Israel Internet Society
Advisory Committee Panel
Case No. 13

Jonathan Agmon (Chairperson)
Dr. Neil Wilkof
Dr. Michael Birnhack

In the matter between

THK Co. Ltd.
v.
Europeanet GmbH

In respect of the domain Name: THK.CO.IL

Decision

Jonathan AGMON (Chairperson):
In accordance with rules 16, 19.4 and 21 to the version 1.1. of the Rules for Allocation of Domain Names under the .IL (Israel) Top Level Domain dated December 1998 (hereafter: "**the Rules**") as amended (2000) this panel decides as follows.

Background
On August 24, 2005 THK Co. Ltd. (hereafter: "**THK**") filed notice pursuant to Rule 19.3 of the Rules requesting the Advisory Committee Panel to reconsider the allocation by ISOC-IL of the domain name THK.CO.IL to Europeanet GmbH (hereafter: "**the Domain Name**" and "**Europeanet**" respectively).

Procedure
This Panel was established on August 25, 2005. Pursuant to the establishment of the Panel, on August 28, 2005 the Panel delivered a copy of the above mentioned notice to Europeanet via e-mail, to the e-mail address which Europeanet itself provided ISOC-IL at the time of its application for the domain name. Respondent Europeanet failed to answer the complaint by the due date of September 12, 2005 (and has not responded in any other manner by the day this decision is issued). The Panel has carefully considered the materials and arguments submitted by THK. Despite the fact that Europeanet failed to respond we considered the matter on the merits, based on the facts provided by the applicant and on examining the web sites at stake, as described below.

Nature of the Dispute
Pursuant to rule 19.3 of the Rules any person or organization who disputes the allocation of a Domain Name to a Holder may request reconsideration of the allocation, including transfer of the allocation to the challenger upon application to the Advisory Committee.

Finding of Facts and Arguments
THK is a Japanese company established in 1973. According to THK, it is a world leader in the linear motion guide products (LM products). THK is also a general machine manufacturing company. THK currently employs over 2,700 employees and had sales exceeding US$1.1 billion in the year 2004 from over 30 offices located across the globe. THK is affiliated with a number of companies such as THK

America, Inc., THK Europe BV and others. THK has begun use of the THK mark during the 1970s. THK states in its application that the mark THK stands for Toughness, High Quality and Know How.

THK attached to its complaint pages downloaded from the web site that was reachable at the Domain Name. The pages attached are similar in design and appearance to the pages at THK's web site, as well as identical in substantial parts of the contents. It appears that at least some of the web pages posted on the Domain Name were translated into Hebrew from the THK.com web site. For example, these pages included a form for communicating with THK. Apparently, Europeanet or the operator of the web site that was reachable at the Domain Name has programmed the form requests to be sent to him rather than to THK. Apparently, shortly after the complaint was filed to ISOC, this web site was removed and is at present no longer available online.

THK argues that its web sites constitute an important tool and means through which it conducts its business, interacts with its employees and customers. THK however did not provide evidence showing it has an office in Israel, a representative or a sales office or other employees in Israel. We were not provided with evidence concerning the specific sales of THK in Israel nor whether it has any Israeli customers. THK provided that it allows customers to purchase goods on its Internet web sites. Our examination, however, revealed that THK US web sites allows only for US and Canada residents to purchase online, and is therefore unavailable to Israeli customers. The THK German web site is in German and is clearly designed for German speaking customers. We could not find a section at the THK web site which provides for assistance to Israeli customers, whether it be in Hebrew or otherwise.

THK owns US federal trademarks serial numbers 127,431; 127,432; and 2,581,214. A review of the US trademark office shows that the mark THK is registered on the name of THK in classes 35, and 7. However, the same mark is also registered in class 41 and 45 on the name of CGI Holdings Corp from Illinois, which is traded in the US stock exchange under the ticker THK. THK is also the owner of a number of domain names among which are thk.com, thk.co.jp, thk.de, thk.co.uk and others. THK does not own trademark registrations in Israel.

