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Yours sincerely,

(sgd) Mgr. Michael Pilz

Enc Ruling of the Supreme Court of 12.09.2001

**Republic of Austria
Supreme Court**

1R 53/ O1y

Higher Regional Court of Vienna

Received on 05. October 2001

IN THE NAME OF THE REPUBLIC

The Supreme Court sitting as a Court of Appeal, presided over by the Judge of the Supreme Court Dr. Kodek sitting alongside Judges of the Supreme Court Dr. Graf, Dr. Griss, Dr. Schenk and Dr. Vogel in the action of the Plaintiffs, the Austrian Freedom Party (hereinafter called the "Freedom Party") domiciled at Kärntnerstraße 28 Vienna 1 represented by Böhmdorfer-Geneff OEG, Attorneys-at-Law in Vienna, *versus* the Defendants, Nic@Internet Verwaltungs und Betriebsgesellschaft mbH Schillerstraße 30, Salzburg represented Dr. Georg Freimüller and Partners, Attorneys-at-Law in Vienna (the sum in dispute being 5000 Austrian Schillings hereinafter abbreviated "AS"), **rejected** the appeal of the Defendants against ruling GZ 1 R 53/0ly-26 by the Vienna Higher Regional Court sitting as a Court of Appeal, which confirmed at a non-public hearing, ruling G2 38 Cg 112/99b-20 on the principal action by the Vienna Commercial Court on 4 January 2001.

The Defendants shall pay to the Plaintiffs within 14 days, the costs of the appeal of 14,635.80 AS (including 2,439.30 AS turnover tax)

G r o u n d s o f t h e R u l i n g

The Plaintiffs are a political party with Internet website "fpoe.at". They maintain a home page at the address www.fpoe.at. The Defendants are available for granting top level domain names "at", "or.at" and "co.at" on the principle of "first come, first served". The owner of the domain "fpo.at" is Alan Lockwood, an individual domiciled in the USA. He has installed a home page under the name allocated to him by the Defendants, which is substantially identical with that of the Plaintiffs and is additional to, but "left" of, right-wing radical organisations.

Relying on §§ 16, 43 and 1320 of the General Civil Code, the Plaintiffs applied for an injunction ordering the Defendants to refrain from granting the right to give the names of the domains infringing the right of the Plaintiffs under the domain "at" and in particular to refrain from granting the domain "fpo.at", to refuse a registration requested by third parties and to remove the domain "fpo.at". At the same time they, the Plaintiffs, applied for the grant of a provisional order to that effect, alleging that the design of the home page at the Internet address "fpo.at" infringed their, the Plaintiffs' naming rights, their honour and commercial reputation, particularly since the point in time of the establishment in October 1999 of electronic links to right-wing radical organisations. Although these had meanwhile been removed, the domain owner could at any time restore the said contents to his home page injurious to the Plaintiffs' reputation and credit. Apart from this, the very fact of the faking of the Plaintiffs' home page is apt to injure their legally protected rights. A danger exists of Internet users calling up the Plaintiffs' home page happening on the domain "fpo.at" whose faked home page might be confused with that of the Plaintiffs and that the said Internet users would assume that the contents located at this address originated with the Plaintiffs. The Defendants refused to close the domain "fpo.at", notwithstanding the fact of having their attention drawn to the infringement of the Plaintiffs' naming rights. The Defendants are jointly responsible for the infringement of the Plaintiffs' naming rights and are liable to become jointly with the owner of the domain, a target of an application for an injunction.

The Defendants claim the dismissal of the attachment and of the principal demand on the grounds of not being obliged when granting domain names, to check the

applicant's right to the said grant and not being responsible for the illegal conduct of the domain owner. They likewise cannot influence any statements appearing on a home page infringing the Plaintiffs' credit or reputation.

