

# INTERNET DOMAIN NAMES AND RIGHTS IN DISTINCTIVE MARKS: A GERMAN AND AUSTRIAN PERSPECTIVE

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## Introduction

### The predictable collision of interests

The allocation and use of Internet domain names<sup>1</sup> has recently raised concerns with respect to their relation to trade marks (and other rights in distinctive marks). Disputes can arise between trade mark owners and "extortionists" (those who deliberately obtain a domain name that mirrors a well-known trade mark or name for the purpose of selling it to the trade mark owner or the highest bidder) and between trade mark owners and holders of domain names for legitimate business or personal use. Up to now trade mark considerations have not, for the most part, been taken into account in the context of domain name allocation, which has led, as electronic commerce has exploded, to a predictable collision between domain name allocation and national trade mark law.<sup>2</sup>

### The current domain name system (DNS)<sup>3</sup>

A domain name must have at least two parts: a top level domain name (TLD), and a second level domain name (SLD).

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1 A domain name is a user-friendly substitute for an Internet address. A true Internet address is a number. To make them easier to remember, the numbered addresses are paired with "domain names". When the domain name is typed into a computer, the Internet software automatically converts the domain name to the numbered address, contacts the associated server, and the home page will appear on the computer screen.

2 Final Report of the International Ad Hoc Committee: Recommendations for Administration and Management of gTLDs, <http://www.iahc.org/draft-iahc-recommend-00.htm>. See also Cunningham, "The Internet, Domain Names and Trade Marks—A Recipe for Confusion" [1997] C.T.L.R. 128; Maher, "Trademarks on the Internet: Who's in Charge?" (1996) at <http://aldea.com/cix/maher.html> and Agmon/Halpern/Pauker, "Domain Names and Trademarks—What's in a name?" (Update April 12, 1996) at <http://www.law.georgetown.edu/lc/interNIC/disc.html> with further references; see also further references of the European Commission Legal Advisory Board at <http://www2.echo.lu/legal/en/interNIC/domnames/domnames.html>. See also Bettinger, "Kennzeichenrecht im Cyberspace: Der Kampf um die Domain-Namen". GRURInt 1997, 402, available also at [www.nic.de/rechte/bettinger.html](http://www.nic.de/rechte/bettinger.html) and Omsels, "Die Kennzeichenrechte im Internet", GRUR 1997, 328; Maver-Schönberger, "Das Recht am Info-Highway", Orac Wien 1997, 156ff; Jordan, "Summary and Comments regarding the IAHC Domain Name Recommendations" <http://www.cyberlaw.com/jrdn.html#1>; Abel/Tiki Dare, "Trade Mark Issues in Cyberspace", <http://www.fenwick.com/pub/cyber.html>.

3 As described in the IAHC Charter at <http://www.iahc.org/draft-iahc-recommend-00.htm>. For an overview of the usual domain name acronyms, see <http://www.wipo.int/eng/arbit/acronyms.htm>.

The levels of the domain names are counted from right to left.<sup>4</sup> There can be only one of each particular SLD in each TLD. A number of TLD registries already exist: one for each country (according to the ISO 3,166 country codes such as .uk, .fr, .us, .de, .at, etc.) and a small number which are international (iTLD) such as .com, .org, .net<sup>5</sup> and .int.<sup>6</sup> SLDs are allocated on a first-come, first-served basis within each TLD.<sup>7</sup>

The old (but still present) system for assigning the international TLDs .com, .org and .net was established by several private and United States government organisations working together, including the (United States) National Science Foundation (NSF), Internet Society (ISOC) and Internet Assigned Number Authority (IANA) among others. Together they established InterNIC (Internet Network Information Center), a virtual organisation, to provide services in the United States. InterNIC, through NSF, contracted with Network Solutions, Inc. (NSI), a private company, to register names for domain names with the TLDs .com, .org and .net.<sup>8</sup>

NSI, like most registries, assigns domain names on a first-come, first-served basis. Currently, there is only one international TLD available to companies and individuals, namely ".com". By the end of 1995, the number of ".com" domain names exceeded 200,000 and by the end of 1996, the number of ".com" domain names exceeded 600,000. As a result, domain names including the ".com" suffix now form the overwhelming majority of names on the Internet and the longer one waits to apply to NSI for a ".com" name, the greater the chance that one's choice will not be available.<sup>9</sup>

The recent explosive commercialisation of the Internet has produced a requirement for enhanced assignment procedures. Also the human-friendly quality of domain name strings has made them commercially valuable.

4 In the domain name "name.com", the TLD is ".com" and the SLD is "name".

5 For entities which are commercial, organisational and network infrastructure in nature, respectively.

6 The TLD ".int" is reserved for international treaty organisations, which must use their name or acronym as SLD (such as "wipo.int"). See also White Paper INTA, Pt III.E, at <http://www.inta.org/wpwhole.htm>. The TLDs ".mil", ".edu" and ".gov" only exist (as historical anomalies) in the U.S. They are reserved for military, educational institutions and governmental agencies, respectively.

7 There can be third level domain names as well. For example, many country-code TLDs include functional SLDs, such as ".co.uk" for companies in the United Kingdom. The home page for such a company would be accessed by a third level domain name such as "company.co.uk".

8 See INTA White Paper, Pt III.C, at <http://www.inta.org/wpwhole.htm>.

9 See INTA White Paper, Pt III.D, at <http://www.inta.org/wpwhole.htm> and EU-DG XV/E-3, "The Internet Domain Name System and Trademarks", Working Document of the Commission Services, at 3.

### Specific problems of domain names in comparison to trade marks

In the trade mark system, the same name can be registered as a trade mark by different entities, for example in connection with different goods or services, or in different countries. In the domain name system, each domain name must be unique, so that a particular domain name in a TLD can be registered and used by only one entity worldwide.<sup>10</sup>

Also current domain name allocation procedures allow the holding of generic names as SLDs. Internationally accepted intellectual property principles do not allow individuals to obtain exclusive use of generic terms, at least in the commercial fields to which the generic terms are relevant. At present the exclusive use of an SLD cannot be challenged on the basis of genericness, since there is no rule that generic terms may not be held as domain names. This exclusive use also cannot be challenged on the basis of rights of others, since there cannot exist any intellectual property rights in a generic term.<sup>11</sup>

### Current Discussions

The above-mentioned problems have been and still are subject to discussions in various fora.

