

Domain Name Dispute Resolution Center (DNDRC) Arbitration and Mediation Center

APPELLATE PANEL DECISION

John Tziviskos v. PKNIC

Case No. A2006-0001

Also in PDF [A2006-0001](#)

1. The Parties

The Appellant is John Tziviskos with its address as per the registration application being at 20218 Steinway Street, Santa Clarita. Email: artiques@otenet.gr .

The Respondent is PKNIC with its Lahore Office at 7-F, Saman Arcade, 1-J, Gulberg-III, Lahore, Pakistan.

2.The Domain Name and Registrar

The domain name at issue is <porno.pk>, the registration of which was applied for with its create date as 21-06-2006. The registration was held invalid by the Respondent on 19-07-2006. The Agent Organization through which the registration was applied is PakHost Web Services.

3. Procedural History

DNDRC was informed that the Appellant queried the Respondent regarding the availability of an appeal mechanism in answer to which the Respondent informed the Appellant that as per PKNIC - Internet Domain Registration Policy, an appeal before the independent dispute resolution provider DNDRC would be possible. The Respondent submitted notification of the Appellants request for Appeal on Saturday 08/12/2006 at 6:04 PM. DNDRC awaited the submission by the Appellant of the Appeal as per the prescribed forms available at www.dndrc.com/downloads. Notwithstanding, the same DNDRC also emailed the Appellant on Tuesday, August 22, 2006 at 8:16 PM with the attachment of the form of the Appeal and informed the Appellant that: DNDRC had received intimation of the interest of the Appellant to apply for an appeal with DNDRC, the forms for filing of Appeal was attached, that the form could be downloaded from www.dndrc.com/downloads, and the “...*proposed/intended use and purpose of the registration of the domain name should be elaborated upon in the form...*” No response has been received from the Appellant. Thereafter, DNDRC once again intimated the Appellant on Monday, September 04, 2006 at 8:38 PM that since no Appeal form had been submitted and no requisite fee had been paid, the Appellant had until the 9th of September 2006 to comply with the same or the

appeal would have to be terminated due to the Appellants failure to apply, comply with the rules & requirements of DNDRC and prosecute the Appeal. No response was received from the Appellant. An automated acknowledgment of delivery was received sent by the Center to the Appellant on Monday 9/4/2006 at 8:39 PM. No failure of delivery message has been received by DNDRC.

Since no Rules of DNDRC have been established as yet in default of the same the UDRP shall apply to the same by virtue of the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1 paragraph 2 which states that “DNDRC may consider and issue a recommendation in the matter in accordance with its own rules for such disputes or in default of such rules apply the Uniform Domain Name Dispute Resolution Policy (As Approved by ICANN on October 24, 1999) and/or the Rules for Uniform Domain Name Dispute Resolution Policy (As Approved by ICANN on October 24, 1999).” Applying Paragraph 4(a) of the Rules for Uniform Domain Name Dispute Resolution Policy (the *Rules*) the Center appointed Barrister Zahid Jamil as Arbitrator who has verified that the Complaint does not satisfy the formal requirements of the Policy and the Rules. Payment in the required amount to the Center or the Arbitrator has not been made by the Appellant.

The formal deficiencies were recorded, on August 22, 2006 at 8:16 PM and again on Monday, September 04, 2006 at 8:38 PM when notifications were sent to the Appellant. No replies have been received nor compliances made.

Today on 9th of September 2006, on expiry of the deadline as intimated to the Appellant, in view of the Appellant’s failures the single panelist arbitrator Barrister Zahid Jamil has been appointed to serve as a panelist in this Case No. A2006-0001. He has accepted and declared Impartiality and Independence.

The language of the proceedings is English, being the language of the registration agreement.

Due to the failures of the Appellant to comply with the formal requirements as detailed above and in fact the Appellant’s complete failure to submit any Appeal leads the Panel to find that in fact no Appeal is pending and on merely this preliminary point the proceedings must be terminated for failure of the Appellant to prosecute the Appeal. As such the Appellant is under the principle of *res judicata* and limitation barred from filing any subsequent Appeal on the same facts or matter.

Since this is the first domain name dispute to originate from PKNIC to DNDRC, the Panelists feel it may be useful to deal more holistically with the merits of the Appeal notwithstanding the absence and failure of the Appellant to file any formal submissions. The Panel thus, proceeds herein below to deal with the Appeal also on merits and dispose of the same. It is cautioned that such further proceeding to deal with a matter on merits despite failure of formal requirements and dismissal on preliminary grounds should not be taken to be a precedent or legitimate expectation for future Appeals or Complaints.

