

DISPUTE RESOLUTION IN CYBERSPACE ©

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Electronic commerce on the Worldwide Web continues to increase exponentially. The ease, speed, and relative cost-efficiency with which transactions can be consummated online attract new users, both merchants and consumers, on a daily basis.

"No other medium makes reaching the entire world as easy as does the Internet. In the print world, or even in broadcast television or radio, the technical requirements and costs of moving from local to national to international distribution are prohibitive to all but the largest companies. This is in sharp contrast to the Internet, where (for the most part) every Web site has equal, global reach from the moment the first file is made available on a connected server computer."¹

Every day we are confronted with additional statistics that reflect this rapid expansion. ActivMedia, a market research firm, reports that Web-generated revenue will total U.S.\$ 24 billion worldwide by the end of 1998, or an increase of U.S.\$ 11 billion over the figure for 1997.² It is estimated that this figure will reach U.S. \$1 trillion by the year 2001.³ Dell Computers, which is currently selling more than U.S. \$3 million daily (more than U.S. \$1 billion per year), reports that it expects to do half of its business online by the year 2000.⁴ Not only can customers do their banking online, but banks which conduct all their transactions over the Internet have been approved by the U.S. Office of Thrift Supervision and are currently operating without the benefit (detriment?) of traditional banking facilities.⁵ The U.S. Securities and Exchange Commission has approved online promotions for Initial Public Offerings, Secondary Offerings, and offerings of debt and convertibles.⁶ Virtually any business one can imagine can now be conducted in virtual space.

I. DISPUTE RESOLUTION IN CYBERSPACE

Because there is no "there" there (with apologies to Gertrude Stein), disputes which arise in electronic commerce pose special problems. Jurisdiction over a person is generally based on that person's physical presence or commission of acts within given geopolitical boundaries. Choice of law often requires an analysis of where an act was committed, where the parties reside, or where a document was signed. The rationale for such distinction is that a party that purposefully avails itself of a geopolitical jurisdiction must expect the laws of that jurisdiction to apply, and it should become familiar with and observe those laws. Yet what of cyberspace? Is a party that offers goods for sale on its Web site, which is potentially accessible from anywhere in the world (even from an airplane flying over the middle of the Pacific Ocean), subjecting itself to the jurisdiction of any geopolitical entity in which a customer might reside and to the application of that entity's laws? How is the proper law applicable to any dispute which might arise to be determined?

These and other related questions pose special dilemmas for our traditional "sovereign" method of resolving disputes. This paper will look at how courts, primarily those in the United States, as its citizens engage in electronic commerce more often than those in other geopolitical jurisdictions, have approached these questions in the areas of jurisdiction, copyright and trademark. It will also examine the special problems which have arisen between trademark-holders and domain name registrants, and how courts and registrants have approached the resolution of these problems. Finally, the article will discuss a few of the major initiatives for resolving disputes, in whole or in part, through the use of online mechanisms.

II. BASIC OPERATIONS OF THE INTERNET.⁷

The Internet grew out of research activities in computer networking funded by the U.S. Department of Defense. It is described as a "distributed network," in that information can travel over many alternative routes, avoiding "traffic jams" and other glitches in different communications lines. Each computer on the Internet has been given a unique numerical address, much like a telephone number. This is called the Internet Protocol ("IP") number. That number is in turn correlated to an alphanumeric string that is registered in one of the Top Level Domains ("TLDs"). The TLDs can be general categories (generic TLDs or "gTLDs") such as ".com," ".gov," or ".org." Or they can be TLDs assigned to the various geopolitical entities, such as ".us" for the United States and ".fr" for France. The alphanumeric string which precedes the "." is the Second Level Domain ("SLD"), for example "microsoft" in "microsoft.com." The computer converts the alphanumeric string to the IP number and transmits the data over the Internet.

To minimize the problem of potential damaged or lost information inherent in sequential transmission of files, information travels over the Internet in small blocks of data called "packets." Each file is broken up into numerous small data packets, which are transmitted over the Internet independently. Should a packet arrive scrambled or not at all, its retransmission takes far less time than the retransmission of the entire message would take, as it is a very small packet of data. Each data packet takes its own route over the network, and a packet that is transmitted later may arrive at the destination sooner than an earlier transmitted packet.

How does one get any intelligible information out of a series of small packets that may follow different paths through the network, and may arrive out of order or even be completely lost? Consider

as an example the Internet Transmission Control Protocol (TCP), which reliably transmits a “stream” of 8-bit bytes between two computers. The sending and receiving computers use simple error-detecting and packet-ordering mechanisms, coupled with explicit acknowledgment from the receiving computer, to ensure data integrity. Before any part of the data stream is transmitted, the sending computer contacts the destination computer and arranges a connection to transfer a certain number of bytes. The sending computer places an initial part of the stream in a packet and adds the bytes of the packet together to form a “checksum,” which is included in the transmitted packet. The receiving computer adds together the bytes of the packet received and compares that total to the checksum in the packet. If they are the same, the data in the packet are correct, and the receiving computer sends an acknowledgment to the sender. If the checksums are different the receiver does nothing, and the sender automatically retransmits the package after a predefined time has elapsed (a “timeout”). This timeout feature also causes retransmission of lost packets.

As packets may arrive in a different order from that in which they were sent, TCP uses the sequence number placed in the header of each packet by the sending computer to ensure correct ordering of data. For example, the receiver may be expecting to get packet 5 next, but receives packets 6 and 7 instead. The receiver holds (“buffers”) those packets. When packet 5 finally arrives, its data are placed ahead of the data in packets 6 and 7. In this way, correct data order is maintained. The receiver can then acknowledge receipt of all packets through sequence number 7. If packet 5 does not arrive before the timeout period, the sender automatically retransmits that packet, and, once again, correct data order is maintained.

During its journey, a data packet is first sent to the sending computer's Internet Service Provider ("ISP"), if the computer is connected to the Internet over a telephone line, or is directly injected into the network. The data packet is then routed through a series of "routers," which act in much the same way as regional postal sorting stations. Each router checks the IP address, and sends the packet to another router that is "closer" (in electronic, rather than spatial, terms) to its ultimate destination. Despite passing through many routers, the data packet arrives at its destination and returns in a fraction of a second.

The important commercial aspect of the Internet is the World Wide Web. The Web connects text, graphics, sound, and images through the use of Hypertext Markup Language ("html"). Using Web browsers (such as Netscape Navigator or Microsoft Explorer) or search engines (such as Alta Vista or Excite), a user can search the Web for particular information. Potential sites that satisfy the search request are ranked and described for the user, who can then "link" to the Web sites that appear to contain the information sought. Html provides the language that formats the Web site itself and also provides the link to another computer. Html is invisible to the user accessing the Web site. Once at the Web site, the user can download information, and, where the site is commercial in nature, a user may be able to download software from the site to the user's computer or purchase an item advertised on the Web site, all with the appropriate mouse click.

Where the purchase involves the use of a credit card, the issues of security and authenticity arise. How can the cardholder be sure that his credit card number and information is not generally available to anyone on the Web, or on the Internet for that matter? And how can the merchant be sure that the person transmitting the credit card information is indeed the authorized cardholder? Through

the use of algorithms, the digital messages can be encrypted so that only the holders of the necessary "keys" are able to decode the message. Algorithms developed by three Massachusetts Institute of Technology mathematicians – Rivast, Shamir, and Adelman – called the "RSA Algorithms", are widely used for encryption. These algorithms employ complementary keys to encrypt and decrypt data. One key is made public (the "public key") and the other is maintained confidentially (the "private key"). Data that has been encrypted by the use of one key can only be decrypted by use of the other. As each user maintains his own separate private key, data security is maintained.

In order to identify and authenticate the party to a transaction, digital signatures have been developed. The electronic communication is run through a "hash function" which produces alphanumeric "gibberish," which is then encrypted using the sender's private key. Thus, a digital signature is unique not only for each individual sender, but also for each electronic communication. To "sign" an electronic communication, the sender runs a computer program incorporating a hash function which creates a unique "message digest" or "hash value," and then encrypts the message digest by using the sender's private key. The resulting encrypted digest constitutes the "digital signature." The computer then sends to the receiver both the digital signature and the message that has also been encrypted by use of the sender's private key. As far as the user is concerned, the process is a simple one, as it only involves a few clicks of the mouse.

The receiver of a digitally signed message runs a computer program that contains the same hash function and the public key. This decrypts the message and the digital signature. The receiving computer automatically creates a second message digest of the communication and compares it to that

which it has received. If the two message digests are identical, the receiver is assured that the message has not been altered during its transmission over the Internet.

How can the receiver be sure that the private key actually belongs to the person who purports to own it? The answer to this question lies in the hands of a trusted third party who can vouch for the sender. This third party is generally referred to as a Certification Authority ("CA"). The sender "subscribes" to the CA by paying a fee, producing satisfactory evidence of identity and ownership of the private key, without disclosing the private key. If this is done to the CA's satisfaction, the CA issues a "certificate" in the form of a computer-based record, which identifies the issuing CA, and the "subscriber" who has the right to use the key. It may also include the expiration date for either the key or the certification. The CA "signs" the certificate with its own digital signature.

The certificate is then "published," i.e. made available to third parties who may wish to verify communications from the "subscriber." This is generally done through a "repository," which is available online. Probably the most often used CA is VeriSign, Inc.

The European Commission, on 13 May, 1998, set forth a draft European Directive establishing a legal framework for "Electronic Signatures."⁸ The Directive covers such subjects as the requirements for effective electronic signatures, the establishment of certification authorities, minimum liability for CAs, and legal recognition for electronic signatures, among others.⁹

In the United States, several states have enacted legislation regarding digital signatures,¹⁰ and a draft provision of the Uniform Commercial Code deals with the subject.¹¹ In addition, the American Bar Association has drafted a set of *Digital Signature Guidelines*, which have already proved influential.¹²

III. JURISDICTION

A Web site is accessible by use of any computer with modem and appropriate software. Such a system can be located anywhere in the world. The Web site operator and the computer user can transact business over the Internet without ever knowing where their respective business partners are located. If a dispute arises between a Web site operator and a user who has accessed the Web site, which court has jurisdiction to hear the dispute? If a dispute arises between a domain name registrant and the holder of a mark registered in some other geopolitical region, which court has jurisdiction? What if the mark has been registered by different parties under the laws of different countries?

These questions have been answered differently by courts which have addressed them.

A. U.S. Court Decisions

Is there jurisdiction at any location at which a Web site can be viewed? Mere use of a Web site has been held to be insufficient to create personal jurisdiction in the political jurisdiction in which the aggrieved plaintiff accessed the Web site. In *Cybersell, Inc. v. Cybersell, Inc.*,¹³ a dispute arose between identically named corporations, one of which held a registered service mark and the other of which had registered the domain name which included that registered mark. The plaintiff brought suit at its principal place of business, alleging trademark infringement. The court held that, as there was no contact with the jurisdiction other than the maintenance of a Web site, which was available to anyone with access to the Internet, the court lacked personal jurisdiction. A Texas court reached the same result in a suit brought by an Ohio registrant of a domain name against a trademark-owner based in Oregon.¹⁴

Similarly in *Weber v. Jolly Hotels*,¹⁵ the court found that it lacked personal jurisdiction where a plaintiff who had been injured while staying in one of the defendant's hotels in Italy, brought suit in her home state of New Jersey.¹⁶ The plaintiff alleged that defendant maintained a Web site which was accessible from New Jersey and which advertised defendant's hotels. In declining to find personal jurisdiction, the court distinguished the present case from those in which the defendants actively transacted business over the Internet or where the user and the Web site can actively exchange information. The court found that this was a situation involving a "passive" Web site. Rather than dismissing the suit, however, the court transferred the case to New York to determine whether it had jurisdiction on the basis that the defendant had a subsidiary which owned a hotel in New York City.¹⁷

Many other courts have found personal jurisdiction under similar facts. In the case of *Inset Systems, Inc. v. Instruction Set, Inc.*¹⁸, the plaintiff brought suit in Connecticut alleging violation of its federally registered trade name by the defendant's use of the mark in its domain name ("inset.com").¹⁹ It was conceded that defendant was a Massachusetts corporation, with its principal place of business in Massachusetts, which had no employees or offices in Connecticut, and which did not transact business in Connecticut on a regular basis.²⁰ Users accessing the defendant's Web site are able to view "advertisements" for the defendant's goods and services.²¹

The court repeatedly noted that there were at least 10,000 computers in Connecticut capable of accessing defendant's Web site.²² Citing the continuous availability of such advertising by users based, not only in Connecticut, but in "all states," the Court found that defendant had purposefully availed itself of the privilege of doing business in Connecticut and was therefore subject to its jurisdiction.²³

The case of *Maritz, Inc. v. Cybergold, Inc.*²⁴ involved another dispute between a domain name registrant and a federally registered trademark-owner. In this case, the defendant was located in California and maintained a Web site which the court noted was "at present continually accessible to every Internet-connected computer in Missouri and the world."²⁵ The Web site provided information about a service which the defendant planned to introduce in the future and invited interested users to sign up on a mailing list, indicating areas in which they were interested in receiving advertising information. The defendant would set up an email box for the user and would forward advertisements pertinent to the user's indicated area of interest.²⁶ The court, noting that there were at least 12,000 computers in Missouri capable of accessing the Web site and approximately 131 "hits" by Missouri users, found jurisdiction not only under the theory of purposeful availment, but also under the theory that the defendant's acts caused injury in Missouri by allegedly infringing the trademark of a Missouri corporation.²⁷

Recently, the Ninth Circuit used the "injury" test to find jurisdiction in another case involving a registered trademark-owner and a domain name registrant.²⁸ However, the domain name registrant in this case was a notorious "cybersquatter," an individual resident in Illinois who had registered numerous trademarks as SLD names in order to force the trademark-owner to purchase the registration right. Among the domain names registered by the defendant were the names panavision.com and panaflex.com. The SLD names panavision and panaflex were both registered marks belonging to the plaintiff, whose principal place of business is in California. When the plaintiff demanded that panavision.com be turned over to it, the plaintiff offered to sell the name to defendant for \$13,000.