#### IAHC/gTLD-MoU

The International Ad Hoc Committee (IAHC) was formed at the initiative of ISOC and IANA. ISOC<sup>12</sup> is, according to its own description, a non-governmental international organisation for global co-operation and co-ordination for the Internet and its Internet-working technologies and applications.<sup>13</sup> IANA<sup>14</sup> has responsibility for the maintenance of administrative tables for Internet services, including TLDs and the delegation of their maintenance to appropriate agencies.

The IAHC was undertaking the task of designing changes to the Internet domain name system (DNS), to try to alleviate trade mark problems, among others. Also WIPO<sup>15</sup> was represented on the IAHC. On February 4, 1997 the IAHC presented its Final Report.<sup>16</sup>

On February 28, 1997, a "Memorandum of Understanding on the Generic Top Level Domain Name Space of the Internet Domain Name System" (gTLD-MoU)<sup>17</sup> was established. With this MoU the signatories agreed to voluntarily co-operate and establish a new system of administration and management of domain names. The MoU provides for the establishment of a depository of the gTLD-MoU (the Secretary-General of the International Telecommunications Union, ITU<sup>18</sup>), a gTLD-MoU

Policy Advisory Body (PAB), a gTLD-MoU Policy Oversight Committee (POC), a Council of Registrars (CORE) and Administrative Domain Name Challenge Panels (ACPs). Pending the creation of CORE, an interim Policy Oversight Committee (iPOC) shall consist of the regular members of the IAHC (which have been appointed by IANA, ISOC, IAB,<sup>19</sup> ITU, WIPO and INTA<sup>20</sup>).<sup>21</sup>

The MoU also provides that seven new TLDs will be added for Internet addresses:

.firm	for businesses or firms;
.store	for businesses offering goods to purchase;
.web	for entities emphasising activities related to the WWW;
.arts	for entities emphasising cultural and entertainment activities;
.rec	for entities emphasising recreation/entertainment activities;
.info	for entities providing information services;
.nom	for those wishing individual or personal nomenclature.

Until May 1, 1997, the gTLD-MoU was signed by 80 organisations. IAHC was declared dissolved<sup>22</sup> and—pending the creation of CORE—iPOC has been set up.<sup>23</sup> When CORE appoints its representatives at its first plenary meeting, iPOC will be dissolved and POC will be set up. CORE will be set up upon the selection of the initial registrars<sup>24</sup> under the Swiss Civil Code.<sup>25</sup> CORE shall manage and maintain the central database for each gTLD, all shared by the new Registrars. Registration procedures, and the obligations and responsibilities of the Registrars, will be governed by CORE under a memorandum of understanding to be concluded among the registrar members of CORE (CORE-MoU).<sup>26</sup> CORE will be responsible to the POC, which will drive its direction from PAB, whose members come from the signatories to the gTLD-MoU.<sup>27</sup>

#### WIPO

A decision of the WIPO General Assembly of October 2, 1996 states that "the International Bureau would carry out a study, with the help of consultants, on international intellectual property issues arising from the new global information infrastructure, including the Internet".<sup>28</sup> Pursuant to that

10 *ibid.*

11 See WIPO, "Issues relating to Trademarks and Internet Domain Names" (March 26, 1997) III, at [http://www.wipo.int/eng/internet/domains/tdn/cm/cm\\_i\\_2.htm](http://www.wipo.int/eng/internet/domains/tdn/cm/cm_i_2.htm). WIPO also indicates that, if any intellectual property right in domain names were to be recognised, and if generic terms continue to be allowed to be used as SLDs, then there will arise intellectual property rights in generic terms, a situation which at present time is not permitted.

12 See home page at [www.isoc.org](http://www.isoc.org).

13 See "What is the Internet Society?" at [www.isoc.org/whatis](http://www.isoc.org/whatis).

14 See home page at [www.isi.edu/iana](http://www.isi.edu/iana).

15 World Intellectual Property Organization; see home page at [www.wipo.int](http://www.wipo.int).

16 "Recommendations for Administration and Management of Generic Top Level Domains" available at <http://www.iahc.org/draft-iahc-recommend-00.htm>.

17 Available at <http://www.iahc.org/gTLD-MoU.html>.

18 See home page at <http://www.itu.int>.

19 Internet Architecture Board; see home page at <http://www.isi.edu/iab>.

20 International Trademark Association; see home page at <http://www.inta.org>.

21 For details see <http://www.iahc.org/gTLD-MoU.html>.

22 For latest news since dissolving IAHC see <http://www.gTLD-mou.org>.

23 David W. Maher (attorney at Sonnenschein Nath & Rosenthal, Chicago) was elected first chairman of iPOC.

24 The plan according to the "Final Report" called for selecting these initial Registrars by lottery. This plan has since been dropped. Hence, anyone satisfying the qualification requirements may become a registrar. See <http://www.iahc.org/press/press-lottery.html>.

25 See <http://www.itu.int/PPI/press/releases/1997/itu.o8.html>. As per May 12, 1997, 106 entities (including *inter alia* ITU, INTA, IANA, ISOC and WIPO) have signed or indicated their intent to sign the gTLD-MoU. For a detailed list see <http://www.itu.int/net-itu/gTLD-mou/simple.htm>. See also [http://www.isoc.org/whatsnew/naming\\_plan.html](http://www.isoc.org/whatsnew/naming_plan.html).

26 A draft of the CORE-MoU is available at [www.gTLD-mou.org/docs/core-mou.htm](http://www.gTLD-mou.org/docs/core-mou.htm).

27 See <http://www.iahc.org/press/press-ipoc.html>.

28 WIPO document AB/XXIX/10, para. 109(b); see <http://www.wipo.int/eng/internet/domains/intro.htm>.

decision a WIPO Meeting of Consultants on Trademarks and Internet Domain Names was held on February 12 to 14, 1997, at WIPO Headquarters in Geneva. Several consultants participated in the meeting, including individuals from national trade mark offices and members of the International Ad Hoc Committee (IAHC), along with WIPO officials. During this meeting also the Final Report of the IAHC was discussed, including those aspects which would involve ongoing activities on the part of WIPO.<sup>29</sup>

On May 26 to 30 a further "WIPO Consultative Meeting on Trademarks and Internet Domain Names (First Session)" was held in Geneva. The International Bureau (IB) had prepared two Memorandums for that meeting.<sup>30</sup> The IB therein finds that "Domain Names by their nature are trademark-like, and are often used to direct users to the home page of a company whose domain name is also its trademark".<sup>31</sup> Various issues are discussed and several questions were prepared for the meeting in these Memorandums.