According to the registration details of the disputed Domain Name, Europeanet is a company residing in Frankfurt, Germany. Europeanet failed to answer the complaint and we have no other information about this company.

THK claims it has rights to the Domain Name. THK claims Europeanet is a free rider on THK's reputation citing causes of action such as unjust enrichment, plunder of THK name, and unlawful exploitation of the THK's reputation.

THK argued that the use of the Domain Name in the manner described above causes THK to lose hundreds of customers each month and to loss of business and reputation. THK argued that such conduct amounts to bad faith on behalf of the Europeanet. THK further argued that the use of an identical web site comprising copied text from the THK web site is designed to allow the owners of the Domain Name to receive business information addressed to THK.

THK further argued that the acts of the Domain Name holder were unlawful according to Israeli law and in breach of THK's rights. THK also argued that these acts were in violation of section 4a of the UDRP. THK claims that registration of the Domain Name constitutes trademark infringement, an act of bad faith contrary to sections 39 and 61 of the Contracts Act, an unreasonable interference with the business of THK contrary to section 3 of the Commercial Torts Act, unjust enrichment and deception under section 56 of the Torts Ordinance [New Version].

Finally we note that THK attorneys have attempted to contact Europeanet on July 24, 2005 or thereafter and requested Europeanet to agree to the transfer of the Domain Name to THK. Europeanet failed to answer THK's attorney's letter.

Opinion

Having reviewed the arguments and facts presented to us by the THK we accept the petition. The reasons for our decision are as follows:

1. Section F of the Rules provide for "special holder's undertakings and representations for the allocation of domain names", made by the holder as part of the contractual framework between ISOC-IL and the domain name holder. In accordance with Rule 26 the holder of a domain name represents to ISOC-IL that the allocation of the domain name does not infringe on a third party right in Israel and further that the information provided by him in the registration process is true and accurate.

2. Europeanet's use of the Domain Name is clearly in violation of Israeli law and suggests that at the time of requesting the Domain Name Europeanet was aware of THK and its use of the THK mark. The web page posted on the Domain Name is nearly an exact copy of a web page from THK's web site. Since THK web site is available on-line it is evident that Europeanet or someone on her behalf could and did access THK web site and obtained the necessary elements to create the web site that was posted on the Domain Name before this application was lodged. The web page was translated to draw Israeli customers to order from the holder of the Domain Name THK products while it misrepresents itself as THK.

3. The Copyright Act, 1911 reserves to the author of a work the right to make, copy or translate a work of authorship. It is an infringement of copyright to do any act which is reserved to the owner of the work, unless permission is given, or under special circumstances such as fair dealing. THK has clearly not given such permission, and we fail to see how the use of the copyrighted works by Europeanet can possibly be considered fair dealing or enjoy any other exception awarded to users in Copyright law. Therefore, we find, for the purpose of this proceeding, that copying of the THK web page and translating the English parts thereof constitutes copyright infringement, is in violation of the Copyright Act, and hence violates Europeanet's undertakings towards ISOC-IL.

4. Europeanet actions of posting a web page in Hebrew which is similar to the THK web page and which is designed to attract Israeli customers away from THK also constitute an act of bad faith contrary to section 61(b) of the Contracts Act (General Section) 1973. Previous Panels have noted that the good faith duty is a tenet of Israeli law and covers all contractual and legal acts performed by a person. See decision in Windows.co.il (decided on January 31, 2005). Since the duty of good faith spans to the acts of Europeanet with respect to the request for assignment of the Domain Name and later the use it made thereof, we conclude that Europeanet's request and use of the Domain Name for the purpose of using the Domain Name to unlawfully lure customer of THK to purchasing THK products from Europeanet was made in bad faith. Europeanet should have known at the time of application that THK is likely to request for its use the Domain Name in Israel. See In re Amdocs (Israel) Ltd. and Ofir Sharon (decided January 2, 2002). Europeanet knew at the time of its application that its statement that it was not in violation of third party's rights in the THK mark was incorrect. Therefore, Europeanet acted in bad faith when it applied for the Domain Name. This was made contrary to the rules and in breach of its contractual obligations to ISOC-IL

