XII.P.60l/03

ON BEHALF OF THE PEOPLE

BELGRADE COMMERCIAL COURT, with judge Snežana Janić-Lukinović presiding over the council and lay judges Srdjan Marinković and Grozdimir Lazić as council members, in the action brought by plaintiff THE COCA-COLA COMPANY, Atlanta, Georgia, USA, represented by attorney-at-law Dušan Stojković of Vlajkovićeva 28, Belgrade, against defendants ASTER TRADE DOO, Bulevar JNA street 166/31, Belgrade, the JUGOSLOVENSKI REGISTAR INTERNET DOMENA [YUGOSLAV INTERNET DOMAIN REGISTRY], Studenski trg 16/IV-717, Belgrade and TELEFONIJA AD, Belgrade, represented by attorney-at-law Gordana Pualić, of Požeška 138/1, Belgrade, for the purposes of determination and other [sic], value of action 27,000.00 dinars, on conclusion of hearing held on 25th December 2003 attended by the attorney of the plaintiff and the second defendant, not attended by the duly summoned first and third defendants, made the following:

PARTIAL RULING

I. RECOGNISING the capacity of first defendant ASTER TRADE, DOO and second defendant JUGOSLOVENSKI REGISTAR INTERNET DOMENA, as parties in these proceedings.

II. PROHIBITING first defendant ASTER TRADE, DOO from using the domain name cocacola.co.yu.

III. PROHIBITING third defendant TELEFONIJA AD, Cerska street no. 20-22, Belgrade from making pornographic content available at the web address wwwcocacola.co.yu [sic].

IV. DETERMINING THAT the defendant ASTER TRADE, DOO of Bulevar JNA street no. 166, Belgrade, is not entitled to use the domain name cocacola.co.yu.

V OBLIGING the second defendant, JUGOSLOVENSKI REGISTAR INTERNET DOMENA, to delete from the registry the registration in the name of the first defendant of the domain name cocacola.co.yu.

VI DISMISSING as unfounded the plaintiff's demand for a ruling that only the plaintiff THE COCA-COLA COMPANU [sic], Atlanta, Georgia, USA be entitled to use the domain name cocacola.co.yu.

VII OTHER demands and the costs of the action are to be decided on in the final ruling.

VIII The TEMPORARY MEASURE imposed by Decision P.br.60l/03 of 20th May 2003 is to REMAIN IN FORCE until the final completion of proceedings.

R a t i o n a l e

In its action, and during proceedings, the plaintiff asserted that the word COCA-COLA was a component part of the trading name of the plaintiff, that the plaintiff was known in the country and internationally by this name and was the owner of the trademark of the same name, registered in our country with the Federal Intellectual Property Office under nos. 19112 and 11732. It asserted that the first defendant, who does not have authorisation to use the trademarks of the plaintiff, registered the domain name cocacola.co.yu with the second defendant, JUGOSLOVENSKI REGISTAR INTERNET DOMENA, subsequently using the domain name cocacola.co.yu via the third defendant, Telefonija AD and setting up a website at the address www.cocacola.co.yu which published pornographic content. It asserted that the third defendant, Telefonija AD, rented a portion of memory on its computer which was continually connected to the Internet, that the first defendant placed data comprising its website on the rented portion of memory, whereby the website of the first defendant was made accessible to Internet users, meaning that the third defendant made it possible for the first defendant to constantly and without interruption publish pornography on the Internet via the address cocacola.co.yu, violating the plaintiff's rights and reputation and causing harm, and misleading consumers. It proposed that the court rule that the first and third plaintiff were guilty of unfair competition, that the first defendant had violated the plaintiff's celebrated trademarks and that it prohibit the first defendant from using the domain name cocacola.co.yu and that it rule that the first defendant was not entitled to use that domain, that the third defendant be prohibited from making pornography available on the Internet at the Internet address cocacola.co.yu, that it rule that the plaintiff had the sole right to use the domain name cocacola.co.yu, that it oblige the second defendant to delete the first defendant's domain name registration, that it oblige the first defendant to publish this ruling at its own expense in the Politika newspaper and that it oblige all defendants to recompense the plaintiff for the costs of the action. It proposed that a temporary measure be imposed and the second defendant be ordered to temporarily prevent the first defendant from using the registration of the domain name cocacola.co.yu, and oblige the third defendant to remove the data relating to the Internet address cocacola.co.yu from the memory of its computer and oblige the first defendant to remove all data it had placed at that address.

