



Jackson, Etti & Edu

The 'NIGERIA AIR' Domain Name Saga – A case of a Stitch in Time...?



The 'NIGERIA AIR' Domain Name Saga – A case of a Stitch in Time...?

Dateline: Wednesday, 18th July 2018.

Place: Farnborough Air Show, United Kingdom

Event: Unveiling of Nigeria Air, Nigeria's New National Carrier/Airline.

When Senator Hadi Sirika, Honourable Minister of State for Aviation, said that the long-lost dreams of Nigeria Airways were restored with the unveiling of the new national flag carrier/airline little did he know that the headlines would be something that appeared 'small' yet had an ability to generate such furore. I am talking about Olumayowa Elegbede, the "sharp guy" as some may call him, who saw this as an opportunity to make a fortune and quickly purchased the following domain names: NigeriaAir.ng and NigeriaAir.com.ng.

- Smart move or an illegality?
- Will the Federal Government get these domains back?
- Errrhhmmm...what exactly are Domain names and why are they so important?

An Intro to Domain Names...

- Definition - The simplest definition I can think of is this: A domain name is the website name of an entity, through which users of the internet can have access to the website. It consists of any combination of letters and numbers, used in conjunction with different extensions such as .ng, .com, .net, etc., depending on the type of entity.
- Examples of domain names include <http://www.jacksonettiandedu.com/>, <https://www.google.com.ng/>, <https://www.konga.com/>, <https://www.wikipedia.org/>, and <https://www.NiRA.org.ng/>.
- Background on Domain Names
- The development of Domain Names can be traced to the 1960s when computers began connecting to each other on Wide Area Networks (WAN). Wide Area Networks gave computers the ability to send data over a large geographical area, and this in turn, increased the use of computers and connections. The internet itself, is a type of WAN.
- With this increase, arose the need to regulate and maintain the domain paths through the networks.
- In response to this need, the United States Defence Information Systems Agency created the Internet Assigned Numbers Authority (IANA), to oversee the assignment of unique





'internet' addresses to each computer connected to the internet, using the Internet Protocol (IP) address system.

- To connect to another user on the internet however, you had to insert the user's IP address such as 14.149.147.10. An ever-increasing number of users meant that the numbers were getting too long to remember, and it became imperative to create a simple and easy-to-remember system for recognizing other networks. This need led to the creation of the name server system in 1984 by researchers and technicians at the University of Wisconsin. The name server system later known as the Domain Name System (DNS), changed user identification from 140.226.789.008, for example, to jacksonettiandedu.com, an easy-to-remember name.
- The internet further evolved and became more commercialized with the introduction of the World Wide Web (WWW) in 1990, making domain names registrable. Today, a domain name/website name is registrable all around the world with domain name Registrars.
- The Domain Name System is a hierarchical system, with top-level, second-level, third-level and sometimes fourth-level domain names.



Types of Domain Names

Top-level domain (TLD) – This domain is at the highest level of the Domain Name System and it typically identifies the registrant's category, e.g.:

-educational institution (.edu),





- government institution (.gov),
- commercial (.com),
- non-profit group (.org).
- network organizations (.net)
- military (.mil)

Types of TLDs include:

- i. **ccTLD (country code Top Level Domain):** A ccTLD is a two-letter domain name established for geographical locations, e.g. .ng. Country-code level domain names are usually managed by national domain name Registrars. For instance, the Nigerian ccTLD .ng is managed by the Nigeria Internet Registration Association (NiRA).
- ii. **gTLD (generic Top-Level Domain):** gTLD consist of generic domains such as .com, .net, .biz, .org, etc. gTLD usually define the domain name class, for example, commercial institutions such as konga, jumia, jacksonettiandedu, use the .com, top level domain for their websites.
- iii. Other top-level domain names include infrastructure top-level domain, restricted generic top-level domains (grTLD), sponsored top-level domains (sTLD) and test top-level domains (tTLD).

Second-level domain (SLD or 2LD) - This is a domain that is directly below a top-level domain and commonly refers to the organization that registered the domain name e.g. google.com.