According to the Chairman's summary<sup>32</sup> of the meeting many questions and comments were presented concerning the details of the substantive guidelines that are under preparation.<sup>33</sup> Additional discussions concerning ACPs were scheduled to take place at a second session of the WIPO Consultative Meeting on Trademarks and Internet Domain Names, to be held on September 1 and 2, 1997, in Geneva.<sup>33a</sup>

### United States Patent and Trademark Office

The United States Patent and Trademark Office intended to solicit public comments and hold public hearings on the domain name trade mark issue in January 1997. It has not yet, however, published results to the public on the WWW.<sup>34</sup>

### European Union

The European Union has circulated a questionnaire<sup>35</sup> to industry concerning trade marks and domain names. The paper

mainly summarises the activities of IAHC and WIPO as approximately of March 1997. This procedure may result in the creation of a green paper on the domain name-trade mark issue.

### International Trademark Association

The International Trademark Association (INTA) published a "White Paper" on the topic "The Intersection of Trademarks and Domain Names" containing information also on court decisions and disputes on registrations as well as a proposal for a new domain name dispute resolution.<sup>36</sup>

### Other NGOs

Various other non-governmental organisations, such as the International Chamber of Commerce (ICC), are in the process of studying the trade mark-domain name issues.

### The Relevant Issues

Can the owner of a name, a firm name, a company symbol or a trade mark prohibit the use of an identical domain name by its owner? Can the owner of such distinctive marks enforce the withdrawal of an identical domain name, and if so, enforce that he obtain the identical domain name himself? May generic and descriptive terms be registered as domain names?

### Applicable law

Before judging whether the registration and/or use of a domain name infringes (national) rights in distinctive marks, the applicable substantive law must be determined. "Shall an act of infringement on the Internet be considered to have taken place in the territory [from] which a transmission is sent over the Internet, or in the territory in which the transmission is received?"<sup>37</sup> This question is still open for discussion. The national courts' decisions regularly apply (their own) law of the place in which the transmission is (also) received.<sup>38</sup>

### Evaluation according to Austrian and German laws on distinctive marks

#### Collisions between domain names and rights in distinctive marks

The first court decision in the German-speaking world on this subject was made by the Landgericht Mannheim,<sup>39</sup> and stated that the City of Heidelberg could demand injunctive relief of the further use of the address "heidelberg.de". This decision is based on the right to bear a name (*Namensrecht*) according to section 12 of the German Civil Code (below referred to as

29 For details see [http://www.wipo.int/eng/internet/domains/feb12\\_14.htm](http://www.wipo.int/eng/internet/domains/feb12_14.htm).

30 "Issues relating to Trademarks and Internet Domain Names" (March 26, 1997) at [http://www.wipo.int/eng/internet/domains/tdn/cm/cm\\_i\\_2.htm](http://www.wipo.int/eng/internet/domains/tdn/cm/cm_i_2.htm) and "Resolution of Intellectual Property Disputes within the Context of the [gTLD-MoU]" (May 16, 1997) at [http://www.wipo.int/eng/internet/domains/tdn/cm/cm\\_i\\_3.htm](http://www.wipo.int/eng/internet/domains/tdn/cm/cm_i_3.htm).

31 See [http://www.wipo.int/eng/internet/domains/tdn/cm/cm\\_i\\_2.htm](http://www.wipo.int/eng/internet/domains/tdn/cm/cm_i_2.htm) at 1.

32 The meeting was chaired by Ms Lynne Beresford, United States Patent and Trademark Office. The summary is available at [http://www.wipo.int/eng/internet/domains/tdn/cm/cm\\_inf1.htm](http://www.wipo.int/eng/internet/domains/tdn/cm/cm_inf1.htm).

33 See latest draft (as of May 19, 1997) available at <http://www.gtld-mou.org/docs/core-mou.htm>.

33a In preparation for this meeting a memorandum on possible issues to be considered in the context of harmonisation of national and regional laws concerning trade marks and Internet domain names (TDN/CMII/2 at [http://www.wipo.int/eng/internet/domains/tdn/cm/cm\\_ii\\_2.htm](http://www.wipo.int/eng/internet/domains/tdn/cm/cm_ii_2.htm)) and a memorandum on suggestions concerning the proposed WIPO ACP Rules and the Substantive Guidelines concerning Administrative Challenge Panels (TDN/CMII/3 at [http://www.wipo.int/eng/internet/domains/tdn/cm/cm\\_ii\\_3.htm](http://www.wipo.int/eng/internet/domains/tdn/cm/cm_ii_3.htm)) were published by the International Bureau together with an agenda. The results of this meeting, however, were not available when this manuscript was concluded.

34 According to <http://www.uspto.gov/web/menu/domain.html> a draft paper concerning trade mark registration of Internet domain names which previously had been available on that site is under revision by the Office of the Assistant Commissioner for Trademarks.

35 EU-DG XV/E-3 "The Internet Domain Name System and Trademarks", Working Document of the Commission services.

36 Version 1.1 of April 1, 1997 at <http://www.inta.org/wptoc.htm>. In the meantime, however, INTA has signed the MoU prepared by the IAHC also.

37 WIPO, "Issues Relating to Trademarks and Internet Domain Names" (March 26, 1997) IV, at [http://www.wipo.int/eng/internet/domains/tdn/cm/cm\\_i\\_2.htm](http://www.wipo.int/eng/internet/domains/tdn/cm/cm_i_2.htm).

38 On that see also LG Düsseldorf (below) at III.B.2.

39 LG Mannheim, March 8, 1996, *Computer und Recht* (C.R.) 1996, 353 with comment by Hoeren. See also Kur, "Internet Domain names", [1996] C.R. 325; Kur, "Namens- und Kennzeichenschutz im Cyberspace", CR 1996, 590.

dBGB).<sup>40</sup> By using the above-mentioned Internet address, the defendants used the plaintiff's name. A significant proportion of Internet users would associate the domain name "heidelberg.de" with the plaintiff. The denomination of the domain name would cause conclusions to the person, resulting in a confusion of attributions.