4. Factual Background

The domain name upon which the Appeal is based is “porno.pk”. No reason for registration of the domain has been disclosed even though an opportunity and request to clarify was provided to the Appellant vide the notification dated August 22, 2006 at 8:16 PM.

5. Parties’ Contentions

A. The Complainant

Since no Form or other communication from the Appellant has been received it is not possible to provide any details. At most it may be assumed that the Appellant generally feels aggrieved by the rejection by the Respondent of the domain registration.

B. Respondent

The Respondent vide their intimation forwarding the interest of the Appellant to Appeal the rejection of the Appellant's application for registration of the domain "porno.pk" contended that *"PKNIC's position about such names is that the publication of pornographic material and marketing tools or instruments to promote it are considered an unlawful activity in the jurisdiction, and in addition they also do not comply to the decency norms of the general society in Pakistan, and hence any domain names that is related to such material or promotional tools (such as websites) are considered offensive to the sensibilities of the user population to which PKNIC has the primary obligations to serve. We have determined porno.pk to be one such name."*

It is noted that the contention does not mention the precise rule or legal basis against which such determination has taken place by the Respondent. However, the Panel must determine whether substantively the decision of the Respondent is in conformity with the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1 and the Rules.

6. Jurisdiction

The Arbitral Panel's jurisdiction over this dispute as between the Appellant and the Respondent is established by virtue of the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1 and the Rules subject to which the Appellant applied for registration of the Domain Name and on the basis of which the Respondent has submitted in the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1 and the Rules to the arbitral jurisdiction of the DNDRC and its arbitration decisions.

In addition the Appellant voluntarily intimated to the Respondent his intention to initiate an Appeal under available provisions and the Respondent submitted the same to DNDRC for decision as per the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1 and the Rules.

Both parties have thus, accepted and submitted to jurisdiction of the DNDRC and its arbitration decision in accordance with the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1 and the Rules.

7. Discussion and Findings

The application for registration of the "prono.pk" domain name on behalf of the Appellant is subject to the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1 and the Rules which state that *"You, the applicant who wants to register a domain name under .PK is presumed to have read and agreed to this PKNIC Internet Domain Registration Policy"*. The Appellant applied for registration on the basis of the same and the Respondent offered registration subject to the same. Hence the relationship between the parties is governed by the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1 and the Rules.

The PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1 paragraph 1 clearly states that it creates an exception for and thus, excludes the registration of domain names that:

- a. *infringes upon a registered tradename,*
- b. *is not bona fide as recognized by international best practice,*
- c. *is a contravention in the opinion of PKNIC to be a contravention of the latest version of the Pakistan Penal Code Act, 1860 (including offences of defamation & blasphemy)/ Anti-Terrorism Act, 1997/any applicable criminal law,*
- d. *has been declared by a Criminal Court of appropriate jurisdiction to have contravened the latest version of Pakistan Penal Code Act, 1860 (including offences of defamation & blasphemy)/Anti-Terrorism Act, 1997/any applicable criminal law), or*
- e. ***in the opinion of PKNIC is not appropriate for registration.***

The PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1 paragraph 6 also states that:

6. *Applicant represents, agrees and warrants the following four statements and a failure to comply with them, or any other parts of the PKNIC policy, will cause PKNIC to cancel the domain registration of the non-compliant domains of Applicant:*
 - i. *Applicant has a **bona fide intention** to use the Domain Name on a regular basis on the Internet;*
 - ii. *Applicant is not seeking to use the Domain Name for any **unlawful purpose**, including, without limitation, tortious interference with contract or prospective business advantage, unfair competition, injuring the reputation of another, or for the purpose of confusing or misleading a person, whether natural or incorporated.*

In this context the following aspects of the dispute will be addressed in this decision:

1. Illegality, unlawfulness or otherwise invalidity of the Application
2. Legitimate interest in Domain Name
3. Registration and use in bad faith
4. Discretion as to appropriateness

I. Illegality, unlawfulness or otherwise invalidity of the Application

Clearly the domain name, its use and purpose need to be in consonance with and not in **“contravention of the latest version of the Pakistan Penal Code Act, 1860 (including offences of defamation & blasphemy)/ Anti-Terrorism Act, 1997/any applicable criminal law”**.

