

WAREHOUSING OF DOMAIN NAMES

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Domain names in Denmark are regulated by the Act on Internet Domains Specifically Allocated to Denmark (also called Danish Domain Law) and the general terms of business of DK-Hostmaster A/S, which administers Danish domains. Danish domain names are registered on a ‘first come, first served’ basis, without any examination of whether the domain name infringes third-party trademark rights or rights to names or other distinctive marks.

This causes problems for companies acting in the Danish market, especially when someone registers and thereby controls a domain name that is either identical to or resembles the name or trademark of a third party with the sole purpose of reselling or renting the domain name to the third party for an unreasonable price. This practice is known as ‘warehousing.’ The websites of such domain names are often used to display adverts until the domain name is resold to the ‘legitimate’ third party.

A dispute between the registrant of a domain name and a third party may be lodged with the Complaints Board for Internet Domain Names or before a court of law. The current situation at the Complaints Board is that the third party normally has several possible points of attack based on his trademark. It is worth noting that a Danish trademark can be obtained through registration or through use.

A trademark owner can use §4 of the Danish trademark law if the registrant uses the domain name commercially, the domain name is identical or similar to the trademark, and the commercial use is for the same or similar goods with a risk of confusing a user. The owner can also use §18 of the Danish Marketing Practice Act if the registrant uses the domain name commercially in a way that could cause confusion with the trademark. However, the latter type of attack is generally very difficult if the trademark has not been registered and lacks distinctive character, which means that it must not be generic or purely descriptive. In such cases, it is often impossible to substantiate that the trademark can be protected under the Marketing Practice Act.

If the registrant is a private person without commercial interests, which is often the case with warehousing, then neither of these attacks are possible and the third party must turn to the current domain law dated June 24, 2005, where §12 sec. 2 states that “registrants must not register and maintain registrations of internet domain names solely for the purpose of selling or renting to other parties”. This is directly aimed at preventing the warehousing of domain names.

However, for domain names registered before June 24, 2005, §12 sec. 2 is only applicable from July 1, 2010. Warehousing disputes have therefore

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often been settled according to the Domain Law §12 sec. 1, which states that “registrants must not register and use Internet domain names contrary to good domain name practice”.

§12 sec. 1 regarding good practice is an *omnibus* clause, which means that the state of the law develops through case law. A study of some of the most recent cases has shown that an assessment of “good domain practice” is based on whether the registrant has a legitimate interest in the domain name and/or whether his registration and use of the domain name reflects spiteful and unfair behaviour towards the third party.

Case law shows that disputes concerning warehousing where §12 sec. 1 is used are often settled in favour of the legitimate third party. Furthermore, the case law only shows a few cases where the Complaints Board stated that although the registrant would have violated §12 sec. 2 regarding reselling/rental if the domain name had been registered after June 24, 2005, the dispute was settled in favour of the registrant because the domain name was in fact registered before that date. Such cases will be settled in favour of the legitimate third party from July 1, 2010.

It is therefore expected that after July 1, 2010, we will see more cases concerning warehousing settled in favour of the legitimate third parties. It is also expected that some of the domain names being warehoused will be sold at more reasonable prices, or that illegitimate registrants will find a use for the domain names in question in order to avoid attacks under §12 sec. 2 regarding reselling/rental.

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