Third-level domain - This is next in line of the hierarchy. It is the segment that is found directly to the left of the second-level domain. They are not mandatory unless the user has a specific requirement. For example, where jacksonettiandedu.com is the second level domain name, and there is also a website for the firm's Intellectual Property Practice, the Third Level domain will be expressed as *ip.jacksonettiandedu.com*

Nigeria Country Code Top-Level Domain Name - Whilst other top-level domain names are managed by the Internet Corporation for Assigned Names and Numbers (ICANN), the Nigerian country code top-level domain name (.ng) is managed by the Nigeria Internet Registration Association (NiRA) which has accredited Registrars who handle the registration, renewal, and transfer of second-level domain names registered with the “.ng” domain name extension. The Nigerian country-code top-level domain name is governed by the Cybercrimes (Prohibition and Prevention) Act 2015 (“Cybercrimes Act”), the National Information Technology Development Agency Act 2007 (“NITDA Act”) and the Nigerian Constitution.





- Every domain name is unique; thus no two websites can have the same domain name. A domain name must be registered before it can be used.
- Note: A registered domain name however, does not vest ownership rights in the domain name; it only grants exclusive right to use the domain name for the duration for which it was paid. This term is usually between 1-10 years.

'Sharp Guy' or Cybersquatting?

In the light of the foregoing, can Mr. Olumayowa “sharp guy” Elegbede lay a valid claim of ownership to the Nigeria-Air.ng and Nigeriaair.ng domain names he very ‘sharply’ registered? Or is this a case of Cybersquatting?

To answer this question requires us to look at the applicable domain name policy which regulates the .ng extension and to draw conclusions from those provisions. The regulator in this case, is NIRA, which incidentally, does not restrict who may apply for and register a domain name.

A search conducted on the NIRA WhoisSearch database, revealed that the domain names were registered on the 18th of July 2018, the same day the announcement was made by the Federal Government, which immediately raises issues of the existence or not, of malicious intent behind the registrations.





Cybersquatting

Cybersquatting is the illegal domain name registration of popular or well-known company names/trademarks with the aim of reselling them to the rightful owners for profit. ICANN defines cybersquatting as the bad faith registration of the trademark of another entity in a domain name. For example, the popular search engine Google had to commence a cybersquatting complaint against a similar domain name registered as “googblog.com” under the Uniform Domain Name Dispute Resolution Policy (UDRP) of ICANN.

Cybersquatting is different from domain name speculation, which is the purchase of domain names to be resold at a profit. Whilst one is a legal business endeavour, the other is a crime and is illegal. For instance, a person could register men.com or men.ng and resell at a higher price to whoever wishes to buy the domain on the agreed terms. With cybersquatting, the converse is the same – there is a deliberate step taken to register popular/well-known marks, for example, blueband.ng (a popular margarine brand), with the intention of reselling it to the rightful owners. This is a crime and is punishable under the Cybercrimes (Prohibition and Prevention) Act 2015 (The Cybercrimes Act).

Section 25(1) & (2) of The Cybercrimes Act.

“Any person who, intentionally takes or makes use of a name, business name, trademark, domain name or other word or phrase registered, owned or in use by any individual, body corporate or belonging to either the Federal, State or Local Governments in Nigeria, on the internet or any other computer network, without authority or right, and for the purpose of interfering with their use by





the owner, registrant or legitimate prior user, commits an offense under this Act and shall be liable on conviction to imprisonment for a term of not more than 2 years or a fine of not more than ₦5,000,000.00 or to both fine and imprisonment”.

In awarding any penalty against an offender under this section, a court shall have regard to the following:

- A refusal by the offender to relinquish, upon formal request by the rightful owner of the name, business name, trademark, domain name, or other word or phrase registered, owned or in use by any individual, body corporate or belonging to either the Federal, State or Local Governments in Nigeria; or
- An attempt by the offender to obtain compensation in any form for the release to the rightful owner for use of the name, business name, trademark, domain name or other word or phrase registered, owned or in use by any individual, body corporate or belonging to either the Federal, State or Local Government of Nigeria.

The above provisions are clear and in relation to the subject matter of this article, where a person intentionally takes or makes use of a domain name belonging to either the Federal, State, or Local Governments in Nigeria on the internet or any other computer network, without authority or right, and for the purpose of interfering with their use, such action amounts to cybersquatting.

I am not sure Mr. 'Sharp Guy' was aware of the law or sought proper legal advice before taking steps to register both domains. Unfortunately, ignorance of the law has never been an excuse and that position is unlikely to change anytime soon!