The Landgericht Köln<sup>41</sup> decided quite to the contrary: the City of Kerpen's claim to prohibit the use of the domain name "kerpen.de" by the defendant was dismissed. The denomination "kerpen.de" on the Internet does not perform the function of a name in terms of section 12 dBGB. The Landgericht Köln decided correspondingly in the cases of domain names "huerth.de" and "pulheim.de".<sup>42</sup>

The Landgericht München I decided on January 9, 1997<sup>43</sup> that the registration of domain names "dsf.de", "eurosport.de" and "sportschau.de" for the sole purpose of subsequent negotiations with the name owners concerning a co-operation with regard to the Internet is contrary to public policy, and therefore constitutes an infringement of fair competition in terms of section 1 of the German Unfair Competition Act (below referred to as dUWG; section 1 prohibiting unfair competitive practices).

The Landgericht Braunschweig decided on January 28, 1997<sup>44</sup> that the City of Braunschweig had the right to demand that the defendant cease further use of the address "braunschweig.de", and release the name for use by the City of Braunschweig. The defendant made use of the plaintiff's name without being authorised to do so by the plaintiff, and without being able to derive this right from other legal grounds. This suggests a connection between the name owner and the defendant, which in reality does not exist, causing confusion of attribution. The application for registration of an Internet address under someone else's name can be compared to a trade mark application in bad faith in terms of section 50 paragraph 1 subsection 4 of the German Trade Mark Act (below referred to as dMarkenG).<sup>45</sup> (A trade mark application must be

considered to be in bad faith if it is made with the intention of hindering third parties in using this denomination or making use more difficult.)<sup>46</sup>

The Landgericht Lüneburg decided on January 29, 1997<sup>47</sup> that the defendant should "refrain from offering services and reserving the right to offer services by isolated use of the name Celle, particularly under the addresses 'www.celle.de' and 'www.celle.com'". Furthermore, the defendant was condemned to release the address "www.celle.de" for use by the plaintiff.<sup>48</sup> The court based its decision on the injunctive relief according to section 12 in connection with section 1004 Abs 1 dBGB. A name serves the purpose of distinguishing a subject from others, and has the function of individualising on one hand, and identification on the other hand. Internet domain names have the same function. Therefore there is a danger of confusion of attribution. The court based the plaintiff's claim to demand that the defendant renounce the reservation of the name "celle.de", i.e. to make a corresponding declaration of release to the German Network Information Center (DENIC) on section 249 dBGB by the court.

By court ruling dated February 24, 1997,<sup>49</sup> the Landgericht München I decided that an enterprise using the firm name "SAT-SHOP" could demand injunction of use of the domain name "sat-shop.com" on grounds of trade mark and competition law.

By a judgment dated March 3, 1997<sup>50</sup> the Landgericht Frankfurt/Main condemned the defendant both to refrain from laying claim to, using, or letting third parties use the domain name "www.das.de" on the Internet, as well as to make a corresponding declaration waiving the domain, for the benefit of the plaintiff (Deutscher Automobilschutz Allgemeine Rechtsschutzversicherungs-AG) towards the DENIC. The court based the claim on section 12 dBGB. A domain address has the function of a name. The Landgericht Köln's considerations were expressly rejected.

The most extensive statement of reasons for granting a claim to a domain name was given in case of the company Epson, whose claim to the domain name "epson.de" was granted by the Landgericht Düsseldorf on April 4, 1997.<sup>51</sup>

First the court held that in the case of anti-competitive conduct in mass media, be it the press, radio, television, teletext or BTX (viewdata), the general principle is applicable according to which the place in which the offence is committed is not solely the place of publication (in the case of the Internet, i.e. the place of the server), but also the place in which the medium is brought to third parties' knowledge purposely, and not just by chance.<sup>52</sup> Otherwise it would be possible for every supplier to escape legal prosecution by choosing a location for his server in a country in which effective legal protection cannot be obtained reasonably.

40 This provision runs as follows: "Wird das Recht zum Gebrauch eines Namens dem Berechtigten von einem anderen bestritten oder wird das Interesse des Berechtigten dadurch verletzt, daß ein anderer unbefugt den gleichen Namen gebraucht, so kann der Berechtigte von dem anderen Beseitigung der Beeinträchtigung verlangen. Sind weitere Beeinträchtigungen zu besorgen, so kann er auf Unterlassung klagen". On that see for instance Fezer, *Markenrecht*, § 15 Rz 21-105. In Austria the parallel provision of s. 43 ABGB runs as follows: "Wird jemandem das Recht zur Führung seines Namens bestritten oder wird er durch unbefugten Gebrauch seines Namens (Decknamens) beeinträchtigt, so kann er auf Unterlassung und bei Verschulden auf Schadenersatz klagen"; on that see for instance Aicher in Rummel, ABGB, § 43 Rz 1 *et seq.* who also takes into account the German precedents on the right to bear a name.

41 LG Köln December 17, 1996 at [http://www.netlaw.de/urteile/lgk\\_2.htm](http://www.netlaw.de/urteile/lgk_2.htm) (see Strömer, *Entscheidungssammlung Online*, <http://www.netlaw.de/urteile/index.html#Kennzeichenrecht>; see also Strömer, *Online Recht* (1997 dpunkt-Verlag Heidelberg).

42 See references in Strömer, *Entscheidungssammlung Online*, <http://www.netlaw.de/urteile/index.html#Kennzeichenrecht>.

43 Available at [http://www.netlaw.de/urteile/lgm\\_4.htm](http://www.netlaw.de/urteile/lgm_4.htm) (compiled by Strömer, *ibid.*).

44 Available at [http://www.netlaw.de/urteile/lgbs\\_1.htm](http://www.netlaw.de/urteile/lgbs_1.htm) (compiled by Strömer, *ibid.*).

45 § 50 Nichtigkeit wegen absoluter Schutzhindernisse. "Die Eintragung einer Marke wird auf Antrag wegen Nichtigkeit gelöscht, ... wenn der Anmelder bei der Anmeldung bösgläubig war". (Translation according to Aufenanger/Barth, *Markengesetz/The German Trade Mark Act* [1996]: Sect 50 Nullity because of Absolute Bars to Protection. Registration of a trade mark shall, upon application, be cancelled because of nullity ... if the applicant was in bad faith upon filing the application.")

46 With reference to Helm, "Die bösgläubige Markenmeldung", GRUR 1996, 589, 593.

47 Available at [http://www.netlaw.de/urteile/lglg\\_1.htm](http://www.netlaw.de/urteile/lglg_1.htm) (compiled by Strömer, n. 41 above).

48 With regard to "www.celle.com" the defendant was not found to be the proper defendant of the claim.

49 [http://www.netlaw.de/urteile/lgm\\_3.htm](http://www.netlaw.de/urteile/lgm_3.htm) (compiled by Strömer, n. 41 above).