When the plaintiff refused, the defendant registered panaflex.com. The plaintiff then brought suit in California federal court for trademark infringement.

The court noted that in a previous decision²⁹, it had determined that a non-resident's mere use of a Web site which used the registered service mark of the plaintiff would not subject the defendant to the personal jurisdiction of the court of another state. The court distinguished that situation from the present case, in that the defendant in this case knew that the brunt of the harm caused by its registration of the marks in question would be felt in California. Based on this and the plaintiff's purposeful availment by sending a letter to California requesting a payment of \$13,000 to turn over the domain name, the court upheld the trial court's finding of personal jurisdiction.³⁰

Perhaps the case most often cited on the question of personal jurisdiction and the Internet is that of *Compuserve, Inc. v. Patterson*, no doubt largely because it was one of the earliest cases dealing with this issue.³¹ The plaintiff was an ISP headquartered in Ohio. The defendant was an individual resident of Texas. The parties were parties to a Service Agreement and a Shareware Registration Agreement.³² Both agreements provided that they were entered into in Ohio, and one had an Ohio choice-of-law clause.³³ Defendant sold approximately U.S.\$650 of software to 12 Ohio residents. Based on the facts stated, the court found that defendant had purposefully availed himself of the benefits of doing business in Ohio, and, thus, was thus subject to the personal jurisdiction of that state.³⁴ The court was careful to note that defendant was a software provider and marketer, and that those facts were crucial, implying that being a mere subscriber to an ISP's service would not be sufficient to subject it to the jurisdiction of a state in which the ISP maintained its principal place of business.³⁵

B. Foreign Court Decisions

German courts have taken an expansive view of their personal jurisdiction. In cases involving German plaintiffs who hold German registered marks and trade names, the courts have not hesitated to find personal jurisdiction over foreign registrants of domain names which are alleged to have infringed the marks, so long as the Web site with which the domain name is used is accessible from Germany.³⁶ In the case of *Advernet v. Ozucom*, a Spanish court held that a U.S. domain name registrant may be in violation of the rights of a Spanish trademark-holder. However the court refused to enter a decree, as such a decree would need to be executed in the United States where the registrant and the registrar (Network Solutions, Inc.) were both residents.³⁷ The High Court of the UK took jurisdiction of an action brought by a U.S. plaintiff for “passing off” based in part on the defendant German company’s Web site advertisements which included use of plaintiff’s trademark. The U.S. plaintiff argued that as the Web site was in English and was accessible in England and as the German company had also mailed advertisements into England, the court should take jurisdiction, and the court did so.³⁸

IV. COPYRIGHT

As cyberspace does not recognize national boundaries, communications in cyberspace are subject to a variety of national laws and national enforcement policies. Therefore, the medium is an invitation to copyright pirates, who can take advantage of these inconsistencies in legal regimes.³⁹ The unique way in which communications travel over the Internet results in novel questions in the application of copyright law to these communications. Technology is challenging both the application and the utility of current copyright laws.

A. Is Data Stored in RAM a "Copy?"

As data is transferred over the Internet in small "packets" which are only a fraction of the information being transmitted, and because the packets of data traverse the Internet by different routes, only a small amount of the data passes through the RAM of any given "router" computer during its travels. Indeed, even when the data arrives at its destination, the receiving computer may store the received data partially in RAM and partially in the computer's hard disk. Do these bits of information which pass through computers on their way over the Internet constitute "copies" within the meaning of a given copyright law? Does the information ultimately delivered and residing in RAM of the receiving computer constitute a "copy?" Courts in the United States have examined this question applying U.S. copyright standards.

Under U.S. copyright law, "copies" are defined as "material objects . . . in which a work is fixed by any method now known or later developed, from which the work can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device." In the case of *MAI Systems Corp. v. Peak Computer, Inc.*,⁴⁰ a maintenance organization which was unlicensed by the company holding the copyright to the operating system, loaded the operating system into RAM in order to perform maintenance work. The Ninth Circuit Court of Appeals held that this created an unlawful "copy" of the copyrighted software.⁴¹ The court noted that the "copy" was stored in RAM for several minutes, and not just a few seconds, and that while in RAM it could be and was viewed by the user.⁴² The court reasoned that this rendered the "copy" sufficiently "fixed" and capable of "be[ing] perceived . . . with the aid of a machine for a period of more than transitory duration."⁴³ This same court had previously held that in a case where data passing through RAM was modified as it

passed through, the resulting modification did not constitute an unlawful derivative work, as it lacked sufficient form and permanence to meet the "fixation" requirement.⁴⁴ The questions left open by these and other similar cases are what constitutes sufficient time for data to be "fixed" and what is required, other than viewing of images produced by the data, for an object to be "perceived."

B. Is a Web Site Posting a "Distribution?"

Under U.S. copyright laws, the owner of the copyright has the exclusive right to distribute copies of the copyrighted work.⁴⁵ Does the posting of a copy of a copyrighted work on a Web site, where it is available for downloading by computers which have access to that Web site, constitute an unlawful "distribution?"

In the case of *Playboy Enterprises, Inc. v. Frena*,⁴⁶ the defendant operated a bulletin board service (BBS) accessible by modem to paying customers or subscribers.⁴⁷ Subscribers admittedly downloaded materials that had been copyrighted by Playboy. The defendant contended that the photographs had been uploaded by subscribers, that the defendant had no knowledge that such photographs had been posted on the BBS, and that as soon as defendant learned of the lawsuit, he removed the photographs from the BBS and monitored it to insure that additional copyrighted photographs were not uploaded.⁴⁸ Among other claims for relief, Playboy alleged that defendant was liable for the public distribution of copyrighted works.⁴⁹ The court held that, even assuming lack of knowledge by the defendant BBS operator, the defendant was liable for the unlawful public distribution of a copyrighted work.⁵⁰

A later decision disagreed with this analysis.⁵¹ In that case the plaintiff sought to hold the BBS operator and the ISP liable for public distribution of a copyrighted religious tract which had been posted on the BBS. Both the BBS operator and the ISP claimed that the material had been uploaded by a BBS subscriber without their knowledge.⁵² The court reasoned that holding the BBS operator and the ISP liable without knowledge would expose them and others to unreasonable liability, as every link in the chain of distribution, including every Usenet server, could be exposed to such liability. The court held that "[w]here the BBS merely stores and passes along all messages sent by its subscribers and others, the BBS should not be seen as causing these works to be publicly distributed or displayed."⁶³

Importation of unauthorized copies of copyrighted work is actionable in the United States.⁵⁴ If a U.S. user accesses a Web site in another jurisdiction and downloads an unauthorized copy of a copyrighted work that is posted on that Web site, does this constitute "importation" for the purposes of the statute? A presidential task force has taken the position that it does, and is pushing for an amendment to Section 106 that would make this explicit.⁵⁵

C. What About Linking and Framing?

A "link" is analogous to a forwarding address that is embedded on a Web site. If a user clicks on that address he may either be forwarded to the addressed site (an "out link") or the material at the addressed site may be brought into the image displayed on the Web site being viewed (an "in-line link").

Where the material brought to the Web site is displayed within a "frame" which is generated at the Web site being viewed, the process is referred to as "framing."

What if the Web site that is the subject of an "out link" is displaying copyrighted material, and the copyright-owner has not authorized such display? Is the operator of the Web site that furnishes the out link liable for contributory infringement? Would this be true even if the only activity by the referred user is the viewing of the material on the referenced Web site? What if the referred user downloads the copyrighted material from the referenced Web site?

Can a Web site provide an out link without the permission or over the objection of the operator of the referenced Web site?⁵⁶ Does the process of "out linking" involve reference to two separate sites, or does the process, which is effectively seamless, incorporate the material at the referenced site into the site providing the out link, thereby creating a single "work?" Does the posting of the material on the referenced Web site create an implied license for such "out linking?"⁵⁷

Several cases have dealt with linking under a copyright analysis. In a case initiated by several news organizations, it was alleged that framing practices of Total News, Inc. ("Total News") constituted copyright infringement. The Total News Web site had a frame that had on the top crossbar the Total News uniform resource locator (URL). On the right center was a "news window" which contained references to the plaintiffs' Web sites, at which were compilations of the current news stories. By a mouse click, the user caused the news from one of the plaintiffs' Web sites to be displayed within the Total News frame. On the bottom crossbar of the frame was advertising whose sponsors had paid Total News a fee for the right to appear there.

When a user initiated an in-line link, the material brought within the Total News frame occupied only a portion of the framed screen, so that the user had to scroll in order to view the material from the referenced site. The advertisements that had been visible at the referenced site were obscured by the Total News frame that included the Total News advertising.

The parties settled the case under an agreement by which Total News agreed to cease the framing of the plaintiffs' Web sites.⁵⁸ However, the settlement permitted Total News to maintain out links to the plaintiffs' Web sites.⁵⁹

A Scottish case involved a claim of copyright infringement by one newspaper against a competing newspaper in the same small geographic market, based on linking and framing activities on the Internet.⁶⁰ The Shetland Times (hereinafter the "Times") maintained a Web site on which it displayed copies of articles that appeared in the daily edition of the newspaper. Users accessing the site initially viewed a "front page" which contained banner headlines. By clicking on one of the banner headlines, the user was linked with the full text of the article. The Times intended to, but had yet to, sell advertising for display on the "front page."

The competing local newspaper, The Shetland News (hereinafter the "News") also maintained a Web site. The News Web site displayed the headlines from the Times and allowed users to link directly to the full text of articles which appeared in the Times, without having to access the "front page" of the Times. This clearly affected the potential advertising value that the Times could realize for display on its "front page."

At the request of the Times, the court issued the equivalent of a temporary restraining order, barring the linking practices of the News, under the theory that the headlines could be considered copyrightable works. It is unclear whether such a result could be reached under United States copyright law.

To the extent that a compilation of headlines is protectable under U.S. law, the matter may be subject to analysis under a derivative work theory. Just such a theory was advanced in the case of *Futuredontics, Inc. v. Applied Anagramics, Inc., et al.*, 1998 U.S. Dist. LEXIS 2265 (January 30, 1998). In that case, the plaintiff ("Futuredontics") operated a dental referral business using the phone number "1-800-DENTIST" that had been licensed to Futuredontics by defendant, Applied Anagramics, Inc. ("AAI"). AAI operated a Web site that included a link (apparently an in-line link) to pages from a Web site operated by Futuredontics. The referenced pages were displayed within a frame maintained by AAI that displays the AAI logo, information on AAI, and links to all AAI web pages.⁶¹ These links were not authorized by Futuredontics.⁶² Futuredontics alleged and AAI denied that the framed link constituted a derivative work.⁶³ The court found that the cases cited by both parties failed to establish whether the page framed constituted a derivative work, and on that basis the court denied a motion to dismiss a claim for copyright infringement. Thus, the theory of derivative works for linked pages that have been framed has yet to be determined by a court.

D. Can Caching and Mirroring Constitute Copyright Infringement?

In order to avoid having to repeatedly retrieve data a user might wish to reference again, the system downloads referenced material for the user and temporarily stores this either at the server level or on the user's own computer. This is referred to as "caching." When the user requests the information again, it is loaded from the "cache," rather than being retrieved from the original source. Where the content of an entire Web site is stored, the practice is referred to as "mirroring." Does the owner of the Web site assume the risk of such uses? Or indeed by displaying the material with an accessible address (the URL), does the Web site owner impliedly grant a license for such use? What if the content of the Web site is constantly being updated, or if the Web site owner is charging advertising fees based on the number of "hits" the Web site receives? If caching and mirroring are actionable under the copyright laws, is the fair use defense available?⁶⁴

Courts have yet to directly address these questions, and the progress of technology may alter them, make them obsolete, or raise new questions before they can do so. These questions simply point out the uncertainty of legal theory as it applies to the developing technology.