What must be established to succeed in a case of cybersquatting?

In the present case, sufficient evidence must be adduced, proving ownership of the name 'NigeriaAir' by the Federal Government. Such evidence should be in the form of the design and launch of the NigeriaAir national carrier; use of the NigeriaAir name and logo on documentation prior to and including the date of the launch, etc.

An argument may be presented in 'sharp guy's' defence that NigeriaAir is not a registered trademark. Fair comment. However, it must be noted that rights also accrue to unregistered trademarks, such as the rights of Passing-off, where another entity encroaches on the unregistered (but, in use), rights of another.

In this instance, NigeriaAir belongs to the Federal Government and has been used to launch the new National carrier, thus enjoying some goodwill. This 'goodwill' is the valuable essence of and bedrock of the rights of Passing-off which an unregistered trademark has a right to enjoy peacefully.





The Position under NiRA ...

Cybersquatting is also frowned upon under both the NiRA and ICANN domain name dispute resolution procedures. Under NiRA, where a domain name has been registered in bad faith, i.e., it was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took place, took unfair advantage of, or was unfairly detrimental to the Complainant's Rights, or has been used in a manner which took unfair advantage of, or was unfairly detrimental to the Complainant's Rights, the domain name can be cancelled or transferred to the rightful owner upon institution of a Complaint under the NiRA Dispute Resolution procedure.

Some examples of bad faith registrations:

- Circumstances showing that the domain name was registered or acquired primarily for the purpose of selling, renting, or otherwise transferring the domain name to another person for valuable consideration in excess of the Registrant documented out-of-pocket costs directly related to the domain name; or
- The domain name was registered by the Registrant in order to prevent the owner of a name, trademark or service mark from reflecting that name or mark in a corresponding domain name; or
- The registrant has registered the domain name primarily for the purpose of disrupting the business or activities of another person; or
- By using the domain name, the Registrant has intentionally attempted to attract, for commercial gain, Internet users to a Website or other online location, by creating a likelihood of confusion with the complainant's name or mark as to the source, sponsorship, affiliation, or endorsement of that the Website or location or of a product or service on that the Website or location.
- The Respondent is using the Domain Name in a way which has confused people or businesses into believing that the Domain Name is registered to, operated or authorized by, or otherwise connected with the Complainant;
- The Complainant can demonstrate that the Respondent is engaged in a pattern of registrations where the Respondent is the registrant of domain names (under .ng or otherwise) which correspond to well-known names or trademarks in which the Respondent has no apparent rights, and the Domain Name is part of that pattern;

Similar provisions on bad faith registration and circumstances evidencing bad faith registration are also provided under the ICANN Uniform Domain Name Dispute Resolution Policy (UDRP).

How Have the Courts Decided? A quick look at Case Law Position





1. **eBay v. Du Hongxia (WIPO Case No D2014-2015):** This domain name complaint was filed by eBay at the WIPO Arbitration and Mediation Centre on November 17, 2014 against Du Hongxia/Liu Yujiao/WHOIS AGENT, Domain Whois Protection Service for the transfer of 1153 (one thousand one hundred and fifty-three) unauthorised domain names registered with the well-known and popular trademark 'eBay' included.

eBay adduced evidence of the Respondent registering domain names with the names of other popular brands such as BMW, NIKE, and SONY, in support of its claim.

The Panel reached a verdict that the domain names were registered and being used in bad faith and ordered the domain names to be transferred to the Complainant. The Panel's decision was based on the following:

- that the domain names were all confusingly similar to the Complainant's eBay trademark, and
- the Respondent had no legitimate rights or interests in the domain names, and
- the registration of the domain names by the Respondent was to trade for commercial gain on the reputation and goodwill of the eBay trademark.

2. **Konga Online Shopping Limited v. Rocket Internet GmbH, Arnt Jeschke (WIPO Case No. DSC2014-0001):** Konga filed a Complaint against Rocket Internet GmbH (Jumia) at the WIPO Arbitration and Mediation Centre on May 30, 2014, for registering domain names with the word Konga in various jurisdictions in bad faith, and to prevent Konga from using the domain name in those jurisdictions.