50 [http://www.netlaw.de/urteile/lgf\\_1.htm](http://www.netlaw.de/urteile/lgf_1.htm) (compiled by Strömer, *ibid.*).

51 [http://www.netlaw.de/urteile/lgd\\_1.htm](http://www.netlaw.de/urteile/lgd_1.htm) (compiled by Strömer, *ibid.*).

52 With reference to Köhler/Piper, dUWG, § 24 Rz 17.

### Trade marks

According to trade mark law, the plaintiff's claim arises from sections 4, 14, paragraphs 1, 2 subsection 1 and paragraph 5 dMarkenG.<sup>53</sup> Use of the domain name infringes another person's trade mark right. Speculative registration of a domain name by someone who does not use that name commercially ("domain-grabbing") presents a sufficiently specific danger of infringement that may be stopped by preventive application for injunctive relief.

As far as it is controversial under new German trade mark law whether the infringing denomination, *i.e.* the domain name in dispute, must also be used commercially in a distinguishing function (*i.e.* to identify products or services; *kennzeichnend*) or whether any use in the course of trade will suffice,<sup>54</sup> there was no cause for the court to state its opinion, as it proceeded on the assumption that in the case at hand, also the use of the domain name in a distinguishing function was threatened.

A domain name serves the purpose of enabling the user to distinguish a certain home page from countless other home pages on the Internet. One can therefore presume that the use of the domain name "epson.de" in a distinguishing function is threatened.

### Company symbols

The impending use also represents a danger of confusion with respect to the plaintiff's company symbols (*Unternehmenskennzeichen*), resulting from both the symbols' as well as the goods/services' identity or similarity, according

to sections 5, 15 paragraph 2 dMarkenG.<sup>55</sup> The court was convinced that when assessing the similarity of goods it is of no importance which goods or contents are possibly offered on a home page. The goods or the services subject to possible confusion are the domain-name-assigned home page itself. The situation is no different from the case in which two magazines are published under the same title, and in which it is dispensable to determine whether they are similar with respect to the contents. Not the contents, but the product itself constitutes the goods or services in terms of dMarkenG.

An offer from a person different from the plaintiff, given on the Internet under the domain name in dispute, triggers the association with the addressed Internet users that the contents of the home page are in some way official, or at least authorised by the plaintiff.

The court went on to say that such danger of confusion is given even more in the case of a made-up name such as "Epson" than if the name of a city is used as a domain name. An Internet user will generally proceed on the assumption that there is a relationship to the plaintiff, and therefore danger of confusion in terms of section 14 dMarkenG exists.

### Firm names

The court also based the plaintiff's claim on a firm name consideration pursuant to sections 5, 15 paragraphs 1, 2 and paragraph 5 dMarkenG and said that the plaintiff is protected against the use of the trade designation in a manner that could cause the danger of confusion. It is crucial whether a domain name is basically suitable to cause dangers of confusion with the plaintiff's company. The court said that this is the case, and that there could be no doubt that the addressed persons would view the domain name as a short form of the company's name.

### The right to bear a name

In addition to this, the court based the claim on section 12 dBGB. A company's firm name such as the plaintiff's is its name in terms of section 12 dBGB. In case of infringement of

53 "§ 4 Entstehung des Markenschutzes. Der Markenschutz entsteht 1. durch die Eintragung eines Zeichens als Marke in das vom Patentamt geführte Register, 2. durch die Benutzung eines Zeichens im geschäftlichen Verkehr, soweit das Zeichen innerhalb der beteiligten Verkehrskreise als Marke Verkehrsgeltung erworben hat, oder 3. durch die im Sinne des Artikels 6bis der Pariser Verbandsübereinkunft . . . notorische Bekanntheit der Marke. (Translation according to Aufenanger/Barth, *Markengesetz/The German Trade Mark Act* [1996]: "Trade mark protection shall accrue 1. from the registration of a sign as a trade mark in the Register kept at the Patent Office, 2. from the use of a sign in the course of trade, provided that the sign has acquired prominence as a trade mark among the trade circles concerned, or 3. from the fact that a trade mark is well-known within the meaning of Article 6bis of the Paris Convention . . .") § 14 Ausschließliches Recht des Inhabers einer Marke; . . . (1) Der Erwerb des Markenschutzes nach § 4 gewährt dem Inhaber der Marke ein ausschließliches Recht. (2) Dritten ist es untersagt, ohne Zustimmung des Inhabers der Marke im geschäftlichen Verkehr 1. ein mit der Marke identisches Zeichen für Waren oder Dienstleistungen zu benutzen, die mit denjenigen identisch sind, für die sie Schutz genießt, . . . (5) Wer ein Zeichen entgegen den Abs 2 bis 4 benutzt, kann von dem Inhaber der Marke auf Unterlassung in Anspruch genommen werden. (Translation according to Aufenanger/Barth, *Markengesetz/The German Trade Mark Act* [1996]: "Sect 14 Exclusive Right of the Proprietor of a Trade Mark; . . . (1) The acquisition of protection of a trade mark pursuant to s. 4 shall confer on the proprietor of the trade mark exclusive rights therein. (2) Third parties shall be prohibited from using in the course of trade without the consent of the proprietor of the trade mark 1. any sign identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is protected . . . (5) The proprietor of the trade mark may claim an injunction against any person who uses a sign in contravention of subsection 2 to 4.")

54 See on that, in detail and instructively, Fezer, *Markenrecht* (1997) § 14 Rz 21-70; Kur, "Namens- und Kennzeichenschutz im Cyberspace". [1996] C.R. 590 (591); Sack, "Sonderschutz bekannter Marken", GRUR 1995. 81 (93ff) and Bettinger, "Kennzeichenrecht im Cyberspace: Der Kampf um die Domain-Namen". GRURInt 1997, 402 (408 *et seq.*). For Austria in favour of the necessity of a distinguishing use ("kennzeichenmäßiger Gebrauch") Koppensteiner, *Wettbewerbsrecht* 3, § 41 Rz 5.