The first defendant disputed the action. It asserted that it had registered the domain name cocacola.co.yu with the second defendant in accordance with local and international regulations [stating that] a domain name did not have the status of a trademark, that the first defendant was not engaging in the presentation of goods and therefore could not have committed an act of unfair competition., that t It asserted that it had not caused direct harm to the plaintiff but that the first defendant had suffered harm in these proceedings by means of the withholding of the website of the first defendant on the part of the third defendant. It proposed that the court dismiss as unfounded both the action and the proposed temporary measure.

The second defendant deferred to the court's assessment of the validity of the action. It explained that the second defendant did not have the status of a legal entity, that the defendant merely maintained a register of users, and that the first defendant had merely registered the name with the second defendant and purchased Internet space from the third defendant. It asserted that it was not authorised to issue permission to anybody, rather it was only authorised to register users, and that pending a decision in these proceedings, after receipt of the action, it had suspended the first defendant's use of the name cocacola.co.yu.

For reasons of caution, the third defendant disputed the action, asserting that it did not have the technical capability to monitor the contents of all service users, of which there were several thousand, but for reasons of caution it had suspended the provision of services to the first defendant pending a decision on temporary measures.

The court held the hearing in the absence of the first and third defendants, and since the first defendant had avoided taking delivery of the summons, the court had summoned it both via the court bulletin board and via a summons hand-delivered to its post-box, since no occupants were present at the address of the first defendant, nor any employees who could be handed the summons directly.

Having the opinion that a verdict could be reached only in regard to part of the action, the court decided as per the written ruling.

By decision of this court dated 20th May 2003, the proposed temporary measure is partially upheld and the second and third defendants are ordered to prevent the first defendant from using the domain cocacola.co.yu and remove the data associated with the Internet address cocacola.co.yu until further decision by this court, whereby an appeal against this decision may not delay its enactment.

In the sense of Art. 82 of the ZPP [Civil Procedure Code], the court has the *ex officio* duty throughout the entire proceedings to ensure that persons appearing as parties in the proceedings may in fact be parties in the proceedings, and in the sense of Art. 77 paragraph 3 of the same code may

in exceptional cases, with legal effect in a specific action, recognise the status of a party even to those forms of common enterprise which are not able to appear as parties. Therefore the court has in the sense of the authorisations as per Article 77, paragraph 3 of the ZPP recognised the ability to appear as parties to the first and second defendants, only in these proceedings and in this phase of the proceedings.

Namely, the first defendant was entered on 11th March 1993 by decision of this court Fi.br.20l0/93 in the register of this court, reg. no. 1-52275-00 as a limited liability company, with the registered business activity of "Retail and wholesale trade, and foreign trade in food and non-food products", with a registered limited liability of 1,800.00 dinars, at the then-current value. Having inspected this court's register at the hearing on 25th February 2003, the court determined that the first defendant was not in compliance with the Companies Law (State Gazette of the FRY 29/96), specifically Art. 442. paragraphs 3 and 4 in connection with Art. 336. of the ZOP [Companies Law] and the Law on Amendments and Supplements to the Companies Law (State Gazette 74/99) and up to and on the allowed deadline, 30th June 2000, had not come into compliance with the ZOP, for which reason the provisions of Art. l00 of the ZOP have been met for the company to be closed due to bankruptcy. However, on inspection of the register of bankruptcies and liquidations maintained by this court, at the same hearing, the court determined that no bankruptcy nor liquidation proceedings had been brought against the first defendant. Also, on inspection of the report of the NBJ [National bank of Yugoslavia], Belgrade Main Branch, dated 30th January 2003, the court determined that the first defendant did not exist in the Register of Account Holders database.