In a ruling made in the course of its attachment proceedings, (the Court of the First Instance rejected the application for attachment and the Court hearing the appeal confirmed the said rejection) the Court of the First Instance (4 Ob 166/00s = MR 2000. 328 (Pilz) = ecolex 2001 , 128 [Schanda] = W 81 2001, 91 [Thiele] = ÖB-LS 2001/31) maintained its view that domains receiving or claiming a name are protected by § 13 of the General Civil Code due to their marking and naming function. The commonly used abbreviated "fpo" or "fpoe" designation of the Plaintiffs was granted the protection of this law from an unauthorised use of a name, since the name used differs only slightly from the protected name and the use by third parties of the name in connection with the contents of the home page is quite clearly intended to mislead on the subject of the identity of the domain owner. An infringement of the interests of the bearer of the name through the unauthorised use of his name which deserve protection, was held by the Court of the First Instance to exist provided that (not yet established in the attachment proceedings) that the "fpo.at" home page had, apart from the Plaintiffs' contents, also received contents "left" of right-wing radical organisations. The Court of the First Instance invoked the principles established for cases of indirect participation in unfair competition. According to these principles, in view of the large number of applications and the requirements of their automatic preparation, the grantor is not responsible for, or in connection with, the checking of the registration of a second-level domain. If, however, the injured party demands subject to the submission of an account of the situation, an intervention and if the infringement is obvious even to a legal layman without any additional investigation, then the grantor can also be required to take steps to prevent the continuation of the said infringement. If, in such a case, the said grantor does not close the domain notwithstanding a request to him to do so, it will in certain circumstances be possible to obtain an injunction for its closure. In such a case, the refusal of the grantor to close the domain shall mean nothing less than the conscious support of the direct agent's infringement and making possible the continuation of the said infringement.

Applying these principles, the Court of the First Instance ruled that the injunction to cease granting the domain infringing the Plaintiffs' naming rights and the refusal of third parties' requests for registration, were not justified, but that the Plaintiffs could claim the removal of the domain infringing its naming rights, as well as the revocation of its registration within the meaning of the Defendants' General Trading Conditions, but that this claim could not be met by a temporary ruling, because this would bring about the extinction of the registered domain, whereby the Plaintiffs would be prevented from reclaiming the domain if the temporary ruling should subsequently prove to have been unjustified.

In the principal process the Plaintiffs withdrew its application for an injunction. They maintained in being their application for the removal of the "fpo.at" domain and in contrast to the 5000 AS claimed in the original pleadings, placed on it a value of 270,000 AS. The new assessment was not objected to by the Defendants. The Plaintiffs put forward an alternative claim, requesting the Defendants to withdraw the registration of the domain "fpo.at" within 14 days according to article 3.8 of the Defendants' General Trading Conditions .

In the principal process, the Court of the First Instance ordered the Defendants to remove the "fpo.at" domain. It compared the current version of the Plaintiffs' home page (consisting of the evidence of the Plaintiffs' party members concerning current day-to-day events) with that of the home page, which Alan Lockwood had installed under the "fpo.at" domain. This refers, in English, under the heading "Official Announcement", with a forgery of the home page. There is no dispute about the form of the said home page and the fact that it contained (given contents apparently identical with those of the Plaintiffs) links to right-wing radical organisations and that on being called up (both then and now), the Horst Wessel song could be heard. Call ups under "www.fpo.at" are now being transferred to "www.tequelin.com", again with the Horst Wessel song being heard. It also appears beyond dispute that the Defendants did not have at the time of the delegation of a domain any knowledge of the contents to be communicated via this domain, that the Defendants cannot influence the contents of the pages of a home page, but that they are technically able to withdraw a domain and to delete entries in the names system of the domain. There is likewise no dispute about the fact that the Plaintiffs did not institute an action against Alan Lockwood, although the Defendants had published his USA address. The Defendants do not dispute that they had been summoned by the Plaintiffs who submitted the facts concerning the infringement of their, the Plaintiffs', naming rights, to close the "fpo.at" domain.