5. Europeanet also acted contrary to section 3 of the Commercial Torts Act, 1999 which provides that a business shall not prevent and burden, in an unfair manner, the access of customers, employees or agents to a business, property or service of another business. The Tel Aviv District Court in Civil Lawsuit 1627/01 M.S. Magnetics Ltd. v. Diskcopy Ltd. and others (Judge Y. Zaft) Takdin 2001(2) 4238, provided that to prove this tort the claimant must show [1] the existence of two businesses (the plaintiff and defendant); [2] that the defendant is preventing or burdening the access of clients, employees or agents to the business or service of the plaintiff, and that [3] the actions by the defendant were in bad faith. As to the first element, it is clear that both parties are commercial entities. As to the second element of the tort, Europeanet has requested the assignment and taken a Domain Name which is identical to the name of THK and which would likely serve THK customers. THK would then be required to choose an alternative domain name which is likely to burden the access of customers to THK's business. By these actions, Europeanet is burdening THK clients with access to THK's business. However, this case presents not only a "burden on access" situation. Europeanet's behavior, in that it copied and translated THK's web site and provided a means to contact itself, rather than THK, lured (or, in the absence of evidence, might have lured) unwary customers to believe that they are communicating with THK, rather than with Europeanet. As to the third element, the bad faith element, Judge Zaft wrote in the M.S. Magnetics case that the term is difficult to define but easy to recognize. In the case before us the actions of Europeanet of copying THK's web site and attempting to receive a free ride on THK's back are easily recognized as acts made in bad faith. The result is that THK has shown that Europeanet is burdening the access of its customers to its business, in violation of section 3 of the Commercial Torts Act.

6. Given the above findings we need not address the further allegations about unjust enrichment. We did not find persuasive the other causes of action brought before us, which are based on trademark law and the tort of passing-off as well as other torts mentioned in the petition. THK did not establish that it has reputation in Israel. THK does not have a registered trademark in Israel and the trademarks it registered in the US are irrelevant in Israel and in these proceedings. THK also did not show a deception on the part of Europeanet contrary to section 56 of the Torts Ordinance [New Version] since use of a cause of action under this section is only allowed if the misrepresentation was designed to deceive the plaintiff rather than third parties. THK also did not show that actual damages were suffered by her as a result.

7. The result is that we order ISOC-IL to revoke the assignment of the domain name THK.CO.IL to Europeanet. ISOC-IL may reassign the Domain Name to THK pursuant to the Rules.

8. As to costs in accordance with Rule 24, we hold that Europeanet shall each pay ISOC-IL the sum of $250 as expenses.

Dr. Neil WILKOF, (Member):
I concur with the result of the Panel as set out in paragraphs 7 and 8 of the Decision. However, my reasoning differs from that of the other Panelists.

1. The case made out by the Petitioner is far from conclusive, even when we take into account that no response has been filed by the Registrant. We note that the Registrant has not alleged use of the THK mark in Israel. There is no allegation that the THK mark has been registered in Israel, or that there is any pending application. The Petitioner has not pointed to any commercial activity under the mark (or otherwise) in Israel, nor has it alleged any instances of actual commercial confusion. While the Petitioner has indicated three registration numbers for U.S.

trademarks, it has not attached a copy of any of the extracts; it is not the duty of the Panel to carry out an independent examination of the USPTO database with respect to these alleged registrations (or any other matters relating to the factual background of this case).

2. There is no indication in the Petition when the Domain Name was registered in Israel, or any explanation why the Petitioner did not seek to register the domain name in Israel at any time since 1995, the year which it claims to have registered the domain name <THK.com>. Moreover, the relevant extract from the WHOIS database with respect to the Domain Name is not attached. The copy of the alleged letter sent by the Petitioner to the Registrant to facilitate a settlement of the matter does not contain a street number but only the name of a street in Frankfurt, Germany. There does not appear to be an attachment to indicate whether the letter was unclaimed or simply not delivered; having regard to the fact the address appears incomplete.