A first defendant not possessing, in the sense of the Decision of the NBJ on the Terms for Opening and Closing Accounts with the NBJ and other Payments Systems (State Gazette 40 and 73/00) [sic - incomplete sentence], nor having complied with the ZOP, is not considered a form of common enterprise pursuant to law, meaning that it is not a legal entity but a fictitious entity; however, this court recognises its status as a party solely in this action and in this phase of proceedings in order to prevent further abuse of rights on the part of the first defendant.

In further proceedings this court also recognised the status of a party in these proceedings to the second defendant. The second defendant is neither a natural person nor an entity (as asserted by the defendant at the hearing on 25th February 2003), merely a register of Internet names, and the court has, solely in this dispute, in the sense of the authorisations in Article 77 paragraph 3 of the ZPP, recognised the status of party to the second defendant for the same reasons it has recognised the status of party to the first defendant, i.e. in order to prevent the abuse of rights by the first defendant.

Hence this court has taken a decision as per paragraph 1 of the ruling in the sense of the authorisations from Art. 77 paragraph 3 of the ZPP, recognising the status of party to both the first and second defendant.

Inspecting the second defendant's Rules of Procedure for the Allocation of Second-level Domains Within the Jugoslav Internet Domain, specifically Article 3, paragraph 1, point 3 of the Rules, the court has determined that the territorial domain of the SRJ [FRY/Federal Republic of Yugoslavia], now SCG [Serbia and Montenegro], in accordance with international recommendations, is divided into the second-level domains ac.yu, co.yu, org.yu and edu.yu, where the second-level domain co.yu relates and is allocated to companies – private, state-owned, mixed-ownership and public – registered in accordance with the Companies Law, regardless of the type of business activity they engage in. However, as previously stated, the first defendant is not registered in accordance with the Companies Law, meaning that according to the Rules of Procedure of the second defendant it does not meet the conditions for registration under the co.yu second-level domain, for which reason the court has decided as per paragraphs 2, 3, 4 and 5 of the ruling.

The court dismisses as unfounded that part of the claim seeking to establish the sole right of the plaintiff to use the domain name cocacola.co.yu. This, for the reason that at the hearing on 8th April 2003 the second defendant stated that it was not authorised to give [such] permission to anyone, and this court is of the opinion that the court is also not authorised to establish the sole right of the plaintiff to use the aforementioned domain name. However, since in paragraph 2 of the ruling it has prohibited the first defendant from using the aforementioned domain name, and in paragraph 4 of the ruling ruled that the first defendant does not have the right to use the same, the court is of the opinion that the plaintiff is authorised to apply for the aforementioned domain name to the second defendant, who is authorised to assess whether the second defendant [sic] has [met?] the necessary conditions for that registration. This especially since the court, in reading the aforementioned Rules of Procedure of the second defendant, has determined that only local legal entities and organisations have the right of registration, while foreign companies and organisations do so only where the company has a representative office in Yugoslavia. By the conclusion of the hearing the plaintiff had not proven that it has a representative office in Yugoslavia and thus the second defendant will assess whether conditions have been met for the plaintiff to carry out the registration. The court notes that in the register of this court, reg. 1-3753-00, a company [called] COCA COLA is registered, but only as an independent company, not as a representative office of the plaintiff. Hence this court is of the opinion that if the plaintiff has a representative office in Belgrade, it can, even without any decision of the court, merely by application and by supplying evidence of the existence of a representative office, register the requested domain name.

The remainder of the demand and the costs of the action will be decided on in the final ruling.

To conclude with, in order to prevent an abuse of rights on the part of the first defendant in the previously described manner, this court has extended the effectiveness of the decision on the temporary measure until the conclusion of these proceedings and has decided as in paragraph 8 of the ruling.

REMEDY This judgement may be appealed before the Higher Commercial Court in Belgrade, via this court, within 8 days of its receipt.	COUNCIL PRESIDENT-JUDGE Snežana Janić-Lukinović, s.r.

Accuracy of dispatch certified by

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