The domain name “porno.pk” is linked to the word porno which is short for pornography. The word “porno” is a generic term. The following definitions of the term porno and pornography are available:

*The **Oxford English Dictionary** describes it as “pictures, writing, or films that are intended to arouse sexual excitement”.*

Dictionary.com Unabridged (v 1.0.1)

por·nog·ra·phy /pɔːnɒɡrəfi/ Pronunciation Key - Show Spelled Pronunciation [pawr-nog-ruh-fee] Pronunciation Key - Show IPA Pronunciation

—noun obscene writings, drawings, photographs, or the like, esp. those having little or no artistic merit.

[Origin: 1840–50; < Gk pornográph(os) writing about harlots (porno-, comb. form of pórnē harlot + -graphos -graph) + -y3]

—Related forms

por·no·graph·ic /ɔːpnəgræfɪk/ Pronunciation Key - Show Spelled Pronunciation [pawr-nuh-graf-ik] Pronunciation Key - Show IPA Pronunciation, adjective

por·no·graph·i·cal·ly, adverb

Dictionary.com Unabridged (v 1.0.1)

Based on the Random House Unabridged Dictionary.

American Heritage Dictionary

por·nog·ra·phy (pôr-ngr-f) Pronunciation Key

n.

Sexually explicit pictures, writing, or other material whose primary purpose is to cause sexual arousal.

The presentation or production of this material.

Lurid or sensational material: "Recent novels about the Holocaust have kept Hitler well offstage [so as] to avoid the... pornography of the era" (Morris Dickstein).

[French pornographie, from pornographe, pornographer, from Late Greek pornographos, writing about prostitutes : porn, prostitute; see per-5 in Indo-European Roots + graphein, to write; see -graphy.]

por·nogra·pher n.

porno·graphic (pôrn-grfk) adj.

porno·graphi·cal·ly adv.

Merriam-Webster's Dictionary of Law

Main Entry: por·nog·ra·phy

Pronunciation: por-'nä-gr&-fE

Function: noun

: material that depicts erotic behavior and is intended to cause sexual excitement

NOTE: Pornographic material is protected expression unless it is determined to be obscene. However, child pornography is illegal under federal and state laws prohibiting the depiction of minors in sexual acts. —por-nog-ra-pher /por-'nā-gr&-f&r/ noun —por-no-graph-ic /'por-n&-'gra-fik/ adjective —por-no-graph-i-cal-ly adverb

WordNet -

pornography

n : creative activity (writing or pictures or films etc.) of no literary or artistic value other than to stimulate sexual desire [syn: porno, porn, erotica, smut]

Free On-line Dictionary of Computing

pornography

<application> Still or moving images, usually of women, in varying states of nudity, posing or performing erotic acts with men, women, animals, machines, or other props. Some say it degrades women, some say it corrupts young boys (who down-load it from the World-Wide Web or exchange it on floppy disks). Most of it is in the form of JPEG images. There are many sites on the World-Wide Web offering porn of all sorts, almost always for a subscription. It is said that these are a driving force in the evolution of new technology and techniques for the web. Advertisements for them certainly constitute a significant proportion of all spam. There are even pornographic computer games, an early example being Mac Playmate.

Beware - many institutions, particularly universities, have strict rules against their computers and networks being used to transfer or store such things, and you might get corrupted.

Clearly the term pornography relates to pornographic material and material that would be deemed to be obscene in most jurisdictions and in particular “.....the decency norms of the general society in Pakistan...” and “...offensive to the sensibilities of the user population to which PKNIC...” However what needs to be assessed firstly is whether the domain name and its use is likely to or would be “unlawful” and/or “be a contravention of the latest version of the Pakistan Penal Code Act, 1860 (including offences of defamation & blasphemy)/Anti-Terrorism Act, 1997/any applicable criminal law”.

The Pakistan Penal Code Act 1860 states:

292. Sale, etc., of **obscene** books, etc.

Whoever--

(a) sells, lets to hire, **distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produce or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatever, or**

(b) **imports, exports or conveys any obscene object** of any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) **takes part in or receives profits from any business** in the course of which he knows or has reason to believe that any **such obscene objects are, for any of the purposes aforesaid, make, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or**

(d) **advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or**

(e) **offers or attempts to do any act which is an offence under this section,**

[shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Exception. This section does not extend to any book, pamphlet, writing, drawing or painting kept or used bona fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

293. *Sale, etc., of obscene objects to young person. Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.*

294. *Obscene acts and songs.*

Whoever, to the annoyance of others,

(a) **does any obscene act in any public place, or**

(b) **sings, recites or utters any obscene songs, ballad or words, in or near any public place,**

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Reported precedents for this section discussing obscenity remain sparse and we are constrained to quote the only precedent of Pakistani Courts in connection with this section and the definition of obscenity and such reference is only made for the restrictive nature of the term obscenity under the Penal Code: P L D 1952 Lahore 384, which was a criminal appeal before the Chief Justice's bench where the order stated:

