied by the law (New Civil Code), good morals, customs and established praxis of parties*”. This is not about a mere exercise of individual rights and duties or special instruments such as a contractual penalty, this is about legal effects of all (!) legal acts.<sup>26</sup> In a complementary manner, Art. 588 of the New Civil Code provides that a court considers any obvious breach of good morals by an act and declares such an act invalid even if not requested so to do by the parties. A strong opinion stream proposes to even disregard the word “*obvious*” and make every breach of good morals a cause for an absolute nullity.<sup>27</sup> Thus, it is manifest that any discussion about the nature and regime of domain names must strongly consider the mandatory concept of good morals.

The introductory trio of provisions of the New Civil Code includes at least two additional absolutely critical principles with respect to domain names and both of them are included in Art. 3. The first is about the creation and protection of the property right and the second about the respect of belonging. Namely, Art. 3(2) letter e) states that “*the property right is protected by a legislative Act and only a legislative Act can state how the property right is created and ceased.*” The following letter, Art. 3(2) letter f) states that “*nobody can be denied what belongs to him/her.*”

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<sup>25</sup> ELIÁŠ, K., ZUKLÍNOVÁ, M., GAŇO, J., SVATOŠ, M., KORBEL, F. *Nový občanský zákoník s aktualizovanou důvodovou zprávou a rejstříkem*. Praha: Sagit, 2012, p. 63.

<sup>26</sup> MacGREGOR PELIKÁNOVÁ, R., ČÍSAŘOVÁ, J. An overview of the concept of good morals in Czech Codices. *AA Law Forum*. 2014, pp. 3-12. Available at 5AALawForum-14-04-09.pdf - Google Drive.

<sup>27</sup> MATES, J., MATESOVÁ KOPECKÁ, Š. Pár poznámek k úpravě institutu dobrých mravů v NOZ. *Bulletin advokacie*. 2011, No. 7-8, pp. 26–32.

Regarding the already mentioned legal and linguistic issue of the term “*name*”, it needs to be mentioned that Art. 11 of the old Civil Code provided that a “*Physical person has the right on the protection of its personality, especially ... its name ...*” and the protection of the personality of a natural person is newly covered by the Art. 81 of the New Civil, while the protection of its name is further developed by the Art. 77 – Art. 79 of the New Civil and thus the name of a human being is protected under the umbrella of personal rights.<sup>28</sup> The 2<sup>nd</sup> Commandment prohibits taking the name of God in vain and consequently Western civilization, based on Christianity, provides a due respect to the “*name*”. Hence, the authors of the New Civil Code should be complimented to reflect it in their drafting.<sup>29</sup> At the same time, the issue of the wording “*domain name*” is even more burning than before and it seems that due to globalization, the Czech legal science is pushed to make a terminological concession and to bear the English translation.

Before tackling the provisions dealing with owning, holding and contracting, it is necessary to review provisions defining the item, i.e. the Czech version of “*re*” and so understanding what is the legislative basis for the heated discussion of whether a domain is an item or not. The New Civil Code brought a large definition of the “*item*”, since according to Art. 489 “*The item in the legal sense is whatsoever different from persons and what serves to the need of people.*” Art. 493 excludes from the definition of the item the human body and parts of the human body and Art. 494 excludes from the definition of the item live animals. The reading of these provisions suggests, at least *prima facie*, that there are four legal categories – persons, items, useless stuff and subject matters especially excluded from the item definition. The New Civil Code continues in the regulations of items in following regulations and provides in Art. 496 (1) that “*A tangible item is a controllable part of the external universe which has the appearance of an individual item*” and in Art. 496 (2) that “*Intangible items are rights, which nature allows it, and other items without material foundation.*” Art. 498 (2) creates a fiction pursuant to which intangible items are considered movable items along with tangible items out of the real estate category. The wording and tenor of these provisions strongly, if not conclusively, suggests that domain names are intangible items, resp. movable items.