55 "§ 5 Geschäftliche Bezeichnungen. (1) Als geschäftliche Bezeichnungen werden Unternehmenskennzeichen [und Werkkürzel] geschützt. (2) Unternehmenskennzeichen sind Zeichen, die im geschäftlichen Verkehr als Name, Firma oder besondere Bezeichnung eines Geschäftsbetriebes oder eines Unternehmens benutzt werden. Der besonderen Bezeichnung eines Geschäftsbetriebes stehen solche Geschäftsabzeichen und sonstige zur Unterscheidung des Geschäftsbetriebes von anderen Geschäftsbetrieben bestimmte Zeichen gleich, die innerhalb beteiligter Verkehrskreise als Kennzeichen des Geschäftsbetriebs gelten. . . ." (Translation according to Aufenanger/Barth, *Markengesetz/The German Trade Mark Act* [1996]: "Sect 5 Trade Designations. (1) Company symbols [and titles of works] are protected as trade designations. (2) Company symbols are signs used in the course of trade as the name, company name or special designation of a business establishment or an undertaking. When business insignia and other signs which are intended to distinguish the business establishment from other business establishments are regarded as a symbol of the business establishment among the trade circles concerned, they shall be of equal rank with the special designation of a business establishment . . .") § 15 Ausschließliches Recht des Inhabers einer geschäftlichen Bezeichnung; . . . (2) Dritten ist es untersagt, die geschäftliche Bezeichnung oder ein ähnliches Zeichen im geschäftlichen Verkehr unbefugt in einer Weise zu benutzen, die geeignet ist, Verwechslungen mit der geschützten Bezeichnung hervorzurufen. (Translation according to Aufenanger/Barth, *Markengesetz/The German Trade Mark Act* [1996]: "Sect 15 Exclusive Right of the Proprietor of a Trade Designation: . . . (2) Third parties shall be prevented from using, without authority, the trade designation or a similar sign in the course of trade in a manner which may lead to its being confused with the protected designation.")

section 15 dMarkenG, section 12 dBGB, which is more extensive, is also infringed as a general rule. Use of his name as a domain name on the Internet poses the threat of usurpation of a name to the plaintiff. This use infringes plaintiff's rights that are worth of protection, even when one considers that a firm name that is merely made-up is only protected in so far as its use affects the business interests of the person bearing that name. This interest worthy of protection is given if confusion in terms of section 15 dMarkenG is likely, as the protection of the name pursuant to section 12 dBGB is more extensive than the protection of trade marks pursuant to section 15 dMarkenG. Arguments stated above concerning proximity to other trades or goods (home page as goods or services) are also applicable for section 12 dBGB.

#### *Unfair competition*

The court also based the claims on section 1 dUWG, because the defendant was engaging in competitive acts contrary to fair competitive practices. This impediment to the plaintiff's use of distinctive marks as a domain name would not constitute unfair competitive practice only if the registration by the defendant were sufficiently justified, particularly if registration had occurred in order to protect his own rights. This is not the case if the registration had occurred only in order to enforce the conclusion of an agreement concerning the domain name. The defendant's conduct constitutes an unfair operational disturbance, which is contrary to fair competitive practices in terms of section 1 dUWG.

#### *Removal; cancellation*

The claim to the declaration *vis-à-vis* the DENIC with which the reservation of a domain name is cancelled can be concluded from sections 14, 18, paragraph 3 dMarkenG, section 1004, paragraph 1 dBGB. Section 18, paragraph 3 dMarkenG<sup>56</sup> enables the application of claims to removal as well as section 1004, paragraph 1 dBGB, according to which the disturber is obliged to end any impairment created by the disturber. Not removing this threat is equal to continuing the disturbance. In such cases the claim to removal runs parallel to the claim to injunctive relief. In the case at hand permanent removal of the danger is only possible by cancellation of the defendant's reservation of the domain name with DENIC.

#### Registration of generic and descriptive terms; need for reservation for public use

On February 13, 1997, the OLG Frankfurt/Main<sup>57</sup> commented on the registration of the domain name "www.wirtschaft.online.de" by a publisher specialising in business publications. The applicant for preliminary injunction objected to the opponent's choice of the purely descriptive and therefore non-reservable term "Wirtschaft"<sup>58</sup> and "Wirtschaft-Online" as a domain name.

56 "§ 18 Vernichtungsanspruch ... (3) Weitergehende Ansprüche auf Beseitigung bleiben unberührt." (Translation: "Sect 18 Claim to Destruction. ... (3) This shall not affect more far-reaching elimination claims.")

57 [http://www.netlaw.de/urteile/olgfr\\_2.htm](http://www.netlaw.de/urteile/olgfr_2.htm) (compiled by Strömer, n. 41 above). See also Kur, "Internet Domain names", [1996] C.R. 325 (328 *et seq.*).

58 Which means "business".

The court rejected the analogous application of section 8, paragraph 2 subsection 1 and subsection 2 dMarkenG.<sup>59</sup> The consequences as provided by the dMarkenG for not satisfying the material requirements for protection are the refusal of registration or the cancellation by the Patent Office. These consequences require a public examining and supervision machinery which is not available for on-line addresses as the law stands. The limits for the choice of descriptive on-line addresses that do not infringe other peoples' rights in distinctive marks could only ensue from general provisions of competition law (s. 1, 3 dUWG).

The court went on to say that there was no misleading statement<sup>60</sup> at hand, nor an infringement of section 1 dUWG by the opponent. The applicant is not hindering in an unfair competitive way in its possibilities to choose an on-line address, because it could still use the term "Wirtschaft" with modifications or additions in its on-line address. The applicant in any case has no more right to use the on-line addresses to which objection was made than the opponent.

That the opponent's on-line addresses are contrary to fair competition neither results from the "channelling function" of purely descriptive domain names which, according to the plaintiff, should therefore be reserved for public use.<sup>61</sup> The described channelling effect is excluded as far as the on-line address is only used in the company's advertising, because then there would be no possibility for selection from several offers that could be influenced by the denomination of the address. In an overall view, judgment depends on user habits in the field of on-line media (which are not known to the court, according to its own statement). This could not be solved in expedited proceedings.

The court also held that the opponent gained no unfair competitive advantage by breach of law. As long as no laws concerning the registration and use of on-line addresses existed that the opponent could infringe, no law was breached.