V. TRADEMARK

The use of trademarks and trade names on the Internet gives rise to a number of questions. Where does the use occur? Does the use of a trademark registered under and protected by the laws of the United States on the Web site of an Italian Company which is hosted by a server located in France give rise to a cause of action for breach of U.S. trademark law? Does it make a difference whether the Web site can be accessed by computers based in the United States? What if the trademarks are invisible to the computer user who accesses the Web site, but are read by the various search engines

employed to locate information on the World wide Web? What if the trademark is used in the domain name of a non-trademark- holder? Suppose the mark is not used as an SLD name, but elsewhere in the string of alphanumeric characters that constitute the Internet address or URL of a party that has no rights to the mark. These questions and more are implicated by the use of a protected trademark or trade name on the Internet.

A. U.S. Trademark Law In Very Brief

In simplistic terms, to establish a case for trademark infringement, the complaining party must prove: first, the ownership of a protectable mark; and, second, the likelihood of confusion as to the origin, affiliation, or sponsorship of the goods or service with respect to which the defendant has used the similar mark. In 1996, the Congress enacted a statute to protect "famous" marks from dilution of their value through use by others, which use does not create a likelihood of confusion.⁶⁵ It is designed to protect against "the lessening of the capacity of a famous mark to identify and distinguish goods or services."⁶⁶ This is true even if the mark is used by a non-competitor and even if there is no confusion as to origin.⁶⁷

B. Trademarks On the Internet, Exclusive of Use As Domain Name

Fans and critics are frequent users of trademarks and trade names of the objects of their affection and disaffection. Web sites are established to extol the talents and virtues of the fan's obsession or to depict in graphic detail the wrongs which have been wreaked by an evil merchant. A

current listing of some of the major Web sites which have become the subject of disputes owing to such activity may be found at the "Trademark Wars On the Web" site.⁶⁸ Some examples include:

- Roadkills R Us - Ongoing dispute with Toys "R" Us over trademark infringement. The Web site has begun listing other unauthorized "R-us" cites, including "Torts 'R' Us;"
- Intel Secrets Page - "'Intel Secrets' and 'What Intel doesn't want you to know' are trademarks of Robert Collins. Pentium and Intel are trademarks of Intel Corporation. 386, 486, 586, P6, and all other numbers are not!" Information regarding status of litigation with Intel;
- KMart Sucks - The trademark-holder, Middleburg and Associates, purports to be helping companies protect their "brand images." A KMart critic under fire;
- Sean Shepard's Pacers Page - The National Basketball Association (BNA) cracks down on fan use of NBA trademarks.

None of these uses creates a likelihood of confusion as to the origin or sponsorship of the site in question. Therefore it is the antidilution statute that is being used against the maintainers of the Web sites.

Trademarks are often used by competitors in the sale of competing goods. In the case of *Sega Enterprises Ltd. v. Sabella, et al.*⁶⁹ a BBS operator encouraged users to upload and download information consisting of video games. Users were charged fees, based on the number of files they wished to download. The operator also sold "copiers," which enable a user to copy video game programs from game cartridges onto floppy disks. This was advertised as a "backup system" for the

Sega Genesis console system. The BBS maintained a directory, giving file descriptors and listing approximately 20 Genesis games, and several times used the Sega trademark. Sega brought an action which included claims for trademark infringement. The operator maintained that she did not know of the unlawful use of the mark being made by persons who uploaded games on the BBS. Nevertheless, the court found likelihood of confusion. However, because of the operator's professed lack of knowledge, the court denied summary judgment against her.

Trademarks can also be employed to lure users searching for the goods or services of the mark-holders to Web sites maintained by competitors. When a Web site is created, html is used within the header of the Web page to provide the architecture of the Web page and to convey particular information to Web browsers or other programs. Html used in this way is referred to as "meta-tags." Meta-tags are "invisible" to the user when he or she accesses the Web site. Search engines, such as AltaVista, Excite, or HotBot, are used to search and index the millions of Web pages on the Worldwide Web. This indexing is based on an analysis of the content of each Web page. The analysis relies heavily on the placement and frequency of words within the page. The closer a word is to the beginning of a page and the frequency with which it is used in a page increases the likelihood that a search engine will rank the page highly when a search is conducted using that word.

Since meta-tags are invisible to the user, but visible to the search engine, they can be exploited by a Web master to attract the search engines to the Web master's site when a search is being conducted for a competitor's product. For example, if Pepsi's Web master repeatedly used the meta-tags "Coke," or "Coca-Cola" at the beginning of his Web page, a user who employs the terms "Coke"

or "Coca-Cola" in his search request, might find that the search engine ranks the Pepsi Web site as that most likely to satisfy the user's search request.⁷⁰

Is a user who has been lured to the Pepsi Web site likely to be confused that the Web site is in fact sponsored by Coca-Cola? Probably not. On the other hand, is the value of the trademark "Coca-Cola" likely to be diluted by this practice? Probably so. Accordingly, are famous marks protected against such conduct, whereas not-so-famous marks lack such protection? That remains to be seen.⁷¹

Is a user precluded from using a trademark in his URL, if it is not being used as a domain name? That was the issue before the district court in *Patmont Motor Werks, Inc. v. Gateway Marine, Inc., et al.*⁷² In that case an individual set up a Web site that used the plaintiff's trademark in the URL, although not as a SLD. The Web site was set up to advertise the sale of used "Go-Peds," small motorized scooters manufactured by the plaintiff. The district court held that use of the trademark in the URL did not, as a matter of law, constitute infringement, as such use could not suggest sponsorship or endorsement by the plaintiff. The court stated that as the use of "goped" in the path of the URL followed the domain name, it could not indicate source or origin.

C. Trademarks Used As Domain Names

In one of the earliest reported cases, a U.S. District court held that the registration of a domain name which is substantially identical to a registered trademark constitutes trademark infringement and the use of such mark was enjoined and the domain name registrant was ordered to yield the domain

name to the plaintiff.⁷³ This case remains the furthest a court has gone in finding infringement in the registration and use of domain names.⁷⁴

Most courts have required more than mere registration of a domain name to constitute trademark infringement. In "cybersquatter" cases, the defendant has registered and stockpiled the trademarks of various commercial enterprises for the purpose of selling the domain name to the trademark-holders or to third parties. For example, in the case of *Panavision International, L.P. v. Toeppen, et al.*,⁷⁵ a well-known cybersquatter registered the domain name "panavision.com." When the Web site was accessed, the user encountered photographs of the City of Pana, Illinois. Thus, there appeared to be little likelihood that a user who accessed the site would be confused that the source or origin of the site was Panavision International. Therefore, the plaintiff proceeded on a trademark dilution theory.

The domain name registrant claimed that he had made no commercial use of the trademark. However, the facts showed that when the domain name registrant was contacted by the trademark-holder, the registrant offered to sell the registered domain name to the holder for US\$13,000. The court held this to be a commercial use. The court found that the use of the mark by the domain name registrant diminished the ability of the mark to identify the plaintiff's goods and services on the Internet, and rejected the registrant's argument that a domain name is no more than an address. The court found that the domain name is used to identify the owner of the Web site. The court found that registrant's use of the domain name diluted the value of the plaintiff's mark.

Companies have also registered domain names which are identical to trademarks held by their competitors. In the case of *Cardservice International, Inc. v. McGee, et al.*,⁷⁶ the defendant had registered "cardservice.com," the SLD of which was identical to the plaintiff's trademark. The plaintiff argued that his business, "Card Service," had a space between the two words, and, therefore, he had not violated the trademark laws. He claimed that, in any event, as Network Solutions, Inc. (NSI's) registration policy was "first come, first served," he was entitled to use the registered domain name. The court disagreed. Stating that the NSI's registration policy could not trump federal trademark laws, the court found that a likelihood of confusion existed. Moreover, the court held that "[u]nauthorized use of a domain name which includes a protected trademark to engage in commercial activity over the internet [sic] constitutes use 'in commerce. . .'"⁷⁷ The court issued a permanent injunction enjoining the defendants from using the domain name, and mandating that they relinquish it.

Domain names may also be used against trademark-holders for political purposes. In the case of *Planned Parenthood Federation of America, Inc. v. Bucci*,⁷⁸ the host of Catholic Radio and an anti-abortion activist, registered the domain name "www.plannedparenthood.com." The defendant argued that the use of the domain name was in the nature of non-commercial speech, and thus was not susceptible to trademark law. The court disagreed. The court found that defendant's action damaged the plaintiff's ability to use its mark to offer services such as health and information. Moreover, even if this were not true, the mere establishment of a Web site on the Internet, which could be accessed by all users, constituted a commercial activity for the purposes of the trademark laws.

The court further found that the defendant used the mark to promote sales of an anti-abortion publication, and that the defendant used the Web site to solicit funds and contributions. As such, the defendant's use of the mark was held to be in connection with the distribution or advertising of goods and services.

The defendant argued that his use of the trademark came within the parody exception, and that as such it was not likely to create confusion. Again, the court disagreed. As the defendant's use of the trademark as a domain name did not convey the simultaneous message that the home page and Web site are those of the plaintiff and those of the defendant, the parody argument must fail. The plaintiff's motion for preliminary injunction was granted.

However, it is a mistake to believe that the courts will invariably find trademark infringement where the defendant has registered a domain name which is confusingly similar, or even identical to, a recognized trade mark. In the case of *Gateway 2000, Inc. v. Gateway.Com, Inc., et al.*,⁷⁹ in 1993 the plaintiff had registered the mark "Gateway 2000, Inc.," but had not registered the mark "Gateway." The defendant produced evidence that he had begun to use gateway.com for his electronic address in May 1988, and that in 1990 he had registered this domain name with Stanford Research Institute (SRI), which was the registrar at the time. The matter came before the court on a motion for preliminary injunction, seeking to enjoin the defendant's use of the domain name, "gateway.com." The court held that the plaintiff had failed to prove that its mark was "famous" for purposes of the antidilution statute prior to the use of the electronic address "gateway.com" by the defendant. The court also held

that the plaintiff had failed to produce sufficient evidence of its use of the mark "gateway" prior to the defendant's use of the mark. Accordingly, the plaintiff's motion for preliminary injunction was denied.

Where the mark-holder is unable to establish a "famous" mark, some courts have held that the holder must establish that the use of the domain name by the registrant creates the likelihood of confusion in the traditional sense. In the case of *Interstellar Starship Services, Ltd. v. Epix, Inc.*,⁸⁰ the plaintiff registered the domain name "epix.com." The defendant was the owner of the registered trademark "Epix" for "printed circuit boards and computer programs for image acquisition, processing, display and transmission." The plaintiff used its Web site only to publicize the activities of a theater production of "The Rocky Horror Picture Show." As a result of threats made by the defendant, the plaintiff initiated suit for declaratory relief. Although the court found that users who accessed the Web site might be initially confused, because of the "epix" name, it held that the difference in the goods and services offered on the Web site from those offered by the defendant precluded a finding of "likelihood of confusion" as to the source or origin of goods or services required under the trademark laws.

The vast majority of the reported cases dealing with trademarks and domain names are from the United States. To the extent that such decisions are consistent, it is still unclear what, if any, extraterritorial reach will be accorded to the rulings. The reported decisions do not deal with the rights established by other jurisdictions regarding trademarks or trade names, nor the possible conflict of laws regarding what constitutes trademark infringement. Many jurisdictions do not recognize trademark dilution, and of those that do, the terminology frequently differs. It is apparent that in a global

marketplace such as the Internet, trademark-owners' reliance on U.S. court decisions may well be misplaced.

VI. RESOLUTION OF DOMAIN NAME DISPUTES

Disputes between domain name registrants and trademark or trade name holders have arisen with increasing frequency. As we have seen, an aggrieved party can bring the matter before a court, but which court? Some courts will decline to exercise jurisdiction, whereas others will take jurisdiction and issue orders that may or may not be enforceable within the jurisdiction which can provide an effective remedy.⁸¹ Different courts may apply different legal standards in the determination of such disputes, yielding inconsistent results.⁸² With this as a background, some agencies concerned with the operation of the Internet have increasingly looked to alternative dispute resolution (ADR) as a mechanism by which domain name disputes can be resolved. Others have attempted to avoid the subject, opting instead to establish a policy designed to escape liability, without offering any mechanism by which disputes can be resolved.