The absolute property rights are proclaimed to be an *in rem* right by Art. 976 Civil Code. Pursuant to Art. 977 “*Only the legislative Acts can determine which rights to property are absolute.*” Possession is described through Art. 987 which states “*The possessor is the person performing the right for him(her)self.*” This right can be the property right or another transferable right able to be performed repeatedly. According to Art. 988 (2) “*An individual right is not a subject of possession or usucapio (adverse possession/acquisitive prescription)*” and according to Art. 989 “*The property right is possessed by the person who gets in possession of an item in order to have it as the owner.*” Art. 996 provides the possessor with a similar protection as given to the owner, i.e. “*An honest possessor can, within the framework of the legal system possess and use the item, even destroy it or otherwise dispose with it, without*

<sup>28</sup> BĚLOHLÁVEK, A. J., ČERNÝ, E., JUNGWIRTHOVÁ, M., KLÍMA, P., PROFELDOVÁ, T., ŠROTOVÁ, E. *Nový občanský zákoník – Srovnání dosavadní a nové občanskoprávní úpravy včetně předpisů souvisejících*. Plzeň: Aleš Čeněk, 2012, p. 30.

<sup>29</sup> ČERMÁK, K. O jménu (Pentatuch pro právníky, díl IX.) – Jak voláme na lidi a psy aneb nevezmeš jména božího nadarmo. *Právo & Byznys*. 2013, roč. 2, č. 12, pp. 36–41.

*being liable to someone else.*” Art. 1002 continues “No one is allowed to arbitrarily intrude in the possession. Those who were disturbed in the possession can enforce the omission of the intrusion by the intruder as well as the restitution in the original status.”

The most interesting part of the New Civil Code for the domain name *in rem v. in personam* discussion is included in Art. 1011 and foll. The language of the Art. 1011 is very broad and states: “All what belongs to someone, all his tangible and intangible assets, is his ownership.” The extent of the property right is defined by Art. 1012 as “The owner has a right to freely dispose with its ownership within the limits of the legal system and exclude other persons from it.” However, the traditional ownership triad inherited from the Roman law, shared by virtually all continental law systems and explicitly included in the Art. 123 of the old Civil Code as *ius possidendi, ius utendi et fruendi, ius disponendi* is not so obvious in the New Civil Code, or at least there is no *expressis verbis* in the New Civil Code. So, is the domain name an item and the right to a domain name is a property right, or at least a possession? Or is the domain name excluded from the “item” category and/or the rights to domain names are exclusively contractual, i.e. *in personam*? And more generally and conceptually, do we still have the *dominium proprietatis*?

#### 4. REVOLUTIONARY V. EVOLUTIONARY APPROACH TO THE INTERPRETATION OF THE NEW CIVIL CODE WITH RESPECT TO DOMAIN NAMES

The New Civil Code is a truly new code, perhaps the final point of the Czech legal transformation,<sup>30</sup> which started after the Velvet revolution in 1989. Thus firstly, it has been in effect just a few months and no settled academic or jurisprudential interpretation could yet be established. Secondly, it is a brand new massive collection of an impressive number of rules and provisions from many fields and disciplines, going even beyond the private law arena. Thirdly, it is the outcome of a many years lasting work done by a heterogeneous group of experts and non-experts, of lawyers and non-lawyers, of legal evolutionarists and revolutionarists. Fourthly, these authors and participants did not follow one, two or three fundamental concepts and models. In other words, many people with various divergent backgrounds, experiences and preferences used many concepts and models. Ultimately, the outcome is not homogenous and it would be misleading to call the New Civil Code either “Elias’ modern version of the draft of the Civil Code No. 844 in 1937” or “a compilation of current civil codes in Austria, Germany, Switzerland and Quebec” or “a modern perfect code finally chasing communistic ideas from the Czech private law”. The abundance of opinions and suggested concepts as well as the perception of individual provisions is not easy to be reconciled. However, this in itself does not imply that it is a good or bad codex, such a decision needs to be referred to the future and it significantly depends upon the manner of how the Czech law professional community will interpret it. The New Civil Code cannot avoid to be generalizing and even vague, not easily to be interpreted. Nevertheless, this is not a reason for its celebration or condemnation, this is just a statement of fact and it is very legitimate and correct to be open-minded and respectfully consider various opinions and arguments while assigning them an appropriate value.