#### Summary of the evaluation according to German and Austrian laws on distinctive marks

The riveting question whether, according to national laws aligned with the Trade Mark Directive,<sup>62</sup> the trade mark owner can only prohibit use in a distinguishing function, or if he can prohibit any other use in the course of trade,<sup>63</sup> will generally not be raised in cases concerning the collision of trade mark

59 "§ 8 Absolute Schutzhindernisse. ... (2) Von der Eintragung ausgeschlossen sind Marken. 1. denen für die Waren oder Dienstleistungen jegliche Unterscheidungskraft fehlt. 2. die ausschließlich aus Zeichen oder Angaben bestehen, die im Verkehr zur Bezeichnung der Art, der Beschaffenheit, der Menge, der Bestimmung, des Wertes, der geographischen Herkunft, der Zeit der Herstellung der Waren oder der Dienstleistung oder zur Bezeichnung sonstiger Merkmale der Waren oder Dienstleistungen dienen können, ...". (Translation according to Aufenanger/Barth, *Markengesetz/The German Trade Mark Act*<sup>2</sup> [1996]: "Sect 8 Absolute Bars to Protection. ... (2) Trade marks 1. which are devoid of any distinctive character with respect to the goods or services, 2. which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, time of production of the goods or of the rendering of the services, or other characteristics of the goods or services, ... shall not be registered. ...")

60 According to s. 3 dUWG.

61 For criticism of that, see Weinknecht, comment to OLG Frankfurt/Main February 13, 1997 at <http://www.weinknecht.de/olgfr.htm#Anmerkung>, 62 89/104.

63 See Art. 5 para. 1 of the Directive.

rights and domain names, because such claim will arise, as a rule, from the more extensive provisions for the protection of a name pursuant to section 12 dBGB and section 43 of the Austrian Civil Code (dABGB).

Use of a name is inadmissible if its use causes the impression that the offered services or goods can be attributed to the named person, and therefore causes confusion of attribution, but also if the bearer of the name is limited in the use of his own name, because in this case the protected right to use a name is impaired also.<sup>64</sup> This would be the case if the impression is given that a relationship exists between the owner of the name and the infringer.<sup>65</sup> What is crucial is the effect the use of the name has on a not completely insignificant part of the addressees.<sup>66</sup>

Whether the registration of generic or descriptive terms as domain names can be prevented according to national law if these terms are non-registrable pursuant to national trade mark law is questionable. Most likely it will be necessary to consider whether such registration constitutes hindering competition contrary to fair competitive practices in terms of section 1 dUWG (and section 1 of the Austrian Unfair Competition Act). As the OLG Frankfurt correctly declared, this depends on user habits in the on-line field, which are subject to constant change. This question has yet to be answered.

## Policies of international domain name registrars

### Old international systems (InterNIC/NSI)

For trade mark dispute purposes, the current NSI policy<sup>67</sup> includes the following:

- (1) An Applicant must submit a statement that states, to its knowledge, the domain name requested does not interfere with or infringe the right of third parties.
- (2) An Applicant must have a bona fide intention to use the Internet domain name on a regular basis.
- (3) An Applicant must not seek the domain for unlawful purpose.
- (4) The owner of a U.S. federal or foreign trade mark registration may challenge NSI's assignment of an "identical" SLD if the domain name holder began use after the challenger's trade mark registration or first use date. The challenger sends NSI a certified copy of its registration and a copy of its protest letter to the domain name holder. Once NSI's dispute policy is invoked, NSI gives the domain holder 30 days to prove either that its use of the domain predates both the first use of the challenging party's registration and the effective date of that registration or that the domain holder has its own trade mark registration, in which case the domain holder will be able to keep the domain, subject to an obligation to indemnify NSI. If, however, the domain holder cannot demonstrate the required prior domain use or produce a trade mark registration certificate, then the domain holder must give up the domain, with a 90 day phase out. The disputed domain then goes into a "hold" status, where it is not available to anyone, pending the outcome of the dispute between the parties. Without a court order or a decision from an arbitration panel, the best result a challenger can expect is for NSI to place the domain name registration on hold.

64 See Aicher in Rummel, ABGB (Manz Wien) § 43 Rz 10 with reference to RGZ 74, 308 and further references also to opposite opinions.

65 Aicher, *ibid.* Rz 16 with further references.

66 Aicher, *ibid.* Rz 16 with further references.

67 According to its description in INTA White Paper, para. III.E. at <http://www.inta.org/wpwhole.htm>.

### New international system according to the gTLD-MoU

According to the gTLD-MoU (Pt II, 7(e)) each CORE-gTLD Registrar may assign SLDs in any gTLD, described or created under the provisions of the MoU and the CORE-MoU, on a fair-use, first-come, first-served basis. A comprehensive system for dispute settlement involving on-line mediation, mandatory arbitration and a fast-track on-line administrative domain name challenge procedure, however, shall be established.<sup>68</sup>

The MoU in Part I, section 2(f) provides that the following principles are adopted:

A policy shall be implemented that a second-level domain name in any of the CORE-gTLDs which is identical or closely similar to an alphanumeric string that, for the purposes of this policy, is deemed to be internationally known, and for which demonstrable intellectual property rights exist, may be held or used only by, or with the authorization of, the owner of such demonstrable intellectual property rights. Appropriate consideration shall be given to possible use of such a second-level domain name by a third party that, for the purposes of this policy, is deemed to have sufficient rights.<sup>69</sup>

This policy shall be executed by the ACPs. The procedures for creating these panels and for bringing challenges before the panels shall be defined in the CORE-MoU.<sup>70</sup> The CORE-MoU shall in particular stipulate that Registrars shall be obligated to honour all decisions of ACPs.

Article 8 of the draft of the CORE-MoU as of May 14, 1997 contains the following provisions<sup>71</sup>:

(b) Registrars shall include in their Registration Agreement and application forms for assignment of SLDs the following paragraphs:

- (I) The applicant acknowledges that, by virtue of the provisions of the gTLD-MoU, any third party may challenge the assignment to or use by the applicant of the domain name before an Administrative Domain Name Challenge Panel ("ACP") in accordance with the WIPO ACP Rules. The applicant further acknowledges that the decisions of an ACP may determine rights of applicant or other parties or both to the use of a particular domain name, and that, with respect to its right to use a particular domain name or names, it will be bound by ACP decisions.
- (II) The applicant agrees that any dispute, controversy or claim between the applicant and a third party, arising out of or relating to this application or any registration made upon this application shall, upon the filing of a request by a third party with the WIPO Center, be submitted to on-line mediation in accordance with the WIPO Mediation Rules.<sup>72</sup> If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the mediation within 30 days, either party fails to participate or to continue to participate in the mediation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the third party, unless the applicant declined

68 See EU-DG XV/E-3, "The Internet Domain Name System and Trademarks", Working Document of the Commission Services, at 6.