A. The World Intellectual Property Organization Initiative

In 1997, the International Ad Hoc Committee (IAHC), a task force selected by a coalition of international and Internet groups, issued its recommendations for administration and management of gTLDs.^{83 84} Among its recommendations is that for the domain names which are to be administered by a proposed Council of Registrars (CORE), the application for registration will contain an agreement to submit to online mediation under the mediation rules of the World Intellectual Property Organization (“WIPO”) Arbitration Center, if initiated by a right-holder who elects that process.⁸⁵ The applicant will also agree to binding expedited arbitration under WIPO's arbitration rules, again at the election of a

right-holder who initiates the process.⁸⁶ WIPO is authorized to establish Administrative Domain Name Challenge Panels (hereinafter the “Panels”), which are to administer the policy for the resolution of SLD name disputes.⁸⁷ Wherever possible, disputes would be heard online, and challenges and proposed decisions would be made public on the Internet, and a reasonable period would be provided for comment by appropriate third parties (including governmental or regional authorities) before any decision became final.⁸⁸

The panels would have the authority to decide that:

- a challenged SLD should be excluded from the gTLD in which it was registered;
 - in appropriate and exceptional cases, a challenged SLD should be excluded from some or all other gTLDs which fall within the gTLD Memorandum of Understanding, in other words gTLDs administered by CORE;
 - in appropriate cases, SLDs closely similar to the challenged SLD should be excluded;
- and
- an existing exclusion be excepted, modified, or canceled.⁸⁹

No Panel decision would affect the power of “the appropriate national or regional sovereign court” to hear cases which involve the interpretation and enforcement of the intellectual property rights within its jurisdiction.⁹⁰ Nor would the procedure preclude a party from initiating litigation or agreeing to other arbitration or mediation procedures.⁹¹ Registrars would be obligated to honor Panel decisions.⁹²

Recently the U.S. Department of Commerce issued its Statement of Policy on the Management of Internet Names and Addresses (hereinafter the "U.S. Statement of Policy").⁹³ In its prior Discussion

Draft,⁹⁴ the Department of Commerce had proposed that a readily available and convenient dispute resolution process be established that would need no registrar involvement.⁹⁵ Registrars would agree to be bound by the resulting decisions (or those of “a court of competent jurisdiction”). Following public comment on the proposed rules, the adopted U.S. Statement of Policy recommended that a private corporation be established to oversee the registration of domain names, and the newly established corporation adopt policies by which registrants would agree that “in cases of cyberpiracy or cybersquatting (as opposed to conflicts between legitimate competing rights-holders),” disputes would be submitted to ADR systems identified by the entity.⁹⁶ Registrars would be required to abide by the decisions issued.⁹⁷ The U.S. Government indicated its intent to seek international support for a process administered by the WIPO to establish such ADR policies, as well as “a process for protecting famous trademarks” in the gTLDs, noting that:

“[obtaining agreement by the parties that jurisdiction over the domain name will be exercised by an alternative dispute resolution body is likely to be at least somewhat less controversial than agreement that the parties will subject themselves to the personal jurisdiction of a particular national court.]”⁹⁸

However, the U.S. position is still that “legitimate competing interests in a particular mark” should be submitted to “an appropriate court” for resolution, suggesting that the “appropriate court” is that in the jurisdiction “where the “A” root server is maintained, where the registry is domiciled, where the registry database is maintained, or where the registrar is domiciled.”⁹⁹

Pursuant to the IAHC Statement of Policy and prior to the issuance of the U.S. Statement of Policy, the Policy Oversight Committee had promulgated a Third Revised Draft of Substantive Guidelines Concerning Administrative Domain Name Challenge Panels (hereinafter the “Panel

Guidelines”).¹⁰⁰ The Panel Guidelines do not preclude resort to a court or other means of dispute resolution.¹⁰¹ A claim made under the Panel Guidelines must be based on the assertion of “a valid intellectual property right” held by the claimant.¹⁰² The claim must specify, for each country under which the right arises, a description of the nature of the right, the date the right came into being, and where the right resulted from a registration procedure, the entity that granted or registered the right, and the corresponding registration “or other identifying number and particulars.”¹⁰³ A unique feature of the Panel Guidelines is the Panel’s discretion to allow the participation of a third party by way of the submission of a Statement of Participant.¹⁰⁴

Under the Panel Guidelines, a claimant may pursue any of the following remedies:

- the transfer of the domain name from the registrant to the claimant for a limited period yet to be defined;
- the specific exclusion of the domain name from the gTLDs specified in the claim, making it unavailable for registration by any third person in the specified gTLDs (an exclusion can be proactive, meaning it can be in regard to a SLD which is yet to be registered by any party);
- the general exclusion of the domain name from all present and future gTLDs, except those that the claimant might specify;
- the partial or complete cancellation of a previously granted exclusion, and, at claimant’s request, the reservation of the SLD for registration by the claimant in any gTLD specified in the claim; or
- the provisional suspension of the registration, where the claim was brought within 30 days of the date on which CORE first published the registration of the SLD.¹⁰⁵

A claim may relate to more than one SLD, so long as the same respondent holds any rights in the SLD, and so long as the grounds on which the claim is made as to each SLD are closely related.¹⁰⁶ Likewise, the claimant may seek remedies in relation to more than one gTLD.¹⁰⁷

The Panel is empowered to grant or deny all or part of a claim, to determine that the claim is inappropriate for Panel determination, and/or to award costs and make determinations with respect to any posted bond.¹⁰⁸ At the request of a party and with the parties' agreement, the Panel may require that the SLD in question be modified, re-assigned, or be "subject to any other measures to avoid conflict with the rights of the Claimant."¹⁰⁹

In cases involving a respondent, the Panel is required to determine whether the SLD is identical or confusingly similar to the alphanumeric string that is the subject of the intellectual property right(s) asserted, so that it would effectively create a likelihood of confusion, would constitute unfair competition or would otherwise dilute or damage the claimant "including its visibility on the Internet."¹¹⁰ The Panel may only make a determination in favor of a party where the party's rights and interests clearly outweigh those of the other party or where it finds that a party has acted in bad faith.¹¹¹ Trafficking (defined as "cybersquatting," "cyberjesting" or "warehousing") is given as an example where the rights and interests of the intellectual property right owner clearly outweigh those of the SLD registrant.¹¹² In cases that are not suitable for determination in favor of one party, the Panel may recommend that the dispute be submitted to another form of dispute resolution.¹¹³

The Panel Guidelines specify the criteria that are to be used by the Panel in making its determination. The criteria include:

- the original date, duration, extent, and geographical area of any existence or registration(s), promotion, market presence or use of claimant’s intellectual property right(s).
- the goods, services, or purposes for which the right is registered or used;
- the uniqueness of the alphanumeric string that is the subject of the right and whether third parties hold intellectual property rights to the same or similar alphanumeric strings or hold identical SLDs in other gTLDs;
- the record of enforcement of the right, including any recognition given it by courts or other competent authorities;
- the financial value represented by the right;¹¹⁴
- whether the respondent holds any intellectual property right in the alphanumeric string (if so, the Panel is to examine criteria listed above);
- any application for an intellectual property right filed by the respondent, the date of filing, and “any indications whether the filing was not in good faith;”
- the respondent’s use of the SLD on the Internet, including its duration, the goods, services, or purposes in connection with which it is used, whether the use is commercial, whether the use relates to public service, the extent of public recognition of the domain name, the respondent’s interest in its continued use, the content of the Web page or e-mail messages associated with the domain name, the nature of the gTLD in which the SLD is registered, whether the SLD corresponds to the respondent’s name or nickname and is registered in a gTLD dedicated to personal names, and any non-use or abandonment of the domain name;¹¹⁵

- whether the respondent is engaged in “trafficking,” which may include any spontaneous offer to sell, rent, or otherwise dispose of the domain name prior to the initiation of the claim, other registrations of the SLD in other gTLDs which are identical or confusingly similar to alphanumeric strings that are the subject of intellectual property rights of others and in which the respondent holds no rights, or the maintenance of the domain name in a “private collection,” without making *bona fide* use of the domain name;¹¹⁶
- whether there is bad faith involved, which may include the registration of a domain name incorporating a competitor’s trademark or trade name for the purpose of disrupting the competitor’s business, the knowing submission of false or misleading information in the proceedings or in the application for domain name registration, the submission of a claim without just cause and with the intent to disrupt the respondent’s activities on the Internet, or the respondent’s procurement of an intellectual property right without intent to use such right corresponding to respondent’s unused domain name;¹¹⁷
- the rights and interests of any third parties;¹¹⁸
- where a general exclusion is sought, the international significance and dominant market presence of the claimant’s intellectual property right;¹¹⁹ and
- where a claim for partial or complete cancellation of exclusion is sought, material change of circumstances (where the party seeking relief was involved in prior proceedings) or circumstances not considered in prior determination (where the party seeking relief was not involved in prior proceedings).¹²⁰

In addition to providing criteria for Panel determinations, the Panel Guidelines also provide for an Emergency Panel to act on claims for suspension and the posting of a bond in connection with such suspensions.¹²¹ The Panel Guidelines also provide for the appeal of any Panel determination to an Appeal Panel consisting of three members. The standard for reversing any determination is whether the Panel made “an obvious and material mistake of fact or was manifestly unreasonable.”¹²² Any determination made by a Panel, Emergency Panel, or Appeal Panel, as well as any claim, answer, or request to participate, is to be made public on the Internet.¹²³ Any final determination is to be automatically implemented by CORE upon receipt of notification by the WIPO Arbitration Center.¹²⁴

WIPO has adopted Draft WIPO Rules For Administrative Challenge Panel Procedures Concerning Internet Domain Names (hereinafter the “WIPO ACP Rules”) to effectuate the Panel Guidelines.¹²⁵ Under the WIPO ACP Rules, communications are to be by e-mail.¹²⁶ A party may initiate a challenge to an SLD which has been registered in a CORE gTLD by communicating to the WIPO Arbitration Center (the “Center”) a request for challenge.¹²⁷ The challenge shall include the names, addresses, fax numbers, and e-mail addresses of the parties and their representatives (if known), the identification of the SLD(s) challenged and the applicable CORE-gTLD, a brief description of the basis for the challenge, the determination sought, and whether the challenger desires a panel of three members.¹²⁸ The challenger may also include the formal Statement of Claim that is otherwise due within 10 days after receipt of notification of the establishment of the Panel.¹²⁹

A party may also initiate a petition for exclusion, modification or cancellation of an exclusion of an SLD in a CORE-gTLD in a similar manner.¹³⁰ The requirements for a petition are similar to that for a challenge, but also include the case reference number of any prior exclusion that has been made.¹³¹

Where a challenge has been submitted within 30 days after the date of the publication on the Internet of the registration of the SLD, the registration will be suspended for the duration of the challenge upon the posting of a bond of the amount set out in the then-current Schedule of Charges. The Panel may vary the amount of the bond at a party's request or *sua sponte*. The Panel may also cancel the suspension if it determines that its maintenance would be more harmful to the respondent than the suspension would be to the challenger.¹³²

Where a request for general exclusion has been made, any registration of the subject SLD is suspended for the duration of the challenge in the gTLDs from which the exclusion is sought.¹³³ Where a petition for pro-active exclusion has been made, any registration of the subject SLD may not be accepted by any designated gTLD for the duration of the proceedings.¹³⁴ In each case, the Arbitration Center will notify CORE accordingly.

The challenge or petition is assigned a case reference number and is posted on the Center's Web site.¹³⁵ Any person other than a party may, within ten days of the posting, transmit to the Center a request to participate.¹³⁶ Any such request shall include a citation to the case reference number, the relevant contact information, and the grounds on which the person believes that participation is justified. The request shall be posted on the Web site and transmitted to each party.¹³⁷

An answer to a request or a response to a petition shall be submitted within 10 days of the commencement of either, which shall include comment on any of the elements in the request or petition.¹³⁸ The answer or response will be posted on the Center's Web site.¹³⁹

Unless the parties agree on three panelists, the Panel will be composed of one member.¹⁴⁰ In the case of a pro-active petition for exclusion that person will be appointed by the Center.¹⁴¹ In all

other cases, unless the Center considers the procedure inappropriate for a particular case (in which case the Center will make the appointment), the Center will transmit to the parties a list of at least three candidates. The parties may make *ex parte* contact with the candidates, but only to discuss the candidate's qualifications, availability or independence in relation to the parties.¹⁴² Each party may delete candidates it finds objectionable and shall rank the remaining candidates in order of preference. That list shall be transmitted to the Center within seven days after it has been received, failure to make such timely transmission to constitute a waiver of objections. The Center shall take account of the objections and preferences indicated, and invite one of the candidates to be the sole panelist. Where the lists returned indicate that no candidate is acceptable to both parties, or an invited person declines appointment or is otherwise unacceptable for service, the Center shall make the appointment. Where there are to be three panelists, the Center will appoint two such members wherever possible to have the same nationalities as those of the parties, and the third or presiding member is chosen by the list procedure described above.¹⁴³ Unless the parties are of the same nationality, a sole or presiding member shall, in the absence of special circumstances, be of a different nationality from those of the parties.¹⁴⁴ Each member of the panel is required to be impartial and independent.¹⁴⁵ No *ex parte* communications between any member of the Panel and any party or participant on any matter of substance relating to the challenge or petition is permitted.¹⁴⁶

Once the Panel has been appointed, the file is transmitted to each member.¹⁴⁷ The Panel is given great discretion in the establishment of procedures, only being required to treat the parties with equality, to give each a fair opportunity to present its case, and to act with expedition.¹⁴⁸ In acting on a

request to participate, the Panel is required to act “as soon as possible,” but is given unfettered discretion in making such determination.¹⁴⁹