In its decision, the Panel denied the reliefs of the Complainant on the basis that the Complainant failed to prove that it had a trademark which was identical or confusingly similar to the domain name registered by the Respondent. The Panel noted that the trademark applications tendered by the Respondent which had not yet proceeded to registration did not constitute a trademark in which a Complainant has rights under the UDRP policy. The Panel further held that the Complainant failed to tender evidence such as the length and amount of sales under the trademark, the nature and extent of advertising, consumer surveys and media recognition in support of its common law right to the use of name "Konga" in respect of e-commerce businesses. As a result, the Complainant failed to prove its ownership of an identical or similar trademark under Paragraph 4(a) of the UDRP Policy, which was essential to succeed in the complaint.

The decision of the WIPO Panel in this case may be seen by some, as unfair to Konga, given the circumstances of the case and the fact that the Respondent/Jumia, indeed included 'Konga' in several domain names it had registered, and in which Konga had common law rights. However, as unfair as it may appear to be, the decision of the Panel re-establishes the





fundamental elements that must be proved in order to succeed in a Complaint under the UDRP.

These are:

- A valid interest or UDRP right in a trademark. A valid interest or UDRP right implies that the Complainant must have in existence, a registered trademark and in the absence of a registered trademark, common law rights in an unregistered trademark, which must be proved by credible evidence, including *length and amount of sales under the trademark, the nature and extent of advertising, consumer surveys and media recognition*.
- The Complainant must prove additional elements, to wit: a of lack of rights or legitimate interest by the Respondent/domain name registrant in respect of the domain name(s) in question; and
- Existence of Bad faith in the registration and use of the domain name by the registrant/Respondent.

Given the above elements however, the decision of the Panel to refrain from requesting for further statements or documents after it had on its own accord, pointed out its powers under paragraphs 10 and 12 of the UDRP Proceeding Rules to do so, in the light of glaring bad faith registrations carried out by the Respondent, does indeed appear unfair.

3. **Amazon Technologies, Inc. v. Robert Nichols:** In this case the exorbitant offers to sell the domain names was held to be an indication of bad faith.

Any Recourse for the Federal Government?

Aside from outright purchase of the domain names from Mr. 'sharp guy', there are other options the Federal Government can explore to recover them.

1. Institute an action under NiRA's Dispute Resolution Policy for the ".ng" domain names or under the ICANN Uniform Domain Name Dispute Resolution Policy for the .com domain name. Both steps are administrative procedures.
2. Initiating formal court proceedings to recover the domain names, Irrespective of the above administrative procedures.
3. Commence a criminal action for Cyber Squatting under Section 25 (1) of the Cybercrimes Act, which is punishable by a term not exceeding 2 years and/or to a fine of N5 million. The Court can further order the offender under the Act to relinquish the domain names to the Federal Government.

Conclusion: A Stitch In Time Saves Nine

This idiomatic expression is the best description of this entire saga.





Hopefully, the major lesson learned by not just the Federal Government, but the general public, is the importance of protecting Intellectual Property in a timely manner. Domain names are most frequently on the lowest rung of importance for entrepreneurs when developing their brands, but it is critical that they recognize the prevalence of cybersquatters who are on the prowl to pounce on unsuspecting/unguarded trademarks, thus benefitting where they did not labour.

Disclaimer:

Please note that this article is not intended to replace formal legal advice. Kindly contact a legal practitioner if you require advice on any issues raised in this article.





Jackson, Etti & Edu is a full-service law firm with a sector focus, rendering legal services to Nigerian, Pan-African and International clients in diverse jurisdictions. We have earned a reputation for delivering commercial advice across all the key sectors: energy & natural resources, fast moving consumer goods (FMCGs), financial services, health & pharmaceuticals, real estate & infrastructure, and technology, media & entertainment.

Further information about the firm is available at www.jacksonettiandedu.com. This is a publication of Jackson, Etti & Edu and is for general information only. It should not be construed as legal advice under any circumstances.

For further information, please contact us at jacksonettiedu@jacksonettiandedu.com

Key Contact



Chinwe Ogban

Senior Associate

chinweogban@jacksonettiandedu.com



Jackson, Etti & Edu

RCO Court 3-5, Sinari Daranijo Street,
Victoria Island, Lagos, Nigeria.

t: +234 (1) 4626841/3, +234 (1) 2806989
e: jacksonettiedu@jacksonettiandedu.com

f: +234 (1) 2716889
www.jacksonettiandedu.com