69 During the first phase, the new dispute settlement mechanism will only apply to the seven new gTLDs. It shall be applicable to the three existing gTLDs when they become "shared" by all Registrars. See EU-DG XV/E-3 "The Internet Domain Name System and Trademarks", Working Document of the Commission Services, at 5.

70 Latest draft (as of May 19, 1997) available at <http://www.gtd-mou.org/docs/core-mou.htm>.

71 Quoted according to WIPO "Resolution of Intellectual Property Disputes within the Context of the [gTLD-MoU]" (May 16, 1997) III, at [http://www.wipo.int/eng/internet/domains/tdn/cm/cm\\_i\\_3.htm](http://www.wipo.int/eng/internet/domains/tdn/cm/cm_i_3.htm).

72 Available at [http://www.wipo.int/eng/arb/ru/rules/mediatio/med\\_rule.htm](http://www.wipo.int/eng/arb/ru/rules/mediatio/med_rule.htm).

mandatory submission to arbitration by checking the box below, be referred to and finally determined by on-line arbitration in accordance with the WIPO Expedited Arbitration Rules.<sup>73</sup> The language to be used in the mediation or arbitration shall be English, unless the parties agree otherwise. Where the third party chooses arbitration, the place of arbitration shall, unless the parties agree otherwise, be either the location of the applicant as indicated in the Registration Agreement or the location of the Registrar, at the option of the third party.

[Option:] The applicant declines a mandatory submission to arbitration.

(c) Registrars and CORE shall cooperate with the WIPO Center by promptly providing any information or materials requested by the Center in the context of domain name disputes, and shall be obligated to honour all decisions of ACPs and of any WIPO arbitration and mediation proceedings concerning SLDs in the CORE-gTLDs. The WIPO Center shall notify CORE of any results and decisions of ACP mediation or arbitration proceedings that require action.

The procedures for creating the panels and for bringing challenges before the panels shall be administered by the existing WIPO Arbitration and Mediation Center ("WIPO Center")<sup>74</sup> in Geneva. WIPO staff shall not however be members of the panel (Pt II, s. 8(b) gTLD-MoU).<sup>75</sup> It will merely provide the procedural framework within which those decisions can take place.<sup>76</sup>

WIPO will make several arrangements to accommodate its Mediation and Arbitration Center with these new procedures. These include the selection of specialised arbitrators, developing technical features to allow "on-line" mediation/arbitration and the protection of privacy, and the development of a new fee policy (for mediation, the cost is expected to be around \$100 or \$200, and for arbitration the cost is expected to be around \$500, plus the arbitrator's fee.<sup>77</sup>

The draft of the CORE-MoU contains the latest version of the Substantive Guidelines Concerning Administrative Domain Name Challenge Panels.<sup>78</sup> These guidelines contain proposed interpretations of the dispute policy of the gTLD-MoU and try to set out objective standards and criteria for interpreting the terms of this policy such as "which is identical or closely similar" or "is deemed to be internationally known" to be executed by the ACPs. The WIPO Centre also distributed a draft of WIPO Rules for ACP Procedures concerning Internet domain names (WIPO ACP Rules) providing detailed procedural provisions for the ACP dispute settlement.<sup>78a</sup>

## Relation between decisions of ACPs and national courts

The gTLD-MoU clarifies that:

no decision of an ACP shall inhibit, affect or prevent the power of the appropriate national or regional courts to hear cases interpreting and enforcing intellectual property rights that fall within their jurisdiction. Likewise, nothing in this Section shall prevent any party, at any time, from bringing any case before such national or regional courts that could otherwise be brought, nor from initiating arbitration or mediation procedures that are otherwise available (Pt II, s. 8(c)).

An ACP would have authority only over the SLD under the gTLDs administered by CORE, and not over persons, since its authority derives only from the gTLD-MoU.

No execution of the ACP's decision is necessary (such as in terms of the execution of an arbitral award), as the ACPs only decide on domain names, and the new system of domain name administration (by the registrars) is able to "execute" the ACPs' decisions itself. If a challenger is successful at the ACP no further steps in national courts will be necessary. The competent registrar will remove the domain name or transfer it to the challenger.

Such decision could be carried to national courts by the former owner of the domain. The court would then examine the agreement between the former domain name owner and the registrar (with submission pursuant to quoted Article 8 of the draft of the CORE-MoU). It seems probable that national courts<sup>79</sup> would accept the validity of this submission and it is unlikely that the trade mark aspects would be dealt with again.

If a challenger remains without success he will possibly apply to national courts. As only the domain name applicant but not the challenger (the owner of national distinctive marks) has submitted himself to the ACPs' jurisdiction, no valid arbitration agreement (in favour of the ACPs) is at hand. The national courts will then be obliged to solve the above-mentioned problems independently, without regard to the gTLD-MoU rules, in accordance with applicable national laws.

73 Available at [http://www.wipo.int/eng/arbit/rules/arbitrat/arb\\_rule.htm](http://www.wipo.int/eng/arbit/rules/arbitrat/arb_rule.htm) in connection with [http://www.wipo.int/eng/arbit/rules/expedite/exp\\_rule.htm](http://www.wipo.int/eng/arbit/rules/expedite/exp_rule.htm).

74 See <http://www.wipo.int/eng/arbit/index.htm>.

75 See <http://www.iahc.org/gTLD-MoU.html>.

76 WIPO "Resolution of Intellectual Property Disputes within the Context of the [gTLD-MoU]" (May 16, 1997) IV, at [http://www.wipo.int/eng/internet/domains/tdn/cm/cm\\_1\\_3.htm](http://www.wipo.int/eng/internet/domains/tdn/cm/cm_1_3.htm). See also "An Open Letter from WIPO to the Internet Community concerning Domain Name Dispute Resolution Procedures under the gTLD-MoU", <http://www.wipo.int/eng/internet/domains/openlet.htm>.

77 EU-DG XV/E-3 "The Internet Domain Name System and Trademarks", Working Document of the Commission Services, at 6.

78 As of May 19, 1997 available at <http://www.gtld-mou.org/docs/core-mou.htm>. Previous version at <http://www.iahc.org/docs/acp-guide.html>.

78a Available at <http://www.wipo.int/eng/arbit/acprules.htm>. See also the memorandum of the International Bureau WO/GA/XXI/9 prepared for the WIPO General Assembly (between September 22, and October 1) at <http://www.wipo.int/eng/internet/domains/index.htm>.

79 At least German and Austrian courts.