Unless otherwise agreed, the proceedings are conducted in English.¹⁵⁰ If the challenger or petitioner has not already done so, it must submit its Statement of Claim. Failure to timely submit the Statement of Claim without a showing of good cause results in termination of the proceedings by the Panel.¹⁵¹ The Statement of Claim must contain a comprehensive statement of the facts and legal arguments in support of the challenge or petition and a statement of the determination must be sought. To as large an extent as possible, the documents on which the challenger or petitioner intends to rely and a schedule of such documents should be transmitted by expedited postal or courier service at the same time as the transmission of the Statement of Claim. Where the documentation is voluminous, a party should include a reference to additional documents that it is prepared to submit.¹⁵²

Within 15 days of the receipt of the Statement of Claim or the receipt of notice of the establishment of the Panel, the responding party must communicate its Statement of Defense to the Panel, the other party, and to any participant. Failure to timely submit the Statement of Defense without a showing of good cause results in the conduct of a default proceeding, unless the panel, in its discretion, determines that there are “exceptional circumstances” that “call for other action.”¹⁵³ The Statement of Defense should include the same items as are required by the Statement of Claim.¹⁵⁴

Within 15 days of the receipt of the Statement of Claim, any participant is required to communicate its Statement of Participant to the Panel and to each party. Failure to timely submit the Statement of Participant results in the continuation of the proceedings in its absence.¹⁵⁵ Such statement should include the same items as are required by the Statement of Claim.¹⁵⁶

Hearings, which include physical meetings, telephone or video conferences, and the simultaneous authenticated exchange of electronic communications on the same channel, shall be held at the request of a party or at the discretion of the Panel.¹⁵⁷ The hearings are private, and the Panel is to determine what record, if any, is to be made of such hearings.¹⁵⁸ Where no hearings are held, the Panel is to make its determination on the basis of documents and other materials received.¹⁵⁹ Wherever reasonably possible, the proceedings should be declared closed within 30 days or less from the delivery of the Statement of Defense or the establishment of the Panel, whichever occurs later.¹⁶⁰ If the proceedings are not declared closed within this time period, the Panel must submit a status report to the Center and the parties and continue to submit such reports every fifteen days until the proceedings are declared close.¹⁶¹

The Panel makes its determination of the challenge or petition using the criteria set out in the Panel Guidelines.¹⁶² In reaching its determination, the Panel must “hav[e] due regard to the determinations made by other Panels under these Rules.”¹⁶³ This provision encourages a form of *stare decisis* that promises to promote a uniform body of decision in domain name challenge cases. Where the Panel is made up of more than one member, the determination is to be made by a majority. If a majority cannot be achieved, the determination is to be made by the chair as if acting as sole panelist.¹⁶⁴

The determination should include the date on which it was made and the reasons on which it is based, it should be signed digitally by the Panel member(s), and state the reasons for the absence of the signature of any panelist.¹⁶⁵ The determination is to be made, wherever reasonably possible, within fifteen days of the closure of the proceedings.¹⁶⁶ Where a Panel cannot issue a determination within that time period of time, it is required to submit a written explanation to the Center and the parties and

to continue to submit such reports every fifteen days until a determination is made.¹⁶⁷ In its determination the Panel fixes costs, including the Panel's fees, any properly incurred travel, communication, and other expenses of the members of the Panel, and other expenses necessary to the conduct of the proceedings, such as the cost of hearing facilities.¹⁶⁸ Unless the parties otherwise agree, the Panel may, in the light of all the circumstances and the outcome, award reasonable expenses, including witness expenses and attorneys' fees.¹⁶⁹

Within 30 days after receipt of a determination, any party may initiate an appeal by transmitting a Notice of Appeal to the Center. The Notice of Appeal contains a request that the determination be referred to an Appeal Panel for review and decision, the case reference number, and a brief description of the basis for the appeal.¹⁷⁰ The Notice of Appeal is posted on the Center's Web site, and the date on which this occurs constitutes the date of the commencement of the appeal. At the same time it posts the Notice of Appeal on its Web site, The Center transmits to the other party and any participant a copy of the Notice of Appeal and a notification of the date of commencement of the appeal.¹⁷¹

The Appeal Panel consists of three members appointed pursuant to the procedures provided for in Article 18 (c) and (d),¹⁷² except in the case of a pro-active petition for exclusion, in which case the Panel is appointed by the Center.¹⁷³ Within ten days of the receipt of notification of the establishment of the Appeal Panel, the appellant must communicate to the Appeal Panel, the other party, and any Participant a copy of all pleadings that were submitted to the Panel by the appellant, together with any supplementary observations it wishes to make.¹⁷⁴ Within ten days of the receipt of these pleadings and any supplementary observations, the other party and any Participant must transmit all pleadings that it submitted to the Panel, together with any supplementary observations they might

wish to make.¹⁷⁵ The Appeal Panel should issue its decision within thirty days after the receipt by the Appeal Panel of the pleadings and any supplementary observations.¹⁷⁶ In its decision, the Appeal Panel fixes costs, including the Appeal Panel's fees, any properly incurred travel, communication, and other expenses of the members of the Panel, and other expenses necessary for the conduct of the proceedings, such as the cost of hearing facilities.¹⁷⁷ Unless the parties otherwise agree, the Appeal Panel may, in light of all circumstances and of the outcome, award reasonable expenses, including witness' expenses and attorneys' fees.¹⁷⁸

In summary, the WIPO ACP Rules implement the Panel Guidelines and do so in such a way as to create a publicly available body of law on the resolution of domain name disputes aimed at achieving consistency and uniformity. The procedures are designed to be efficient and cost-effective, and delay is discouraged. Determinations, although subject to an expedited internal appeal procedure, are designed to be final and binding.

B. The Network Solutions' Domain Name Dispute Policy

A marked contrast to the approach of a CORE and the WIPO to the resolution of disputes involving domain names is the policy enunciated by Network Solutions, Inc. ("NSI"), the current registrar of the .com, .org, .net, .edu, and .gov gTLDs. The NSI policy seeks to avoid any involvement in the resolution of domain name disputes. Instead, it seeks to leave the matter to the parties and to courts of "competent jurisdiction." The policy is directed primarily as an attempt by NSI to insulate itself from any liability for any action it might take in relation to a disputed domain name.

Effective from February 25, 1998, NSI adopted the Network Solutions' Domain Name Dispute Policy, Revision 03.¹⁷⁹ The policy applies to .com, .org, .net, and .edu.¹⁸⁰ The policy states

that the registrant is solely responsible for selecting the domain name and must represent that the statements made in connection with the application are true and that, to the best of the registrant's knowledge, the selected domain name does not interfere with or infringe the rights of a third party and is not being registered for an unlawful purpose.¹⁸¹ The registrant agrees to indemnify NSI and hold it harmless from any loss or damages awarded by a "court of competent jurisdiction" related in any way to the registration of a domain name.¹⁸² The policy states that "Network Solutions neither acts as arbiter nor provides resolution of disputes between registrants and third party complainants arising out of the registration or use of a domain name."¹⁸³ Complainants are not obligated to use the policy, and the policy is not intended to convey any rights on third parties.¹⁸⁴ The policy is not intended to limit NSI's use of administrative or legal procedures.¹⁸⁵

The registrant agrees that NSI shall have the right, but not the duty, to revoke, suspend, transfer, or modify a domain name registration upon thirty days' written notice, or at such time as NSI should receive a properly authenticated order from "a court of competent jurisdiction" or an arbitral award requiring revocation, suspension, transfer or modification of the domain name registration.¹⁸⁶

NSI may be presented with information that "a domain name possibly violates the trademark rights of a trademark-owner."¹⁸⁷ If a complaint is to be sufficient to trigger discretionary action by NSI, the complaining must present two satisfactory documents. First, the complainant must produce an original, certified copy, not more than six months old, of a trademark registration "on the principal or equivalent registry of any country" that is "in full force and effect" and that is identical to an SLD.¹⁸⁸ Registration from the supplemental registry or its equivalent and trademarks incorporating a design will be insufficient.¹⁸⁹ The complainant must also furnish a copy of the written prior notice sent to the

domain name registrant, the mode of delivery, and the basis for believing that the delivery was received.¹⁹⁰ The notice to the registrant must clearly state that the complainant believes the use of the registered domain name violates its trademark rights and the factual and legal bases for such belief.¹⁹¹

Assuming the above documentation is furnished, NSI **may** determine the date of registration of the domain name (the “domain name creation date”).¹⁹² If the domain name creation date precedes the effective date of the complainant’s trademark registration, NSI will take no action.¹⁹³ If the domain name creation date is subsequent to the effective date of the complainant’s trademark registration, then NSI shall request from the domain name registrant proof of ownership of a registered trademark or service mark. The evidence must be of the same type submitted by the complainant.¹⁹⁴ If the trademark or service mark registration date is prior to the date on which the complainant first notified the domain name registrant of the dispute, NSI will take no further action.¹⁹⁵ If the domain name registrant is unable to produce the requested evidence within thirty days of NSI’s request letter, then the registrant may, within the same period, submit a Registration Agreement requesting the registration of a new domain name and a written request which includes the NIC tracking number assigned by NSI in response to the new Registration Agreement.¹⁹⁶ If the registrant follows this latter procedure, then NSI will assist the registrant with the registration of a new domain name and will allow the registrant to maintain both names simultaneously for a period of ninety days.¹⁹⁷ At the end of the ninety-day period, the challenged domain name will be placed on “hold” status pending resolution of the domain name dispute.¹⁹⁸ A domain name on “hold” status is not available for registration by any other party.¹⁹⁹

The domain name will also be placed on hold if within thirty days of receipt of NSI’s dispute notification letter:

- the registrant fails to provide evidence of the ownership of a registered trademark or service mark whose registration date is prior to the date on which the complainant first notified the domain name registrant of the dispute, or
- the registrant fails to relinquish the domain name and transfer it to the complainant, or
- the registrant fails to register a new and different domain name pursuant to §9(d), or
- the registrant fails to provide a file-stamped copy of a civil action related to the registration and use of the domain name, filed against the complainant in a “court of competent jurisdiction.”²⁰⁰

The domain name will remain on hold until such a time as NSI receives “a properly authenticated temporary or final order by a court of competent jurisdiction, or arbitral award, stating which party to the dispute is entitled to the domain name,” other satisfactory evidence of the resolution of the dispute, or a request from the complainant that the name be released from “hold” status.²⁰¹

In the event that NSI receives from the registrant a copy of a filed civil action noted in the text to note 200, above, NSI “ will deposit control of the domain name into the registry of the court by supplying the registrant with the registry certificate for deposit.”²⁰² In the event that the complainant files such a civil action and provides the proper documentation to NSI, NSI “will deposit control of the domain name into the registry of the court by supplying the complainant with the registry certificate for deposit.”²⁰³ In both situations, NSI agrees to abide by a temporary or final court order, or arbitral award, directing the disposition of the domain name, **so long as** NSI is not named as a party in the action and the domain name registrant is so named.²⁰⁴ If NSI is named as a party, it reserves the right

to raise any and all defenses deemed appropriate, and “to take any other action necessary to defend itself.”²⁰⁵

Instead of adopting a comprehensive policy directed toward the resolution of domain name disputes, NSI’s policy seems merely an attempt to avoid involvement, and where that is impossible, liability. A comprehensive dispute resolution policy such as that adopted by a CORE seems far more likely to reduce potential involvement and liability than that adopted by NSI.

C. The Canadian Domain Name Consultative Committee Proposed Dispute Policy For the .ca Domain

The Canadian Domain Name Consultative Committee ("CDNCC"), which has been given interim oversight of the .ca domain, has proposed a policy similar to that of NSI.²⁰⁶ Under the proposed policy, domain name applicants must sign a contract in which the proposed non-profit corporation which will administer the .ca domain, the Canadian Internet Registration Authority ("CIRA"), will disclaim any responsibility for the registrant's use of the SLD. The CIRA will not resolve disputes, and it is the responsibility of the registrant to resolve any dispute with a third party.

In the event of a dispute, the CIRA will maintain the operation of the domain name unless and until the registrant instructs the CIRA to the contrary or the CIRA receives a valid order from a Canadian court requiring it to take specific actions. Foreign parties that register SLDs in the .ca domain will be required to agree to be subject to Canadian law regarding their use of Canadian registered names. The CIRA intends to develop a mediation service for domain name disputes. Participation in mediation would be voluntary.

D. The InternetOne Domain Name System and Dispute Resolution

InternetOne (“IO”) is a not-for-profit British corporation which administers the Indian Ocean domain (.io). As part of this administration, IO has established a shared domain name indexing system, which permits identical domain names to co-exist in the same registry. It employs a combination of domain name, Uniform Resource Locator (URL), and registrant description in achieving this function. Each registrant represents to IO that the registration and use of the domain name will not infringe the rights of third parties, will not be used for an unlawful purpose, that the information furnished in conjunction with the registration is accurate, and that contact information is up-to-date, including that for the agent for service of process.²⁰⁷

When identical domain names have been registered, a party communicating via use of the domain name will access a “distinguishing information page.” This page will list the domain names for each of the registering entities, with associated text describing and identifying each of the registrants, and hypertext links to each of the registrants' Internet sites. The accessing party will be able to link directly to the desired site.