3. In my view, it is not within the purview of the Panel to make a finding that the website of the Registrant constitutes an infringement of copyright of under the Copyright Act-1911, as incorporated within Israeli law. There are other tribunals that are appropriate for resolving a question of copyright infringement. Even if this Panel were such a tribunal, thorny questions of the jurisdiction and situs of the infringement raise threshold questions, the answer to which is far from certain on the basis of the evidentiary record at hand.

4. I also disagree with my co-Panelists that the M.S. Magnetics Ltd. v. Diskcopy Ltd. decision is relevant here (see Paragraph 5 of the Decision). As a threshold matter, I question whether this tribunal is appropriate to find the commission of a commercial tort under the Israel Commercial Torts. In any event, even if the answer is yes, in the absence of any allegations that the Petitioner engages in commercial activity in Israel, any inquiry into whether a commercial tort has been committed under Israeli law seems misplaced. (As to the third prong of the court's test, namely, bad faith, see paragraph 6 below).

5. I have had the benefit of reading the concurrent reasoning set out in exemplary fashion by co-Panelist Dr. Birnhack and I would offer one further comment. The adjudication role that has been delegated to the Panel under the Rules is sui generis to an extreme. It provides a quick means for resolving disputes regarding the registration of a domain name. The Panel is not a court nor is it an administrative law body. The Panel finds facts only in the most rudimentary fashion, and the sources of its legal authority and the force, if any, of its decisions as binding precedent, are both uncertain. I am not prepared to set in stone that under no circumstances would I consider claims based on grounds other than bad faith and trademark-related rights. However, I am hard-pressed to imagine a set of circumstances in which copyright infringement per se, might ever be appropriately considered by the Panel.

6. Based only on the foregoing, I would have great difficulty ruling in favor of the Petitioner. However, what tips the scales in its favor in this matter is the alleged translation into Hebrew of certain contents of the Petitioner's website. Irrespective of whether such action constitutes infringement of copyright (see paragraph 4 above), the very fact of the alleged copying, and the associations created thereby between the Petition and the Respondent, point to bad faith conduct by the Petitioner with respect to the adoption and assignment of the Domain Name. In my view, the blatancy of the Petitioner's actions in this regard falls within the concept of bad faith as developed in Israeli jurisprudence.

For the reasons set out above, I concur with the Decision of the Panel.

Dr. Michael BIRNHACK, (Member):

1. I join my co-panelists and concur with the result as stated in the decision authored by the Chairperson. Although there is no mandatory principle of precedent in the developing jurisprudence of Israeli domain name disputes, the dispute at stake raises issues of principle, regarding the scope of jurisdiction of the Advisory Committee Panel ("ACP") under the Registration Rules of ISOC-IL ("the Rules"). Accordingly, I would like to add the following comments.

2. The dispute between my distinguished co-panelists, Mr. Agmon and Dr. Wilkof, focuses on the basis on which an ACP may base its decision in a domain name dispute, under the Rules. While Mr. Agmon based the decision on a wide range of causes of action, namely copyright law and the Commercial Torts Act, 1999, Dr. Wilkof seems to hold a narrower view as to the jurisdiction of ACPs. According to his analysis, the only bases on which an ACP can establish its decision are trademark law (and presumably also the related tort of passing-off), and the principle of good (or bad) faith, which is by now a well-established principle in Israeli law.

3. It is true that up until now, ISOC-IL cases were trademark-related. Petitioners in the current case failed to establish a cause of action based on trademark law, for the reasons stated in my co-panelists' opinions, namely, petitioner did not register a trademark in Israel. It seems that petitioner believes its trademark is a well-known trademark, and accordingly might be protected even in the absence of local registration. However, petitioner has not provided evidence to prove this cause, neither has it established its local good will. Thus, it can not enjoy the protection awarded to owners of good will by the tort of passing-off.