The Court of the First Instance moreover ascertained the contents of the contractual conditions of the Defendants with their customers based on their General Trading Conditions citing the following points:

Point 1.6: General Stipulations and Conditions. All registrations via Nic.at take place in the belief in the legality of the claim. The applicant declares that he is observing the relevant legal stipulations and in particular that he is not infringing anyone's mark and competition rights (naming, trade mark, unfair competition, etc) Nic.at does not carry out any examination of the applied for domain, but reserves the right to reject applications in the event of an obvious infringement of legislation, or of an abusive claim to the use of the services of Nic.at. The applicant undertakes to keep Nic.at immune in the event of legal action by third parties on the grounds of alleged infringement of their rights, if the infringement shall be attributable to his, the applicant's, domain delegation request.

Point 3..8 Withdrawal of a registration. The registration shall be able to be withdrawn from Nic.at on the following conditions, namely, because of repeated technical problems of the said domain, notwithstanding repeated admonitions of the owner (e.g. if name server cannot function), non-payment of the fee, insufficient data of the domain owner (see 1.3), a valid Court ruling, as well as the instructions of an appropriate authority.

Based on the ruling of the Court of the First Instance in the attachment proceedings the said Court confirmed the indirect legal responsibility of the Defendants. They should have acknowledged no later than the point in time of the formal admissions in the process that the disputed situation implied a serious infringement of personal rights of the Plaintiffs and that the Defendants would accordingly have had the duty to close the domain under complaint, in order not knowingly to support the obvious

infringement by the direct agent and not to continue making the infringement possible.

The infringement of the naming right as an absolute right not only confers the right to claim an injunction to prevent future infringements, but also the right to the removal of facilities resulting in ongoing infringement of the other party's rights.

The Court of Appeal confirmed this ruling and also ruled that the sum of the ruling exceeded 52,000 AS and that a regular appeal was admissible, because the Supreme Court had not yet ruled on the question of whether the claim for removal was conditional on a (hitherto) not submitted application for an injunction. Its legal ruling was identical with the view expressed in the course of the attachment proceedings before the Court of the First Instance. The grantor of the domain would only be responsible for infringement of the naming right, if the injured party requested an intervention on the basis of the submission of an account of the circumstances of the infringement and if the said infringement was obvious even to a legal layman without any need for further investigation. These conditions exist in the present case. Pre-hearing correspondence which was submitted according to which the Plaintiffs regard themselves as an injured party and whose correctness, is not being contested by the Defendants and is unequivocal, making it obvious even to a legal layman that the domain which is being complained about, massively infringes the rights of the Plaintiffs. The changes made to the home page during the Court hearing, are not able to remove the infringement of rights which is evident even to a legal layman. The claim for removal is not conditional on the concurrent right to an injunction. It serves the removal of the illegal situation and confers the right to an injunction. The desire for removal is adequately justified and enforceable. In what manner and to what extent a removal should be implemented depends on the type and extent of the infringement, with only actions needed for the removal of the infringement being able to be demanded. In the present case the desire for removal would become exhausted by the Defendants' technically possible elimination of the "fpo.at" domain and the deletion of the corresponding registration.

The appeal of the Defendants is admissible, but not justified, on the grounds stated by the Court of Appeal.

The Appellants cast doubt on the alleged obviousness of the infringement and are of the opinion that it has not been established that the immediate agent used the domain "fpo.at" by name and thereby caused a danger of confusion of attribution and that it has likewise not been established that use by name could only take place via the domain itself, or in connection with its contents. A guarantee of the grantor is excluded in this connection, because the said grantor could not influence the contents of the domain and hence could also not be a joint agent.