As a condition of registration with IO, a registrant agrees that any dispute will be determined according to the IO dispute resolution policy.²⁰⁸ As part of the policy, the registrant agrees that it will notify IO of the commencement of any legal proceedings in connection with the registration or use of an IO domain name.²⁰⁹ The registrant also agrees to the non-exclusive jurisdiction of the English courts over actions brought against the registrant in connection with the registration or use of the domain name.²¹⁰ The registrant also consents to arbitration under the WIPO Expedited Arbitration Rules, As Adapted For Internet One Dispute Resolution Policy, at the option of any third party.²¹¹

Proceedings are initiated by filing a Request for Arbitration with the WIPO Center.²¹² The current draft rules provide for communications to be made electronically through the Center's online dispute resolution facilities, as well as by telefax, courier service, or expedited postal service.²¹³ The request for arbitration is to be accompanied by a Statement of Claim, containing a comprehensive statement of the facts and legal arguments and, to the extent possible, the documentary evidence on which the claimant relies.²¹⁴ Within 20 days of the availability of the request for arbitration to the respondent or within ten days of the appointment of the tribunal, whichever occurs later, the respondent must transmit its answer accompanied by a Statement of Defense, including the same material as the Statement of Claim.²¹⁵ The Statement of Defense may include any counterclaim or set-off, including the same material as the Statement of Claim.²¹⁶

The Tribunal is to consist of a sole arbitrator jointly appointed by the parties within 15 days of the commencement of the arbitration, or failing such appointment, by the Center.²¹⁷ Unless otherwise agreed, the arbitrator shall be of a nationality different from those of the parties.²¹⁸ The arbitrator shall be impartial and independent, and the same limitations on *ex parte* communications apply as in the ACP Rules.²¹⁹ The tribunal is given great discretion in the conduct of the arbitration, so long as both parties are treated with equality and both are given fair opportunities to present their case.²²⁰ The tribunal is charged with completing the proceedings expeditiously, although the Tribunal has the discretion, in exceptional cases, to extend the periods of time fixed by the rules.²²¹

The place of the arbitration shall be determined by the Center, but the tribunal may conduct hearings wherever it deems it appropriate.²²² The language of the arbitration shall be that of the arbitration agreement, subject to change by the tribunal.²²³ The tribunal may order that documents be

translated into the language of the arbitration.²²⁴ The WIPO Online Rules mirror the WIPO Arbitration Rules in the areas of evidence, experiments, site visits, agreed primers and models, and disclosure of trade secrets and other confidential information.²²⁵

A hearing shall be held at the request of either party or at the discretion of the tribunal, either in the form of a physical meeting, a telephone or video conference, or “other similar simultaneous means of electronic communication.”²²⁶ If a hearing is held, it shall be held within 30 days after the receipt by the claimant of the Answer and Statement of Defense.²²⁷ Unless otherwise agreed, the hearing is private, and the tribunal shall determine what, if any, record shall be made of the hearing.²²⁸ Each party may submit a post-hearing brief within an undefined “short period of time after the hearing,” either as agreed by the parties or determined by the tribunal.²²⁹

The tribunal is to decide the dispute in accordance with the law or rules of law chosen by the parties.²³⁰ Failing such a choice, the arbitrator is to apply the law or rules of law it determines to be appropriate.²³¹ The proceedings should, wherever reasonably possible, be declared closed within three months of the availability of the Statement of Defense or of the establishment of the tribunal, whichever occurs later.²³² The final award shall, wherever reasonably possible, be made within one month of the declaration of the closing of the hearings.²³³ In making its award, the remedies which a tribunal may award are limited by the IO dispute resolution policy to the provisional suspension of a registration for the duration of the proceedings; the cancellation of a registration; or if the parties agree, a modification of the registration.²³⁴ IO is bound to implement the decision of the WIPO arbitrator or “any order or decision of a court that is enforceable against it.”²³⁵

The IO dispute resolution policy and the Draft Online Rules are similar to the Panel Guidelines and the WIPO ACP Rules, with several significant differences:

- There is no requirement that the IO tribunal decisions be made available to the public, and no requirement that the IO tribunal look to previous decisions in arriving at its decision. Thus, in the current draft, the Draft Online Rules do not give the same impetus to uniformity and consistency of decision.
- There is no provision for third-party participation under the IO dispute resolution policy or the Draft Online Rules.
- There is no provision for appeal of a tribunal's determination.
- The IO dispute resolution policy requires consent to the jurisdiction of a particular court (England), while the Panel Guidelines do not.

Otherwise the procedures for dispute resolution are quite similar.

VII. ONLINE DISPUTE RESOLUTION

Organizations have begun to adopt procedures for resolving disputes online. Some of these procedures anticipate that the entire dispute will be resolved electronically, without any face to face meetings of the parties or the tribunal. Others contemplate the possibility of live hearings, with the management of documents handled solely electronically. Four of the more prominent current experiments with online dispute resolution are the WIPO Online Expedited Procedures, the Virtual Magistrate Project, the CyberTribunal, and the Online Ombuds Office.

A. The WIPO Online Expedited Procedures

In the discussion of the resolution of domain name disputes in the InternetOne domain, (as above) the application of the WIPO Online Expedited Procedures were discussed. These procedures were designed to resolve not only domain name disputes, but any dispute involving intellectual property. Digital communications are encouraged to be used to the maximum extent possible. Facilities will be established to insure secure communications, and parties and neutrals will be able to communicate in real time using electronic "chat" capabilities, as well as audio and televideo as those facilities become available. The WIPO is working to adapt not only the technical infrastructure necessary to support online dispute resolution, but also the legal infrastructure.²³⁶

B. The Virtual Magistrate Project

The Virtual Magistrate Project (hereinafter the "VM Project") is an experimental project designed to offer rapid resolution of disputes involving users of online systems, those who claim harm due to wrongful messages, postings, or files placed online, and online system operators. It is a joint venture of the Cyberspace Law Institute, the American Arbitration Association, the National Center for Automated Information Research, and the Villanova Center for Information Law and Policy.²³⁷ The goals of the VM Project include:

- to establish the feasibility of online dispute resolution;
- to help to define the reasonable duties of system operators;
- to provide system operators with informed and neutral judgments on complaints regarding postings;
- to provide users with cost-efficient remedies for complaints concerning online messages, postings, or files; and

- to explore the feasibility of using the project to resolve other disputes related to computer networks.

The VM Project accepts complaints about messages, postings, or files concerning alleged trademark or copyright infringement, misappropriation of trade secrets, defamation, fraud, deceptive trade practices, inappropriate materials (including alleged obscenity), invasion of privacy, and other wrongful conduct. The VM tribunal will determine whether it is reasonable for the system operator to delete or restrict access to a challenged file, or in appropriate circumstances to deny access to the system to the accused wrongdoer. The VM Project is not designed to resolve claims for monetary damages.²³⁸

The Virtual Magistrate Project Basic Rules (hereinafter the "Basic Rules") vests great discretion in the arbitral tribunal (the "Magistrate") in the conduct of the proceedings.²³⁹ The goal of the Basic Rules is to attempt to resolve complaints within 72 hours of acceptance.

Complaints must be submitted through e-mail addressed to vmag@mail.law.vill.edu. Alternatively, the complainant may use the complaint form available at <http://vmag.law.vill.edu.8080/>. The complaint should describe the nature of the disputed activity or conduct and the identity of the parties. Where possible the complaint should include:

- a description of the conduct giving rise to the complaint;
- the reason relief is sought;
- the name, affiliation, address, and e-mail address of the complainant;
- the name, address, and e-mail address of any network or system operator whose actions or facilities are relevant to the complaint;

- the name, affiliation, address, and e-mail address of any other persons whose activities or facilities are relevant to the complaint;
- any posted material that is relevant to the complaint.

The Basic Rules permit, at the Magistrate's discretion, a party to proceed anonymously. A complainant may request that information pertaining to the complaint not be made public, and any party may request confidentiality for all submissions. Discretion to grant such requests is vested in the Magistrate. In any event, complaints and related materials will not be made available to the public until the Magistrate has issued a decision.

The American Arbitration Association will screen the complaints received and will request additional information where appropriate, before accepting the complaint. Before the matter can be referred to a Magistrate, all necessary parties must agree to participate in the proceedings. The 72-hour period does not commence until the necessary parties have so agreed.

Once the complaint has been accepted, the American Arbitration Association will appoint the Magistrate. This appointment and the forwarding of the complaint to the Magistrate may occur prior to agreement, where it appears that the Magistrate may be able to assist the parties in reaching the necessary agreement. Upon receipt of the complaint, the Magistrate must acknowledge receipt promptly. Failure to promptly acknowledge may result in the re-assignment of the matter to another Magistrate.

A secure site for communications (the "grist") will be established and passwords will be sent to all participants. The Magistrate is given broad discretion in the conduct of the proceedings so long as the process is "fair and appropriate." The Magistrate may decide to ask for additional information, may

contact the parties, may conduct proceedings, ask questions, take argument, or conduct the matter in any other manner he deems appropriate. The Magistrate should, "when practical," keep participating parties informed of these activities and is obliged to share with the parties any information received.

The Magistrate, at its discretion, may receive private communications from any of the participants, and from persons who are not participants to the proceedings. The Magistrate is required to maintain a copy of all records, correspondence, evidence, and other materials received in relation to a particular case. These records are required to be forwarded to the Villanova Center for Information Law and Policy.

To the extent that procedural matters are not addressed by the Basic Rules "or in other Virtual Magistrate Procedural documents," the matters will be governed by the American Arbitration Association's Commercial Arbitration Rules "and general principles of fairness."²⁴⁰

The Magistrate is limited to granting relief in the form of requiring the system operator to delete, mask, or otherwise restrict access to a challenged message, posting, or file. In extreme cases a Magistrate may determine that it is appropriate for a system operator to deny the wrongdoer access to the system. The Magistrate is not empowered to award monetary damages.

To date, the Virtual Magistrate has decided one case, which is one more case than any other online process has reported. That case is *Tierney and EMail America*, Docket No. 96-0001, May 8, 1996.²⁴¹ In *Tierney*, EMail America had placed an advertisement on the America Online system ("AOL") offering to sell five million e-mail addresses for bulk mailings. The petitioner sought removal of the advertisement on three grounds:

- 1) the advertisement promoted bulk e-mailing, a practice against public policy and against AOL's own policies;
- 2) the advertisement was a potential violation of petitioner's privacy;
- 3) the advertisement was deceptive in that it impliedly promised great profits through the use of the e-mail addresses purchased.

The Magistrate agreed that the advertisement was deceptive, and requested that AOL remove the advertisement. The Magistrate issued its decision within four days of submission of the dispute, and AOL complied with the award.²⁴²

C. The CyberTribunal

The CyberTribunal is a project developed by the *Centre de recherche en droit public* of the University of Montreal Faculty of Law. The project is entitled "CyberTribunal," and it employs mediation and arbitration, for the most part conducted online, for the resolution of certain disputes which arise in electronic commerce. The project's focus is twofold: first, the process of developing rules of conduct; and, second, the process of effective application of regulations for the prevention and resolution of conflict. The spheres of action of the CyberTribunal are:

- Electronic commerce;
- Competition;
- Copyright;
- Trademark;

- Freedom of expression;
- Privacy; and
- Other appropriate areas, not including criminal law.

The CyberTribunal will not issue decisions on issues of a public nature, and will limit itself to issues which concern new information technology law.

As an experimental project, the services of the CyberTribunal will be offered free of charge. Mediators and arbitrators will be jurists and non-jurists from around the world who specialize in commercial dispute resolution and new information technology law. The CyberTribunal will conduct the bulk of the procedures over the Internet and has the computer capability to ensure the confidentiality of the proceedings. All parties must expressly consent to submit their dispute to the CyberTribunal, and proceedings can be conducted in French or English, with Spanish to follow.

1. CyberTribunal Mediation

The CyberTribunal has elected not to adopt rules of procedure in order to give the maximum freedom to the mediator in the conduct of the mediation, due to the special nature of online mediation. An online mediation module, which includes forms for the initiation of mediation, provides a basic framework for the conduct of the mediation. The framework is designed to enhance, rather than retard, the flexibility of the procedure. The framework exists to encourage the parties to take maximum advantage of the electronic medium.