4. Are trademark-related torts the exclusive bases for deciding an ACP dispute? I believe the answer is in the negative. This conclusion stems from both the mandate of the ACP as declared in the Rules, and from a purposive interpretation of its role and jurisdiction, as well as the practice of previous ACP opinions.

5. The ACP derives its power and jurisdiction from the Rules. Section 16 of the rules states that –

   > "The Advisory Committee is an independent committee designed for expedited resolution regarding allocation of Domain Names under these Rules."

   The ACP should be composed of "internet and trademark specialists" (ibid). The ACP is not an arbitration process, and the Arbitration Law does not apply thereto (section 17). Section 19 draws the contours of the ACP's jurisdiction, which is –

   > "The Advisory Committee is designed for expedited resolution of the following disputes regarding Third Level Domain Names allocated according to these Rules within Israel only…"

   Section 19 then lists three kinds of disputes as to which the ACP has jurisdiction– (1) an applicant's dispute against refusal to allocate it a domain name; (2) a holder's dispute against a cancellation of allocation, and (3) third party disputes. The latter situation provides the framework for the current dispute (and to previous Israeli ACP decisions). It states that

   > "Any person or organization who disputes the allocation of a Domain Name to a Holder ("Challenger"), may request reconsideration of the allocation, including transfer of the

> allocation to the Challenger upon application to the Advisory Committee".

Other rules determine procedural matters of the ACPs.

6. What, then, is the scope of the ACP jurisdiction? Whereas the first two disputes listed in section 19 have the nature of a judicial appeal on ISOC-IL's decisions as to refusal of allocation and canceling an allocation of a domain name, the third kind of dispute is closer in nature to a first instance judicial tribunal. Section 19(3) does not limit petitioners in the causes of action they may raise, nor does it limit the ACP in its powers. The only explicit limitation is to be found in the preamble of section 19, which limits the ACP jurisdiction to disputes regarding Third Level Domain Names which were allocated according to the Rules within Israel only. Another limitation might be found in that the Rules mention that the ACP should examine, in the appropriate situations, the allocation of a domain name (see section 16, as quoted above).

7. The power of the ACP derives from the Rules and is limited to the Rules. The Rules do indeed emphasize trademark causes of action. This is apparent in the composition of the ACP (section 16), as well section 26.1. Indeed, without having conducted an empirical research, it is safe to state that most Domain Name disputes have revolved around trademark issues. However, the Rules are not limited to trade mark disputes. Section 26 lists Holder's representations, and states:

   > "(1) Holder represents and warrants that the allocation or use of the Domain Name by the Holder does not infringe the legal rights of a third party..."

8. The undertaking of a holder is not limited to representations related to trademark law and is stated in the most general manner: that the holder does not infringe "legal rights of a third party". Furthermore, it is important to notice that the rule is addressed to the *holder* of a domain name, rather than the *applicant* thereto. This choice of language indicates that the representation is an ongoing representation. It is not limited to the period between the request submitted to ISOC and the moment of allocation of a domain name.

9. But text and language are always indeterminate, and are only one source, though an important one, in determining the scope of the jurisdiction of the ACP. Israeli law adopted a different mode of interpretation: the purposive interpretation. It seeks to determine the purpose of a legal text, rather than the meaning of the plane language. It is not limited to the intent of the authors of the text, and is not limited to the text. The latter are, nevertheless, important factors in determining the purpose of a legal text, be it a statute, a will, a contract or any other text which purports to create legal rights and impose duties. Chief Justice Aharon Barak's scholarship and judicial record have discussed and explained this method of interpretation at length, and I need not repeat it here.

10. What is the purpose of the ACP? Clearly, it is closely affiliated, if not identical, to the purpose of ISOC-IL in general. ISOC-IL has the authority to allocate the domain names in Israel under the <.il> top level domain (see section 1 of the Rules). The Rules determine the procedures of allocation of domain names, and include also bars to allocation (section 3.1). These include, *inter alia* -

    > "(c) Offensive Obscene words and names incorporating foul language or names that otherwise do not comply with the Laws of Israel.