<sup>30</sup> TELEČ, I. Nový občanský zákoník ve společnosti sítí. *Právní rozhledy*. 2012, roč. 20, č. 23/24, pp. 853–855.

The proclaimed principal goal of the drafters of the New Civil Code was to prepare a codex comparable to the well-established regulations in Western Europe and reflecting social and economic challenges of the last several decades.<sup>31</sup> Consequently, it is suggested that the new regulations mean that for certain areas and aspects a turn by 180 degrees from the old and only partially modernized Civil Code which still “*mixed legal models created in the middle of the 20<sup>th</sup> century and focused more on the protection of socialist legalism than on the protection of the private interests of the people ... and was the code of the so-called winning socialism*”.<sup>32</sup> This opinion was and is not meeting a unanimous endorsement. In particular, the old Civil code in its post millennium version probably does not deserve a harsh criticism and should not be labelled as a document marked by the concept of “*winning socialism*”. At the same time, it needs to be underlined that its restrictive wording caused problems to our post-modern capitalist society and the treatment of domain names according to the old Civil Code was not satisfactory. The New Civil Code offers a better regime for them, via larger definitions of item and ownership as well as via reinforced good morals and other fundamental principles in favor of the private interests of persons. However, the verb “*offering*” as opposed to “*giving*” needs to be emphasized. Indeed, the New Civil Code allows various interpretations ...

Regarding domain names, it is critical to reach at least a preliminary consensus about the meaning, extent and applicability of good morals and their impact on the classification and regime of domain names. The professional comparative tables, confronting the provisions of the New Civil Code with the provisions previously valid, have a blank by the Art. 2 of the New Civil Code<sup>33</sup> and it appears that the reinforced role of good morals is a big unknown to everyone in the Czech Republic. It can become a dormant provision or an instrument for judicial activism, it can operate in favor of the rule of law or against it. There are no signs of conclusive arguments in this respect. So, we are left with the general assumption that the concept of good morals has become more significant while the definition of good morals continues to be left to the decision-making practice of the courts, especially to the Supreme Court and Constitutional Court.<sup>34</sup> Neither the judiciary as a system nor the individual judges have asked for such a powerful instrument, nevertheless they now have it. It will be up to them how they will employ it, whether the good morals will keep their rather sleeping beauty function or will become a massively employed counterbalancing instrument leading to a reevaluation of individual justice with a potential to challenge the consistency and predictability of the law.<sup>35</sup> Considering the dramatically growing social and business significance of domain names, it cannot be excluded that the good morals will contribute to their full recognition and will assist in preparing a more robust protection regime for them.

<sup>31</sup> ELIÁŠ, K. Problematická ustanovení nového občanského zákoníku a jejich výklad. *Bulletin advokacie*, 2013, č. 13, pp. 274–32.

<sup>32</sup> ELIÁŠ, K. Problematická ustanovení nového občanského zákoníku a jejich výklad. *Bulletin advokacie*, 2013, č. 13, pp. 274–32.

<sup>33</sup> SVEJKOVSKÝ, J., SVEJKOVSKÁ, J., KABELKOVÁ, E., JIRÁSKOVÁ, T., ŠLAUF, P., FAIST, O., and others. *Nový občanský zákoník – Srovnání nové a současné úpravy občanského práva*. Praha: C. H. Beck, 2012, p. 9.

<sup>34</sup> Constitutional Court II. US 544/2000 of March 12, 2001 “*this general criterion develops its moral content with the evolution of the society, in space and time, and must be scrutinized in the light of the particular case.*”

<sup>35</sup> MacGREGOR PELIKÁNOVÁ, R., ČÍSAŘOVÁ, J. An overview of the concept of good morals in Czech Codices. *AA Law Forum*, 2014, pp. 3–12. Available at 5AALawForum-14-04-09.pdf - Google Drive.