2. CyberTribunal Arbitration

Rules of procedure were adopted for arbitration, rules which are based on the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules and the International

Chamber of Commerce ("ICC") Arbitration Rules, although modified to take into account the special nature of electronic arbitration.²⁴³ One of the interesting features is the use of compulsory forms. Wherever forms exist for a particular purpose, the parties are required to use them.²⁴⁴ Where no such forms exist, the parties may communicate with the Secretariat or the arbitral tribunal by means of e-mail "or any other means."²⁴⁵

A party initiates the arbitration by transmitting an application for arbitration on the proper form to the Secretariat.²⁴⁶ Within five days of receipt and following an examination, the Secretariat will notify the parties whether the submission comes within the competence of the CyberTribunal.²⁴⁷ Within two weeks of the receipt of the form, the Secretariat shall transmit an acknowledgment of receipt to the claimant and notification of receipt to the "defendant."²⁴⁸ If the Secretariat believes mediation to be appropriate, it will invite the parties to mediate. This invitation must be accepted within two days. If the parties agree to mediate, the arbitration is suspended, and, should mediation fail, the arbitration must be re-initiated by the filing of a new application for arbitration.²⁴⁹

The application for arbitration shall include:

- the complete names, affiliations, occupations, and electronic and postal addresses of each of the parties;
- a description of the nature and circumstances of the dispute;
- the purpose of the application and the nature of relief sought;
- a list of the evidence on which the application is based;²⁵⁰
- the text of the dispute resolution clause or submission agreement; and
- "any other useful observation."²⁵¹

Within fifteen days of the receipt of notification from the Secretariat or of the parties' refusal to engage in mediation, the defendant shall transmit its answer, including:

- its complete names and affiliations, occupations and e-mail and postal addresses;
- its comments on the nature and circumstances of the dispute;
- its position regarding the stated purpose of the application and the relief sought;
- a list of the evidence on which the answer is based; and
- "any other useful observations."²⁵²

The defendant may file a counterclaim at that time, or may do so later provided that the arbitration tribunal accepts it.²⁵³ The Secretariat shall file the application, answer, and any counterclaim in "the site of the case in question," which is a Web site set up to store the set of data, documents, and information relevant to the conflict, and which is accessible only by the use of a secret code to be communicated by the Secretariat to the parties and the tribunal.²⁵⁴ In addition to the initial pleadings, all documents, reports, exhibits, facts, and information that either party intends to present as evidence must be filed in the "site of the case in question."²⁵⁵

The arbitral tribunal shall consist of one or three arbitrators at the Secretariat's discretion, unless the parties have expressly agreed on the number.²⁵⁶ The arbitral tribunal shall be appointed by the Secretariat subject to the approval of the parties. In making the appointment, the Secretariat must consider the arbitrator's nationality, place of residence, and any links the arbitrator might have to the parties' countries of origin.²⁵⁷ The parties have two days within which to indicate their disapproval and this time limit is compulsory.²⁵⁸ If a party rejects an arbitrator, the Secretariat will appoint another,

whose appointment is final, subject only to challenge for serious doubts as to the arbitrator's independence and impartiality.²⁵⁹

Unless the arbitral tribunal decides otherwise, "the language of the procedure shall be French or English."²⁶⁰ The jurisdiction of the arbitral tribunal may be challenged, so long as such challenge is raised, at the latest, at the time an answer is filed.²⁶¹ The arbitral tribunal is empowered to rule on its own jurisdiction, either as a preliminary matter or at the time of its ultimate decision.²⁶² The tribunal is empowered to take provisional measures "with respect to the substance of the conflict," and the request for such measures addressed to a judicial tribunal is not to be considered a renunciation of the right to arbitration.²⁶³

The parties are free to agree on the applicable substantive law.²⁶⁴ Where the parties fail to so agree, the arbitral tribunal shall select "the national law with which the conflict has the closest links," except where one of the parties is a "consumer," in which case the national law of the consumer is to be applied.²⁶⁵ In all cases, the arbitral tribunal is "to take into account the contract and prevailing cyberspace practices."²⁶⁶ The arbitral tribunal may only act as *amiable compositeur* if expressly authorized by the parties to do so.²⁶⁷

Unless the tribunal determines otherwise, testimony will be given electronically.²⁶⁸ Computerized documents filed by the parties must be accompanied by reliable guarantees, the sufficiency of which shall be determined by the arbitral tribunal.²⁶⁹ Guarantees of sufficient reliability must include the following, which is not to be considered a minimum security standard:

- systematic document input by a responsible person;
- use of encryption for document transmission;

- establishment of reasonable security measures; and
- reasonable maintenance of the operating system.²⁷⁰

After examining the written submissions, the arbitral tribunal may decide to hear witnesses or experts, either in person or by other appropriate means, such as telephone or video conference. The arbitral tribunal may, at its discretion or at the request of a party, authorize a hearing at a physical location. Before closing the proceedings, the arbitrator may invite the parties to submit their conclusions on the appropriate form within ten days of the invitation.²⁷¹

Once the parties have been given the opportunity to present evidence and produce witnesses or statements, the arbitral tribunal shall declare the hearings closed.²⁷² The tribunal shall render its award within 30 days of the declaration of closure, unless the Secretariat extends this limit at the justified request of the arbitral tribunal.²⁷³ Where the arbitral tribunal consists of three members, its decision shall be by a majority.²⁷⁴ The arbitral tribunal shall transmit its award to the parties by encrypted e-mail and file it in the "site of the case in question."²⁷⁵ The award must give reasons, and the electronic signatures of the arbitrators must be affixed.²⁷⁶ The award rendered is final and not subject to appeal and the parties undertake to execute the award without delay.²⁷⁷ Unless either of the parties oppose it, the award will be posted on the CyberTribunal Web site 60 days after it is rendered.²⁷⁸ In the event of such opposition, the Secretariat may propose to the parties that the award be redacted of identifying characteristics and then posted.²⁷⁹

D. Online Ombuds Office

The Online Ombuds Office is a project of the Center for Information Technology and Dispute Resolution at the University of Massachusetts.²⁸⁰ Established in 1996, it provides mediation services in

the resolution of certain types of disputes, including disputes between members of newsgroups or list-servers, domain name disputes, disputes between competitors in cyberspace, spamming disputes, disputes with ISPs, and copyright disputes. There is no defined set of procedures, but an "ombudsperson" acts to mediate disputes. Mediation is conducted online, at no cost to the user. The present program is funded by outside grants.

The program is extremely informal and flexible.²⁸¹ At present, there is no assurance of confidentiality of communications, but the project is working to provide the option of anonymous communication.

VIII. CONCLUSION

Cyberspace does not recognize geopolitical boundaries. Parties from anywhere on the globe, or anywhere above it, so long as electronic communication can be established, can transact business with someone located anywhere else. Parties transacting such business do not have to, and may not, know where the other party is domiciled, where the other party is physically at the time the transaction is consummated, or what the legal regime is at such location. International bodies move slowly to adopt unified solutions. The speed of progress of electronic commerce is exponential. Disputes are arising and will continue to arise in increasing numbers. Business people require a dispute resolution mechanism which meets their needs.

Business people desire a dispute resolution system that is predictable. When different nations apply different laws to similar disputes, that need is not met. Business people need a cost-effective method for the resolution of their disputes. To be subject to being summoned into the national court of

any geopolitical entity on the globe is not cost effective. Business people require neutrality in the decision makers. They do not want to fear that national courts might be predisposed to their own citizens. The decision makers should have expertise and understanding of the business practices and in the determination of the specific types of disputes at issue. More often than not, the time and attention of national court judges is spread over a wide range of matters, most of which have no relation to commercial disputes. Business people want to know that any decision which they might receive will be enforceable. In the case of a national court judgment that is far from certain.

Arbitration (and mediation, as a first resort) is capable of providing what is required. At present, it has an international presence with arbitrators who are experienced in many commercial areas. It has an international treaty (the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) that provides for ready enforcement of an award in the territory of virtually all trading nations of the globe. The neutrality of international arbitral institutions is generally recognized. However, there are some requirements of which the present arbitral regime falls short.

Arbitration is not currently predictable. As arbitral awards are confidential, and as arbitrators are not required to follow decisions of previous arbitrators, a business person has no precedent at which to look. Arbitration is not necessarily cost effective. Moving parties and arbitrators to a location which is mutually inconvenient for the parties concerned may be of little importance when hundreds of millions of dollars are at issue. Yet what if tens of thousands of dollars are at stake? At present, it is not economically feasible to pursue such a claim. The new arbitral procedures of the World Intellectual Property Organization, the Virtual Magistrate, and the CyberTribunal are steps toward meeting these needs. Their mediation programs, and those of the Online Ombuds Office, provide a cost effective

means of amicably resolving disputes between distant parties in an efficient manner. Only time will tell if such initiatives will evolve to satisfy the needs of cyberbusiness.

1 M. J. Ezor, "Representing the New Media Company: Advertising on the Web," *The Computer Lawyer*, Vol. 15, No. 5, May 1998, at 7.

2 *Cyberspace Lawyer*, Vol. 3, No. 1, March 1998, at 28.

3 *Id.*

4 *Id.*

5 *See, e.g.*, <http://www.atlantabank.com/checkus.htm>.

6 *See, e.g.*, <http://www.netroadshow.com/abouttrs.asp>.

7 For much of the discussion that follows, the author gratefully acknowledges the source of his understanding, Ron Danielson, Associate Professor of Engineering at Santa Clara University, with whom the author teaches a course in law and technology at the Santa Clara University School of Law.

8 The text of the draft Directive may be found at <http://www.ispo.cec.be/eif>.

9 *Id.*

10 California is one of these states. *See*, Cal. Gov't. Code Sec. 16.5 (1995). For a current summary of state legislation, *see*, <http://www.mbc.com>.

11 Draft UCC Article 2B.

12 A copy of the guidelines is available at <http://www.abanet.org/scitech/ec/isc>.

13 130 F.3d 414 (9th Cir. 1997)

14 *CD Solutions, Inc. v. Tooker*, 965 F. Supp. 17 (N.D.Tex. 1997)

15 977 F.Supp. 327 (D.N.J. 1997)

16 *Id.*, at 330.

17 *Id.*, at 334.

18 937 F.Supp. 161 (D. Conn. 1996).

19 *Id.*, at 162-163.

20 *Id.*

21 *Id.*, at 163.

22 *Id.*, at 163, 164, and 165. Apparently the plaintiff produced no evidence of actual "hits" on defendant's Web sites by users based in Connecticut.

23 *Id.*, at 165.

24 947 F.Supp. 1328 (E.D. Mo. 1996).

25 *Id.*, at 1330.

26 *Id.*

27 *Id.*, at 1331, 1333, and 1333, n. 4. In arriving at the number of "hits," the court did not count the
180 "hits" initiated from users employed by the plaintiff, because a plaintiff could create jurisdiction
by such methods.

28 *Panavision International, L.P. v. Toepfen, et al.*, 141 F. 3d 1316 (9th Cir. 1998).

29 *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997).

30 The distinguishing factor seems to be that *Panavision* involved a cybersquatter, while *Cybersell*
did not.

31 89 F.3d 1257 (6th Cir. 1996).

32 *Id.*, at 1260.

33 *Id.*

34 *Id.*, at 1263.

35 *Id.*, at 1264.

36 Landgericht Berlin, November 20, 1996, 5 U 659/97, 97 0 193/96 (upheld on appeal March 25,
1997); Landgericht Dusseldorf, April 4, 1997, 34 O 191/96. *See*, S. Abel, Trademark Issues In
Cyberspace, at www.fenwick.com/pub/cyber.html for more extensive discussion and additional
cases.

37 3 Cyberspace Lawyer No. 2, at 38 (April 1998).

38 2 Cyberspace Lawyer No. 7, at 28 (October 1997).

39 A particular example is the copying of music recordings, both of legitimate and illegitimate origins. The
music industry is currently suffering losses from foreign piracy in the tens of millions of dollars, and
Internet piracy can only add to those losses. M. Mayer, "Do International Internet Sound Recording
Infringements Implicate U.S. Copyright Law?", 15 *The Computer Lawyer* 11 (May 1998).

40 991 F.2d 511 (9th Cir. 1993).

41 *Id.*, at 518.

42 *Id.*

43 *Id.*

44 *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 964 F.2d 965 (9th Cir. 1992).

45 17 U.S.C.A. Sec. 106(3).

46 839 F.Supp. 1552 (D.C.M.D. Fla. 1993).

47 *Id.*, at 1554.

48 *Id.*

49 *Id.*, at 1556.

50 *Id.*

51 *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F.Supp.
1361 (N.D. Cal. 1995).

52 *Id.*, at 1372.

53 *Id.*

54 17 U.S.C.A. Sec. 602(a).

55 *Information Infrastructure Task Force, Intellectual Property and the National Information
Infrastructure: The Report of the Working Group on Intellectual Property Rights* (1995), at 95 and
Appendix 2: Statutory Markup at 3.

56 In the pending case of *Ticketmaster Corp. v. Microsoft Corp.* (No. 97 Civ. 3055, C.D. Cal. 1997), Ticketmaster contends that Microsoft's linking to the Ticketmaster Web site constitutes an unauthorized use that is actionable. First Amended Complaint, ¶¶ 12 and 18. Microsoft takes the position that it only supplies the user with the address (the URL) of Ticketmaster's Web page. Answer to First Amended Complaint, Affirmative Defenses and Counterclaims, ¶ 45.