(d) Barred By Law Names that are injurious to public order or to public sensibilities or otherwise do not comply with the Laws of Israel."

These bars, as well as the existence of section 19.3 cited *supra*, indicate that other than the technical allocation of a domain name, ISOC-IL has a duty to maintain the integrity of the domain name system. In my view, the integrity of the domain name system is a fundamental underlying principle which guides and should guide ISOC-IL in the allocation of domain names, and hence also the ACP.

11. What does this purpose of the integrity of the domain name system mean? In my view, the integrity of the domain name system is composed of at least two components. One is internal to the system of domain names, and one is external thereto. I shall begin with commenting on the latter, so we can focus on the matter here, which refers to the internal component.

12. The *external integrity* is that the domain names do not violate the social norms of the community, as stated in the relevant applicable law. In Israel, this external component is illustrated in the above cited rules 3.1(c) and (d). ISOC-IL has the initial mandate to make decisions as to the external component of integrity, and the ACP has the power to review ISOC-IL's decisions. This is the power the ACP has been accorded under sections 19.1 and 19.2, which I discussed earlier. Of course, courts too have the power to adjudicate disputes related to web sites, and under extreme situations, a court might issue a restraining order, for example, that requires a web site to be shut off.

13. The *internal integrity* is simple to state, though it might be difficult to apply: that domain names function as they are intended to. This means that a domain name should lead users to the web site they wished to access (including users who did not know in advance what to expect in the web site, as is often the case). Accordingly, if a domain name misleads a user who expects to reach web site owned by A, and instead reaches a different and unaffiliated web site owned by B, then the integrity of the system might be breached, and its allocation should be reexamined. The power to ensure the internal integrity is deposited with the ACP under section 19.3 of the Rules (of course the judiciary has its powers too).

14. To summarize the discussion thus far, the purpose of the ACP is to assist the integrity of the domain name system, first and foremost for the benefit of users and for the benefit of law abiding operators of web sites who wish to exercise their legitimate rights of free speech, occupation and the like.

15. This analysis, and the conclusion that the purpose of the ACP is to assist in maintaining the integrity of the domain name system leads to the following conclusion, in relation to the power of the ACP to maintain the *internal integrity* of the domain name system, which is the case at dispute here: *any cause of action which is related to the integrity of the system should be allowed*. (Of course, the petitioner should prove the cause under the particular circumstances).

16. More specifically, causes of action based on trade mark law, on the tort of passing-off and on bad faith representations are all relevant causes of action which can be adjudicated by an ACP. Furthermore, the commercial tort of unlawfully disturbing access of clients to a place of business (see section 3 of the Commercial Torts Act, 1999, and its application in the *Magnetics* case, cited *supra* by the Chairperson) and any other tort which related to misrepresentations such as section

56 of the Torts Ordinance, or causes of action according to the Consumer's Protection Act of 1981 are justiciable by the ACP. This is not an exclusive list of causes of action.

17. This does not mean that the ACP is the address for all kinds of causes of action. To the contrary. A web site might be blamed of illegal speech, such as defamation, violation of privacy or of copyright; as well as criminal offences such as illicit inducement. It might be suspect of illegal conduct such as sales of drugs or distribution of malice software. These are not issues with which the ACP should deal under its authority under section 19.3. ISOC-IL might decide to cancel the allocation of a domain name which hosts such a web site, under section 3.1(c) and (d), thus fulfilling its duty to maintain the *external integrity* of the domain name system. The ACP might be called upon to review such decisions. But here we are drawing the limits of the *internal integrity*. Under this component, illegal acts and/or alleged torts which are unrelated to the domain name system, are beyond the jurisdiction of the ACP, with one exception: *if the alleged tort or illegal act is related to the internal integrity, i.e., to the simple but basic principle that a domain name should be connected to the web site it purports to be (if it does), then the ACP does have the jurisdiction and power to examine the cause of action.*