The professional comparative tables offer some equivalents for the Art. 3 (2) letter e) of the New Civil Code<sup>36</sup> and the statement about “*all owners have the same rights and duties and are provided with the same legal protection*” which existed in the old Civil Code. However, the provision of the Art. 3 (2) letter f) about “*no one can be denied what belongs to him/her*” seems rather new and opening several venues for interpretation. According to a relatively strong opinion stream in the Czech Republic, each and every domain name belongs to someone. If this stream prevails, then it would be easy to argue about the need to reinforce the regime of domain names. If this stream is defeated, then of course Art. 3 (2) of the New Civil Code will not do too much for domain names and their Registrants.

Without any doubt, Art. 489 and foll. of the New Civil Code are brand new and extremely important. Hands down, the item as “*re*” is at the very heart of every Civil law regulation and the introduced broad definition of the item, meaning almost everything useful, can and maybe even should, if not directly, shake the former concept of the item under the old Civil Code. The item in the legal sense is conceived broadly, following the spirit of the facilitation of transfer technologies as well as of the importance of intellectual property rights.<sup>37</sup> Despite the reluctance of certain authorities, including specialists from the team drafting the New Civil Code, it seems inevitable to proclaim domain names to be such an item. Such a conclusion is a good point after a 15 years long counter-productive and not really useful discussion about whether the domain name is at least an intangible asset. Already the technical and logistic nature makes this obvious and sadly many lawyers, to the astonishment of IT specialists and economists, were pushing the idea that a domain name is an insignificant note in a private registry. Even the six zero prices of domain names did not seem to change their opinion.<sup>38</sup> Of course, the majority of domain names are not used and have an insignificant, if any, value, but this does not rule out the fancy, expensive, and important tip of the ice-berg.<sup>39</sup>

The proclamation of absolute property rights and their identification by a legislative Act is included in Art. 976 and foll. of the Civil Code and again does not have a proper equivalent in the prior Civil Code.<sup>40</sup> Possession was covered a much more modest manner in the Art. 129 of the old Civil Code than it is currently in the Art. 987 and foll. of the New Civil Code. Similarly, the setting of the ownership in the Art. 1011 and foll. in the New Civil Code is rather different from provisions of the Art. 123 and foll. of the old Civil Code. As a matter of fact, the current key Art. 1011, according to which “*All that which belongs*

<sup>36</sup> SVEJKOVSKÝ, J., SVEJKOVSKÁ, J., KABELKOVÁ, E., JIRÁSKOVÁ, T., ŠLAUF, P., FAIST, O., and others. *Nový občanský zákoník – Srovnání nové a současné úpravy občanského práva*. Praha: C. H. Beck, 2012, pp. 9–10.

<sup>37</sup> TELEČ, I. *Nový občanský zákoník ve společnosti sítí*. *Právní rozhledy*. 2012, pp. 853–855.

<sup>38</sup> SHONTELL, A. The 25 Most Expensive Domain Names Of All Time. *Business Insider*. 23<sup>rd</sup> December, 2012. Available at <http://www.businessinsider.com/the-20-most-expensive-domain-names-2012-12?op=1#JucBP>.

<sup>39</sup> MacGREGOR PELIKÁNOVÁ, R. The (in)significance of domain names for e-commerce. *ACC Liberec, Issue B Science of Economics*. 2013, XIXB (2), pp. 40–52. MacGREGOR PELIKÁNOVÁ, R. The Business (In)Significance of the Pre-Dot Domain Name Wording. *Scientific Papers of the University of Pardubice, Series D 3/2013*, 2013, 20(28) pp. 67–79. Available at <http://connection.ebscohost.com/c/articles/90444537/business-in-significance-pre-dot-domain-name-wording>.

<sup>40</sup> SVEJKOVSKÝ, J., SVEJKOVSKÁ, J., KABELKOVÁ, E., JIRÁSKOVÁ, T., ŠLAUF, P., FAIST, O. and others. *Nový občanský zákoník – Srovnání nové a současné úpravy občanského práva*. Praha: C. H. Beck, 2012, p. 228.

to someone, all his tangible and intangible assets, is his ownership” does not have any previous equivalent at all.<sup>41</sup>

