

World Trademark Review Daily

New decree for '.fr' defines legitimate interest and bad faith France - Hogan Lovells

Domain names

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In October 2010 the French Constitutional Court ruled that certain provisions of the French Posts and Electronic Communications Code were unconstitutional (for further details please see "[Rules applicable to '.fr' domain names found to be unconstitutional](#)"). As a consequence, new legislation (Articles L45 ff of the code) was adopted on March 22 2011 (see "[Alternative dispute resolution procedures for '.fr' suspended](#)").

Further to the passing of this new law, an implementation decree was required to provide further detail on how some of the new provisions should be implemented. This decree was signed on August 1 2011 and published in the French *Official Journal* on August 3 2011.

[Decree 2011-926 relating to the management of internet first-level domains corresponding to the national territory's country codes](#) specifies the requirements applicable to the designation of the registries managing French country-code top-level domains, which include '.fr', '.re' (Reunion Island), '.pm' (Saint-Pierre et Miquelon) and '.yt' (Mayotte). The decree also sets out the rules for the accreditation of registrars for those extensions and the notions of legitimate interest and bad faith used to evaluate the legitimacy of the registration of domain names.

The provisions setting out the rules relating to the designation of registries managing domain name extensions corresponding to French territories remain similar to those set out in prior legislation. However, with regard to registrar accreditation, the decree sets out general principles which will have to be used by the designated registry (currently [AFNIC](#)) in order to grant or refuse accreditation. Registrars will now be required to:

- master the principles and the functioning modalities of the domain name system and of the internet;
- have implemented a procedure for the verification of the identification data provided by domain name applicants allowing them, as the case may be, to answer requests from the registry;
- have the necessary human and technical resources to allow the update of the administrative and technical data provided by domain name applicants;
- have the necessary hardware and software to ensure security of the personal data provided by domain name applicants; and
- provide adequate conditions to receive the public.

While these rules do not appear to be excessively stringent, AFNIC has indicated that it intends to conduct a general review of the existing accreditation procedure to bring it in line with the terms of the decree. This review will, in all likelihood, lead AFNIC to request currently accredited registrars to provide information relating to the above-listed criteria.

The decree also sets out circumstances under which legitimate interests and bad faith can be inferred from a registrant's actions. The concepts of legitimate interest and good faith have been incorporated into French domain name law by Article L45-2, 2 and 3 of the code. According to these provisions, the registration of domain names under the French extensions can be refused or cancelled if they are likely to infringe IP or personality rights, or if they correspond to the name of the French Republic, of a municipality or of a state body, "*unless the applicant has a legitimate interest and acts in good faith*".

The provisions of the decree relating to legitimate interest and good faith will be incorporated in a new version of Article R20-44-43 of the code. These provisions are extremely similar to those set out in Paragraphs 4(b) and 4(c) of the [Uniform Domain Name Dispute Resolution Policy](#).

According to these provisions, legitimate interest can be established:

- "if the registrant is using the domain name, or an identical or related name, in the course of an offer of goods or services, or if it can demonstrate that it has made preparations to do so" (similar to Paragraph 4(c)(i) of the UDRP);
- "if the registrant is known under a name which is identical or similar to the domain name, even in the absence of acknowledged rights over said name" (similar to Paragraph 4(c)(ii) of the UDRP); or
- "if the registrant is making a non-commercial use of the domain name or of a related name without any intention to confuse consumers or to harm the reputation of a name over which a right is acknowledged or established" (similar to Paragraph 4(c)(iii) of the UDRP).

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Furthermore it is provided that bad faith can be demonstrated by having obtained or requested the registration of the domain name primarily:

- "for the purpose of selling, renting or transferring it, in any fashion, to a public organisation, a local constituency or to the owner of an identical or related name over which a right is acknowledged or established and not to actively use it" (similar to Paragraph 4(b)(i) of the UDRP);
- "for the purpose of harming the reputation of the holder of a right or legitimate interest over the name or a related name or that of a good or service linked to it in the mind of consumers" (similar to Paragraph 4(b)(ii) of the UDRP); or
- "for the purpose of benefiting from the reputation of the holder of a right or legitimate interest over the name or a related name or that of a good or service linked to it by creating confusion in the mind of consumers" (similar to Paragraph 4(b)(iii) of the UDRP).

It seems that French legislators are increasingly passing the principles of the UDRP into hard law, at least for French domain name extensions. These provisions will be helpful for AFNIC and panellists in their rulings in disputes regarding the attempted recuperation of domain names under French extensions.

The change in French domain name legislation prompted AFNIC to release some 1,500 terms for registration which were previously banned because they were either considered unlawful or contrary to public policy or because they were reserved for state bodies or municipalities (for further details please see "[Anyone may now apply for 'fundamental' terms under '.fr'](#)").

While the provisions of the decree relating to legitimate interest and bad faith apply to the evaluation of the second category of 'fundamental' terms now open for registration (terms reserved for state bodies or municipalities), they do not specifically apply to the first (terms previously considered unlawful or contrary to public policy), the allocation of which is left to AFNIC's discretion. However, it is likely that AFNIC will still take the provisions of the decree into account for the evaluation of the legitimacy of applications for domain names such as 'islam.fr', which is included in more than 6,000 applications received for registrations of 'fundamental' terms. Given that certain popular domain names received over 50 applications, it seems that AFNIC will find it difficult to decide how to allocate them, with or without the terms of the decree for guidance.

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