In its ruling made in the course of the attachment proceedings, the Court of the First Instance held in compliance with German and Austrian jurisdiction that such named domains are, as a result of their marking and naming function, protected by § 41 (??) of the General Civil Code (4 Ob 166/00s = ecolex 2001/54 = MR 2000, 328 = WB1 2001/.69B = ÖB1LS 2001/31 mwN;Z ai.kl. responsibility for outside Internet contents JB1 2001, 409). The explanations of pre-ruling concerning the protection, which the (also) commonly used abbreviation of the Plaintiffs enjoy from the unauthorised use of name and do not exclude the small differences between the used

and the protected name, are pointed out. The principal process does not generate any doubt that the external use of names in connection with the home page (exhibiting extensive similarities of content with that of the Plaintiffs with links to right-wing radical organisations) quite obviously aimed to create confusion about the identity of the domain owner and thus also the danger of a confusion of allocation. There is likewise no doubt that the undisputed method of proceeding of the direct agent constitutes a serious infringement of the personal rights of the Plaintiffs as a result of the use of names, a fact, which is obvious without further explanations even to a legal layman.

The absence of the possibility of the Defendants being able to influence the content of the home page, does not exclude the possibility of their participation in the present case. Their argument that a possible infringement activity could only be restricted to the grant of the domain itself, because the Defendants are not involved in the publication of the content of a home page, overlooks the fact that the warranty of the Defendants cannot be deduced from their own wrongful conduct in connection with compliance with contractual obligations. They are, accordingly, not jointly responsible for the infringement, because they did, or did not, participate in changing the contents of the home page, which is being complained about. Rather, it should be stated that notwithstanding a summons by the party, the obvious infringement of whose naming right was obvious even to a legal layman, they refused to close the domain, or to adopt any other steps to prevent the continuation of the infringement. In the course of its attachment proceedings, the Court of the First Instance had already recognised that the Defendants' conduct in the present connection could only mean an obvious and knowing promotion of the infringement by the direct agent and of a continuing effort to make the infringement possible. The Court of the First Instance continues to hold, as it did during the attachment proceedings, that the guarantee of the grantor of the domain in the circumstances here specified exists and that it is upheld by literature (Höhne, Position of the Domain Jurisdiction of the Supreme Court, MR 2000 p 356 et seq. Schramböck, Supreme Court 2001, 34; Stamper, Responsibility of the Domain Grantor for Characteristic Infringements RdW 2001/155; Zankl, Responsibility for Outside Internet Contents, JBI 2001, 409; Schanda.ecolex 2001, 129; Thiele, WBI 2001, 94; Zib, Current Legal Questions in Internet Advertising and Internet Domain Names VR 2001, 38, critically only Pilz, @R 2000, 338 who is involved in the process as a legal representatives of the Defendants).

In its most recent (not yet published) ruling of 17.05.2001, the (Austrian) Federal Court IZR 251/09 ambiente.de (see Federal Court Press Release of 15.05.2001 in MR 2001, 147) that the grantor would have to withdraw if it could be obviously established that the grant of the domain clearly interfered with third-party rights.

Whether the grant of the domain name itself or its utilisation in connection with the home page able to be called up interfered with the rights of a third party, cannot in those cases affect the responsibility of the grantor where the infringement is obvious to even a legal layman without a need for any investigation and where the injured party, having submitted details of the case, demands intervention. In such a case, the grantor can be expected to adopt steps to prevent a continuation of the infringement of rights. If, a summons by the injured party notwithstanding, the grantor shall not close the domain, its removal can become the subject of an injunction. The refusal of the

Defendants to close the domain even after becoming aware of an obvious infringement of the rights of the Plaintiffs, cannot in such a case mean anything other than the knowing support of the obvious infringement by the direct agent and the making possible of an ongoing infringement of the Plaintiffs' rights (4 Ob 166/00a)

Action by the grantor (on the prevention of a knowing support of the agent in cases of an obvious infringement of rights) does not prejudice a subsequent Court ruling, if the grantor shall adopt steps, which (only) serve the object of preventing ongoing infringement, but do not nevertheless fully remove the domain registration.

If, however, according to these principles, the grantor is responsible as an indirect participant, he can be held responsible in priority, or in addition to the direct agent and not only if legal action against the domain owner would prove impossible, or unduly difficult.