Before proceeding with further discussions about the domain names and their regime, we must pause here and humbly recognize that an overwhelming problem may be, or even is already, pending. The Czech juridical science welcomes contradictory opinions about major as well as minor aspects of the Czech legal system and just a few cornerstones and pillars are considered respected anchors. These cornerstones are principles such as the rule of law or fundamental rights covering key aspects of our free lives. Regarding pillars, one of the top candidates are the principal structures from the Roman law. In other words, the ownership triad - *ius possidendi, ius utendi et fruendi, ius disponendi* – has had its place in the European legal systems for two milleniums ... and honestly, unless a dramatic need emerges, it should not be changed. Not only because it strongly provides the consistency and legitimacy, but as well because it is right, or at least not manifestly wrong, and this can be easily demonstrated through various situations related to the use of e.g. agricultural land.<sup>42</sup> This classic triad does not have any ideological content and it seems much too harsh to label it “*legal Stalinism*” by prof. Elias or “*trash*” by prof. Knapp.<sup>43</sup> The issue of the exact content of the property right is not a problem of the wording of the New Civil Code, as a matter of fact the wording is again an open-ended platform allowing a consistent, legitimate and just interpretation. The triad does not need to, and should not, be enunciated or solemnly dropped by the legislature. Our consciences and righteousness should facilitate a fast and easy consensus about the maintenance of this critical piece of the rare stable pillar of the Czech legal system.... Or what about to take this attitude as well with respect to issues specifically linked to domain names? The New Civil Code does not slam a door and deserves due respect, i.e. to be seriously studied while employing teleological, comparative, contextual and qualitative normative methods, and to be interpreted in an optimal, meaningful and legitimate manner while preserving the integrity of the legal system as well as of ourselves. After all, the social and business significance of domain names does neither require the classification of domain names between items covered by the property rights with a classic ownership triad content nor mandates to push the regime of the domain names above and beyond regimes of other intellectual property assets. Nevertheless, the statement that domain names are all over in the world, including the Czech Republic, linked only to relative property rights and are just the results of a contractual relationship, i.e. they are just a receivable to obtain certain e-services,<sup>44</sup> does neither fully reflect the technical and logistic nor the legal reality. If nothing else, the doctrine of privity, the global multi-stake holder decentralized DNS, and the true Roman law roots should be well addressed, before the Czech community proclaims the DNS to be a mere yellow pages and domain names just a small record in a private registry. Con-

<sup>41</sup> SVEJKOVSKÝ, J., SVEJKOVSKÁ, J., KABELKOVÁ, E., JIRÁSKOVÁ, T., ŠLAUF, P., FAIST, O. and others. *Nový občanský zákoník – Srovnání nové a současné úpravy občanského práva*. Praha: C. H. Beck, 2012, p. 234.

<sup>42</sup> PĚCHA, F. Několik poznámek k triádě obsahu vlastnického práva – je triáda o obsahu vlastnického práva opravdu výplodem stalinismu? *Právník*. 2014, roč. 153, č. 4, pp. 326–329.

<sup>43</sup> PĚCHA, F. Několik poznámek k triádě obsahu vlastnického práva – je triáda o obsahu vlastnického práva opravdu výplodem stalinismu? *Právník*. 2014, roč. 153, č. 4, pp. 326–329.

<sup>44</sup> TELEČ, I. Nový občanský zákoník ve společnosti sítí. *Právní rozhledy*. 2012, roč. 20, č. 23/24, pp. 853–855.

sidering the over 150 years long tradition of the Journal *Právník* and its English branch *The Lawyer Quarterly* to present “old and new” knowledge and their focus on the presentation of the results of theoretical research as well as of disputes and contributions to current “hot” issues,<sup>45</sup> they constitute a perfect forum to do so, i.e. to present various opinions regarding the critical sphere of Internet domain names.

