

## GERMANY



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## Domain ruled not *jus ad rem*

The German Federal Supreme Court (BGH) has recently put an end to the moot question of whether the registration of a domain provides a right *in rem*, thus establishing a comparable relation of ownership as existing in relation to IP rights. In its decision on January 18 2012 the BGH had to deal with this question in an action where the claimant sought a sentence against the defendant to agree that the claimant shall be registered as proprietor of the domain *gewinn.de* (profit/price). The claimant based its claim on Sections 823(1) and 1004(1) of the German Federal Civil Code (BGB). These provide a right to request abatement of a nuisance as a result of an act of tort. However, the entitlement for compensation under the German legal concept of tort requires an infringement of a right *in rem* in nature comparable to other IP rights.

In answering this question the BGH followed the position also taken by the German Federal Constitution Court that negated such *in rem* nature of a domain. The BGH pointed out that by registering a domain its proprietor does not become the owner of a domain itself, which would put him in a position comparable to a proprietor of an IP right. Instead, the contract concluded between the proprietor of a domain and Denic (the German registry body administering and operating TLD .de) merely provides a contractual right of use *inter partes*. Also the fact that a domain name can only be assigned once at a time is only for a technical reason, not establishing a right *in rem*. Moreover, in consideration of the bundle of claims based on the contractual relationship provided by the contract of a party with Denic, the BGH also sees no necessity to broaden the scope of application of the rules of tort regarding claims relating to domains.

However, the BGH did confirm the applicability of Section 812(1) sentence 1, second alternative BGB: requesting the change of ownership of a domain based on the rules of unjust enrichment.

Being the registered owner of a domain not only establishes a contrac-

tual relationship with Denic, but also provides the enablement to assign the domain to a third party. Therefore, the actual legal owner of a domain is entitled to seek consent of the factual (unjustified) registered owner based on a concept of unjustified enrichment. Obviously, without actually being the registered owner of a domain, and while the latter is only of a declaratory nature, the mere material ownership does not allow one to fully exercise an economical interest in relation to a domain, such as licensing or assignment.