57 *See, generally*, Allen R. Grogan, "Implied Licensing Issues In the Online World," 14 *The Computer Lawyer* 1 (August 1997).

58 The settlement agreement is available at <http://www.callaw.com/opinions/hotdocs/totalnew.html>.

59 *Id.*

60 *The Shetland Times Co., Ltd. v. Wills*, Scotland Court of Session, Oct. 24, 1996.

61 *Id.*, at *3.

62 *Id.*, at *4.

63 *Id.*, at *6.

64 17 U.S.C.A. §§ 107(1) – (4).

65 15 U.S.C. Sec. 1125(c), et. seq.

66 15 U.S.C. Sec. 1127.

67 *Id.*

68 www.Web.net/~misha/trademark.html.

69 Case No. C 93-04260 CW, 1996 U.S. Dist. LEXIS 20470 (N.D. Cal. Dec. 18, 1996).

70 Other information which is "invisible" to the user can also be used in this manner. In our Pepsi Web site example, the Web master could have the terms "Coke" and "Coca-Cola" appear in white on a white background or in black on a black background, such that they are invisible to a user accessing the site, but which will be registered by a "spider" crawling the Web for purposes of search engine indexing.

71 In the case of *Playboy Enterprises, Inc. v. Calvin Designer Label*, No. C-97-3204 CAL, a Northern District federal court granted a preliminary injunction against the use of Playboy trademarks in meta-tags, but no case has yet gone to final judgement on this issue.

72 No. C 96-2703 THE, 1997 U.S. Dist. LEXIS 20877 (N.D. Cal., decided Dec. 17, 1997).

73 *ActMedia, Inc. v. Active Media International, Inc.*, Case No. 96C 3448, 1996 U.S. Dist. LEXIS 20814 (N.D. Ill., decided July 12, 1996).

74 Most courts have rejected the position that mere registration of a domain name, without more, can constitute trademark infringement, as it does not constitute a commercial use. *See, e.g.* *Panavision International, L.P. v. Toeppen*, 945 F. Supp. 1296, 1303 (C.D. Cal. 1996); *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949 (C.D. Cal. 1997).

75 141 F.3d 1316 (9th Cir. 1998).

76 950 F. Supp. 737 (E.D. Va. 1997).

77 *Id.*, at 741.

78 42 U.S.P.Q. 2d (BNA) 1430 (S.D.N.Y. 1997).

79 No. 5:96-CV-1021-BR(3), 1997 U.S. Dist. LEXIS 2144 (E.D. N.C.).

80 983 F. Supp. 1331 (D. Or. 1997) at 1332.

81 *See* section III, above.

82 See section V,C, above.
83 Generic top level domains, such as *.com*, *.gov*, and *.int*.
84 The report is available at www.iahc.org/draft-iahc-recommend-00.html.
85 IAHC Final Report, §7.1.1.
86 *Id.*
87 *Id.*, at §7.1.2.
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.*
93 The document may be found at www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm.
94 A Proposal to Improve Technical Management of Internet Names and Addresses, Discussion
Draft, 1/30/98, which may be found at www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm.
95 *Id.*, at Appendix 2, §4.
96 U.S. Statement of Policy, n.13, *supra*.
97 *Id.*
98 *Id.*
99 *Id.*
100 The panel guidelines are available from the WIPO Arbitration and Mediation Center,
arbiter.mail@wipo.int.
101 Panel Guidelines, Art. I,5.
102 *Id.*, Art. IV,17. Factors which **may** establish an “intellectual property right” include an intellectual
property registration certificate, a certificate of filing an application for an intellectual property right
(provided the application was made in good faith), evidence establishing the existence of a non-
registered intellectual property right, or a final and authoritative court decision establishing such
right. Each of the above must be derived from a jurisdiction that is subject to the Paris Convention
or Trade-related Aspects of Intellectual Property Rights (“TRIPS”). *Id.*, Annex A. Factors which
conclusively establish the equivalent of an intellectual property right include an alphanumeric string
which has been the subject of a communication under Article 6ter of the Paris Convention, or the
corresponding provision of TRIPS, a name published by the World Health Organization in the
Cumulative List of International Nonproprietary Names For Pharmaceutical Substances, an official
country name, or its translation or transliteration, or a two- or three-letter country code listed in
ISO 3166, or the name or initials of the organizations that participated in the gTLD Memorandum
of Understanding process. *Id.*, Annex B.
103 *Id.*, Art. IV,18.
104 *Id.*, Art. III,E,16.
105 *Id.*, Art. III,A,7. And Art. III,B,9.
106 *Id.*, Art. III,C,13.
107 *Id.*, Art. III,C,14.
108 *Id.*, Art. V,A,21.

109 *Id.*, Art. V,A,21(d).
110 *Id.*, Art. V,B,23.
111 *Id.*, Art. V,B,24.
112 *Id.*
113 *Id.*, Art. V,B,25.
114 *Id.*, Art. V,D,28.
115 *Id.*, Art. V,D,29.
116 *Id.*, Art. V,D,30.
117 *Id.*, Art. V,D,32.
118 *Id.*, Art. V,D,34.
119 *Id.*, Art. V,D,35.
120 *Id.*, Art. V,D,36.
121 *Id.*, Art. VI.
122 *Id.*, Art. VII.
123 *Id.*, Art. VIII.
124 *Id.*
125 The WIPO ACP Rules may be found at www.wipo.org/eng/arbit/acprules.htm.
126 The WIPO ACP Rules, Art. 3(a).
127 *Id.*, Art. 6(a).
128 *Id.*, Art. 6.
129 *Id.*, Arts. 6(c) and 41.
130 *Id.*, Art. 9(a).
131 *Id.*, Art. 9.
132 *Id.*, Art. 34.
133 *Id.*, Art. 35.
134 *Id.*, Art. 36.
135 *Id.*, Arts. 8 and 11.
136 *Id.*, Art. 12.
137 *Id.*
138 *Id.*, Arts. 13 and 15.
139 *Id.*
140 *Id.*, Art. 17.
141 *Id.*, Art. 18(a).
142 *Id.*, Art. 20.
143 *Id.*, Art. 18.
144 *Id.*, Art. 19.
145 *Id.*, Art. 21(a).
146 *Id.*, Art. 46.
147 *Id.*, Art. 37.
148 *Id.*, Art. 38.
149 *Id.*, Art. 39.

150 *Id.*, Art. 40.
151 *Id.*, Art. 49(a).
152 *Id.*, Art. 41.
153 *Id.*, Art. 49(b).
154 *Id.*, Art. 42.
155 *Id.*, Art. 49(d).
156 *Id.*, Art. 43.
157 *Id.*, Art. 48.
158 *Id.*
159 *Id.*
160 *Id.*, at Art. 55(a).
161 *Id.*, at Art. 55(b).
162 *Id.*, at Art. 52, and, Panel Guidelines criteria, *supra*, in section VI,A, above.
163 *Id.*, at Art. 52.
164 *Id.*, at Art. 53(a).
165 *Id.*, at Art. 54(a) through (c).
166 *Id.*, at Art. 55(a).
167 *Id.*, at Art. 55(c).
168 *Id.*, at Art. 67(a).
169 *Id.*, at Art. 68.
170 *Id.*, at Art. 59.
171 *Id.*, at Art. 60.
172 *See* n.143, above, and the accompanying text.
173 The WIPO ACP Rules, at Art. 61.
174 *Id.*, at Art. 62(b).
175 *Id.*, at Art. 62(c) and (d).
176 *Id.*, at Art. 63.
177 *Id.*, at Art. 69(e).
178 *Id.*
179 The document may be found at <http://rs.internic.net/domain-info/nic-rev03.html>.
180 *Id.*, § 1.
181 *Id.*, § 2.
182 *Id.*, § 6.
183 *Id.*, § 3.
184 *Id.*
185 *Id.*, § 4.
186 *Id.*, § 7.
187 *Id.*, § 8.
188 *Id.*, § 8(a).
189 *Id.*
190 *Id.*, § 8(b).

191 *Id.*
192 *Id.*, § 9.
193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.*, § 9(d).
197 *Id.*
198 *Id.*
199 *Id.*
200 *Id.*, § 9(e).
201 *Id.*, § 9(f).
202 *Id.*, § 10(a). At least one court has rejected an attempt to deposit the domain name with the
court. *Network Solutions, Inc. v. Clue Computing, Inc.*, 946 F. Supp. 858 (D. Col. 1996).
203 *Id.*, § 10(b).
204 *Id.*, § 10(c).
205 *Id.*
206 Additional information on CDNCC, CIRA, and the policy is available at www.canarie.ca.
207 Dispute Resolution Policy for Domain Names registered with InternetOne (the “IO Dispute
Resolution Policy”), §1.1. This document is available at <http://www.io.io/dres.html>.
208 Terms & Conditions for the Registration of “IO” Domain Names, §5,1. This document is
available at <http://www.io.io/tandc.html>.
209 IO Dispute Resolution Policy, §2.2.
210 *Id.*, § 3.1.
211 *Id.*, § 3.2.1.
212 *Id.*, § 3.2.2.
213 Draft WIPO Online Expedited Arbitration Rules (“WIPO Online Rules”), Art. 4.
214 *Id.*, Arts. 10 and 41(b) and (c).
215 *Id.*, Arts. 11, 12, 41 (b) and (c), and 42(b) and (c).
216 *Id.*, Art. Art. 42(c).
217 *Id.*, Art. 14.
218 *Id.*, Art. 20.
219 *Id.*, Arts. 21 and 45. *See, supra*, notes 52 and 56 and accompanying text.
220 *Id.*, Art. 38.
221 *Id.*
222 *Id.*, Art. 39.
223 *Id.*, Art. 40.
224 *Id.*
225 *Id.*, Arts. 48-52. *And, see*, WIPO Arbitration Rules, Arts. 48-52.
226 *Id.*, Art. 53.
227 *Id.*
228 *Id.*

229 *Id.*
230 *Id.*, Art. 59.
231 *Id.*
232 *Id.*, Art. 63.
233 *Id.*
234 IO Dispute Resolution Policy, §3.2.3.
235 *Id.*, § 4.
236 Additional information is available at www.wipo.int.
237 George H. Friedman, "Alternative Dispute Resolution and Emerging Online Technologies:
Challenges and Opportunities," 9th Annual Computer Law Symposium, *Comm/Ent* 1997, 83,
86-87.
238 *See, generally*, <http://vmag.vclip.org/docs/smpaper.html>.
239 The Basic Rules are available at <http://vmag.vclip.org/docs/vmrules.html>.
240 This is a rather curious provision, as the Basic Rules purport to vest the Magistrate with broad
discretion, and the Commercial Arbitration Rules tend to specify and establish the limits of arbitral
authority.
241 The decision is available at <http://vmag.vclip.org/doksys/96-0001/>.
242 G. Friedman, *op. cit.*, n. 2, at 89.
243 Indeed, where the adopted rules are silent, they are expressly to be supplemented by reference to
the UNCITRAL Arbitration Rules. CyberTribunal General Arbitration Procedure, Art. 16.
244 *Id.*, Art. 3(1).
245 *Id.*, Art. 3(2).
246 *Id.*, Art. 4(1).
247 *Id.*, Art. 4(3).
248 *Id.*, Art. 4(2).
249 *Id.*, Art. 4(4).
250 Each party must file the listed evidence within ten days of its listing. *Id.*, Art. 18(5).
251 *Id.*, Art. 4(5).
252 *Id.*, Art. 5(1).
253 *Id.*, Art. 5(3).
254 *Id.*, Arts. 1(f) and 5(4).
255 *Id.*, Art. 15(2).
256 *Id.*, Art. 6(2) and (3).
257 *Id.*, Art. 6(6).
258 *Id.*, Art. 6(1) and (4).
259 *Id.*, Arts. 6(5) and 8(1).
260 *Id.*, Art. 10.
261 *Id.*, Art. 11.
262 *Id.*
263 *Id.*, Art. 14.
264 *Id.*, Art. 17(1).

265 *Id.*, and Art. 17(4).

266 *Id.*, Art. 17(2).

267 *Id.*, Art. 17(3).

268 *Id.*, Art. 18(2).

269 *Id.*, Art. 18(3).

270 *Id.*, Art. 18(4).

271 *Id.*, Art. 19.

272 *Id.*, Art. 20.7

273 *Id.*, Art. 21.

274 *Id.*, Art. 22.

275 *Id.*, Art. 23(1).

276 *Id.*, Art. 23 (2) and (3).

277 *Id.*, Art. 23 (4) and (5).

278 *Id.*, Art. 23 (6).

279 *Id.*

280 Additional information on the Ombuds Online Office's program is available at
<http://128.119.27/center/ombuds/default/htm>.

281 A transcript of a mediation conducted by Online Ombuds Office is available at
<http://128.119.199.27/center/ombuds/narrative1.html>.