Finally, the Plaintiffs only ask for removal. Their claim has the object of providing defence against the past, but still ongoing, infringement of their rights. A party which has created an ongoing state of infringement by breaching the law, continues to infringe for as long as the said state shall last. Although § 43 of the General Civil Code does not expressly grant the right to claim removal, precedent nevertheless does so almost unanimously in connection with infringements of naming right. (Edibacher, Naming Right , 147), Plaintiffs' Claims for Injunction and Removal; Naming right as an absolute right also includes responsibility to third parties for contents and its infringement generates not only a claim for the cessation of any future infringement, but also for its removal of facilities causing an ongoing infringement of the rights pf third parties. (Adler in Klang 294 et seq; Gschnitzer, Law of Contract. (general part) 186; Brick, Personal Rights 80; Aicher in Rummel, General Civil Code Rz 23 § 23-43; Korn/Neumayr, Personality Protection in Civil and Competition Legislation, 121). Precedent gives as examples of claims for removal, claims for the withdrawal of companies or of marks, for the removal of the name from a company title, from business documents or catalogues, but also for the destruction of credit cards, posters, ledgers and the like which contain the name without authorisation (Aicher aaO Rz 23 § 43 Po. ch aaO Rz 35 § 43). The Supreme Court has likewise recognised claims for removal by a party injured in its right of naming for the removal of the name (used without authorisation) from the letterhead of the office papers (ÖBI 1985, 14 - Attorney's office paper) and lastly also the claim of a party whose right to a trade mark had been infringed for the removal of an installation infringing its right to a mark in an ongoing manner (ÖBI 1999, 97 - Ralph Lauren II. This is being maintained. If through his illegal conduct, the agent had not only occasioned the danger of a repetition of his interference as a condition of a claim for an injunction, but also created installations causing an ongoing impairment of the absolute right, the injured party is entitled to claim not only the cessation of any future infringing actions, but also the removal of the installation which continue to infringe his right

The claim for removal is not hindered by the fact that no simultaneous claim for cessation is being made. Whilst the legal protection aim of the claim for an injunction to prevent future infringements continues to exist, that of the claim for removal is implemented by the claim for removal of the installations which infringe the said right. The different aims to legal protection make it clear that the claim for removal is not dependent on the continued existence of a claim for an injunction.

In the present case, the ongoing existence of the infringement of the rights of the Plaintiffs consists in continued existence of the possibility of intervention on the domain "fpo.at", whereby the domain owner continues to be in a position to impair the interest of the Plaintiffs worthy of being protected. The fact that when the home page "www.fpo.at" .is called up a transfer takes place to another home page with a different designation, does not remove either the danger of confusion, or the impairment of the rights of the Plaintiffs. The subsequent removal of the links to right-wing radical organisations is not apt to remove the already existent infringement of the Plaintiffs' naming rights, but the Horst Wessel song still sounds when the corresponding home page is called up. infringing the personality rights of the Plaintiffs.

In what manner and to what extent a removal is to be implemented, depends on the type and extent of the impairment, where the actions required for the removal of the impairment can be demanded (ÖBI 1999, 47 - Ralph Lauren II Baumbach / Hefermehl, Right of Competition, UWG R2 312). In any event, the grantor may implement actions which he entitled and able to implement according to his General Trading Conditions. He likewise has the possibility of withdrawal according to point 3.8 of the General Trading Conditions and the cancellation of the domain registration, whereby the domain registration would be withdrawn and removed. The Plaintiffs' stated claim for the removal of the domain is adequately exact.

The Defendants' unjustified appeal has failed.

The ruling on costs is base don §§ 41 and 50, 2 of the Civil Procedure Order. The parties have reached agreement on the basis of determination (§8, RATG)

Supreme Court
Vienna, 12 September 2001
Dr. Kodek

Signature of the person responsible for the correctness of the document (illegible)