## CONCLUSION

Our current post-modern global society relies on information technologies and information systems and the outcome of the globalization, integration and solutions of various crises strongly depends upon the content as well as the form structure of the Internet.<sup>46</sup> Technically, the domain is part of the Internet and the domain name is a verbal (literate) form of a code address of an Internet knot (IP numeric address) converted through the DNS. Economically and legally, the domain name is an absolutely unique and symbolic denomination performing far more functions than merely to serve as an address, and has a significant social and economic potential.<sup>47</sup> The legal issues surrounding the Internet, DNS, and domain names are highly specific, perhaps they represent a highly specific area of law, under which questions concerning the relationship between the autonomy, privacy, and property take up a distinctive position.<sup>48</sup>

Domain names are not regulated by international law, and only seldom by national *lex specialis*. Thus, the determination and regulation of domain names and related relationships is implied from general provisions included in each and every national law. Exactly this happens as well in the Czech law and the key general law source applicable to the domain name sphere is the fresh New Civil Code which replaced the many times modified and updated old Civil Code from 1964.

Regardless whether we follow the Czech intellectual stream that the Internet has changed the law<sup>49</sup> or not,<sup>50</sup> the Internet and domain names are fully covered by the Czech national law. In addition, the Czech New Civil Code has the potential to move domain names within the Czech legal system where they belong and should have already been for many years. The New Civil Code did specifically and concretely nothing evil to them and perhaps the well-based criticism with respect to the New Civil Code should target rather the underlying concepts and what is not in the New Civil Code than what is in it. Conceptually, the New Civil Code is inclined to perceive the virtualized world and e-forms as an

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<sup>45</sup> ADAMOŤ, K., LOJEK, A. Contemplation over the publishing history of Journal *Právník*. *The Lawyer Quarterly*. 2011, Vol. 1, No. 1, pp. 43–52. Available at <http://www.ilaw.cas.cz/tlq/index.php/tlq/article/view/5/4>.

<sup>46</sup> MacGREGOR PELIKÁNOVÁ, R. Internet My Dearest, What Type of European Integration Is The Clearest? *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*. 2013, Vol. 61, No. 7, pp. 2475–2481. Permanently available at <http://dx.doi.org/10.11118/actaun201361072475>.

<sup>47</sup> MacGREGOR PELIKÁNOVÁ, R. New top level domains – pending success or disaster? *Journal on Legal and Economic Issues of Central Europe*. 2012, Vol. 3, No. 1, pp. 75–81.

<sup>48</sup> ŠTEDRŮN, B. Reviews and Annotations - Ján Matejka: Internet jako objekt práva: hledání rovnováhy autonomie a soukromí. CZ. NIC, Praha 2013, 256 s. The Internet as the Subject of Law: Searching for Balance between Autonomy and Privacy. CZ. NIC, Prague 2013, 256 pp. *The Lawyer Quarterly*. 2014, Vol. 4, No. 1, pp. 66–67. Available at <http://www.ilaw.cas.cz/tlq/index.php/tlq/article/view/106/93>.

<sup>49</sup> POLČÁK, R. *Internet a proměny práva*. Praha: Auditorium, 2012.

<sup>50</sup> TELEČ, I. Poznámky k Internetu a proměnám práva. *Právní rozhledy*. 2013, č. 12, pp. 448–452.

instant mode which will evaporate and the cornerstone of the civil and commercial life will be again heavy items, preferably real estate, and true counterparts of humans, the animals.<sup>51</sup> The authors of the New Civil Code clearly perceived domain names as certain *technicalities* which can be addressed successfully and sufficiently by the analogy. Naturally, this is not wrong *per se*. However, such an analogy must be done properly and consistently, i.e. not to hesitantly mix apples with oranges. After all, the fundamental legal principles are constant regardless of the speed and extent of technical changes.<sup>52</sup> At the same time, the Internet and domain names are not a mere temporary *technicality* to be automatically pushed in the general *innominate* contractual, *in personam*, regime, possibly slightly reinforced with the employment of unfair competition protection. They are not a fast evaporating *technicality*, they are assets with the potential to reach a tremendous value which is subject to a trade, including massive stock exchange transactions. They are not technical trash as the Roman ownership triad is not legal trash.

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<sup>51</sup> POLČÁK, R.. Elektronické právní jednání – změny, problémy a nové možnosti v zákoně č. 89/2012 Sb. *Bulletin advokacie*. 2013, č. 10, pp. 34–40.

<sup>52</sup> TELEČ, I. Poznámky k Internetu a proměnám práva. *Právní rozhledy*. 2013, č. 12, pp. 448–452.