18. Previous ACPs have also addressed the scope of applicable substantive norms. The opinion in Re *Disney.co.il* (January 28, 2000), for example, was the first case to address this issue directly. The ACP concluded that "the ACP has broad authority to apply the substantive Israeli law to domain name disputes under the Rules" (at p. 7 of the decision). That ACP outlined the "legislative history" of the Rules, and reached the conclusion (with which I fully agree), that "ISOC-IL chose to empower its own ACP with general power to decide disputes according toe the law of the land without tying them to substantive rules drafted by ISOC-IL" (ibid, at p. 9). The operative conclusion was that the allocation of a domain name can be examined under the Rules themselves, under a specific Israeli statute, and under principles of the Israeli legal system, especially the good faith principle. This conclusion was applied in further disputes. See for example In Re *Habitat.co.il* (July 31, 2000), which was based on the good faith principle or In Re *Snapple.co.il* (February 25, 2001), which was based not only on trademark law, but on the Commercial Torts Act, 1999. (see similarly, In Re *Amdocs.co.il* (January 2, 2002).

19. It is time to return to the case at stake and to my co-panelists' opinions. Under the principle of integrity stated above, examining the causes of action of trademark law and passing-off is clearly within the scope of the ACP. I join both opinions above, that petitioner in this case failed to prove either of these causes of action. Furthermore, it is within the scope of the ACP to examine the cause of action of bad faith behavior. The good or bad faith behavior of a domain name holder lies at the heart of the integrity of the domain name system. Both panelists agree that respondent's behavior in this case was in bad faith, and I join them in this conclusion, based on the undisputed facts of the case.

20. Under the principle of integrity stated above, I further conclude that it is perfectly within the jurisdiction of the ACP to examine the cause of action under the Commercial Torts Act, as previous panels have concluded. I join the Chairperson's decision in this regard, as stated in paragraph 5 of his opinion.

21. Should the ACP attend to the copyright cause of action? In most cases, the answer should be in the negative. This is part of the *external integrity* of the domain name system, or more precisely, of the World Wide Web at large. The responsibility to maintain this component of the system's integrity lies with courts, upon the submission of a law suit. However, facts related to copyright disputes might indicate the good or bad faith of a party, or might shed light on other causes of

action, such as deceit, the tort under section 3 of the Commercial Torts Act and the like torts. In other words, facts related to copyright issues might be related to the *internal integrity* of the domain name system. In such circumstances, a copyright cause of action is within the scope of the ACP, for the limited but fundamental purpose of maintaining the integrity of the system. This is the case in the matter in front of us. Respondent has clearly infringed the copyright of petitioner. This finding of infringement in itself would not have been sufficient to decide against respondent in the dispute regarding the allocation of the domain name. However, in this case, the copyright infringement is part of a wider picture of respondent's behavior. As described in detail in the Chairperson's opinion, respondent translated text from petitioner's web site, and added a form to be filled by users, the information being sent to respondent, rather than to petitioner. The copyright infringement was part of a wider scheme of misleading users to believe that they are visiting a web site affiliated with petitioner.

22. Another final comment is in due place: Needless to say, courts are better equipped than the ACP to adjudicate copyright disputes. Procedural rules, evidence and various authorities render courts a better forum to adjudicate copyright disputes than the ACP. However, the analysis offered here limits the ACP's copyright analysis to an ancillary position. Only when the copyright issues are indicative of the bad faith, deceit, misleading and similar kinds of behavior, by holders of disputed domain names, should the ACP attend to the copyright dispute. Furthermore, a finding by an ACP regarding copyright infringement (or for that matter, any other "external" cause of action), is not a final determination, and the jurisdiction to adjudicate such disputes lies with the judiciary. The ACP's power is limited to the allocation of the domain name.

23. Accordingly, I concur with the result and join the Chairperson's reasoning, with the clarification as to the cause of action under copyright law.

October 10, 2005