It is regrettable that this issue should have been made in the trial Court the subject of controversy between men of literature and surprising that there should have existed a difference of opinion between them in regard to the story in question being obscene. Whatever conception of art and literature those who considered the publication in question to be innocuous may have, it becomes necessary to remind them that they are

completely mistaken in their conception of "obscenity" as used in law. Since the case of Reg v. Hicklin 1868 L R 3 Q B 360, one test of obscenity has always been whether the tendency of the matter charged is to deprave and corrupt those whose minds are open to immoral influences and into whose hands a publication of this sort may fall and that the motive, or intention in publishing the work does not prevent it from being,, obscene if the descriptions in it are in themselves obscene. This definition has been consistently followed in several cases in this country of which the latest is Kailashchandra Acharjya v. Emperor I L R 60 Cal. 201, which is a fully argued out case on the subject. The passage in the story, to which special reference has been made earlier in this judgment, is full of grossly indecent and sexual details of a sexual episode and would undoubtedly suggest to the minds of the young of either sex, and even to persons of more advanced years, thoughts of~ lewd and libidinous situations. It is wholly immaterial what the intention of the author in writing the story was; what matters in such cases is the tendency and not the intention.

Clearly pornography under the Penal Code would be considered obscene.

In addition the Constitution' of Pakistan 1973 which would satisfy the requirement of "any other applicable criminal law", also in Chapter II, Principles of Policy at Article 37 states,

37. The State shall:

(g) prevent prostitution, gambling and taking of injurious drugs, printing, publication, circulation and display of obscene literature and advertisements;

Hence, the Constituting in like manner also prohibits pornography, its use, publication and circulation.

The right however, of free speech which may be used as an argument in certain other jurisdictions has under the Constitution is only available to Pakistani citizens and has been restricted under Article 19 which states:

*"Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, **subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign states, public order, **decency or morality**, or in relation to contempt of court, [commission of] or incitement to an offense.**"*

The act of making such a domain name available would only be for the advertised (as per the meaning of the domain name "porno.pk", since the purpose of the chosen domain name is to define the purpose, use and content of the website by which it is accessed through the domain name) publication, accessibility, availability, circulation and dissemination of pornographic material which being obscene under the law would be in contravention of the Pakistan Penal Code and the Pakistan Constitution.

The Electronic Transactions Ordinance 2002 states that:

***"3. Legal recognition of electronic forms.—**No document, record, information, communication or transaction shall be denied legal recognition, admissibility, effect, validity, proof or enforceability on the ground that it is in electronic form and has not been attested by any witness."*

As such all material that would otherwise be in writing or in physical form, if generated or made available in electronic form would attract the provisions of the same sections of the Penal Code or any law had the material been in physical, written or printed form. Thus, the Penal Code equally applies to publications or material available in electronic form on the Internet through the use of a domain name such as "porno.pk".

Since the Internet by its very nature is a public place, the access of the domain name may involve export and import of data of obscene nature and its domain names as well as content are made known ("**makes known by any means whatsoever**") at the very least by use of Search engines to the public, the additional offences under sections 292, 293 and 294 may be attracted.

By allowing the registration of the Domain Name "prono.pk" the Respondent would be allowing and become an aider, abettor, encourager and co-conspirator and also liable to criminal offences.

The Panel therefore, concludes that the registration of the domain name "porno.pk" would be illegal, unlawful and otherwise invalid in terms of the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1 not to mention that the Respondent by allowing such registration would itself be committing a contravention of the Pakistani criminal law and a breach of its own Internet Domain Registration Policy June 20, 2006 version 4.1.

II. Legitimate interest in Domain Name

In order for the Appellant to have any legitimate interest in the domain name such interest requires legitimacy and therefore by definition require legal enforceability. Since such interest would be a breach of the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1 and a contravention of the Penal Code and generally the law, no such legitimate interest could exist. Since the registration of the domain name would be illegal and unlawful there can be no legitimate interest

In addition under the Contract Act of 1872 section 23 and 24 state:

23. What considerations and objects are lawful and what not.-- *The consideration or object of an agreement is lawful, unless –*

- a) *it is **forbidden by law**; or*
- b) *is of such a nature that, if permitted, it would **defeat the provisions of any law**; or*
- c) *is **fraudulent**; or*
- d) *involves or implies injury to the person or property of another; or*
- e) ***the Court regards it as immoral, or opposed to public policy.***

*In each of these cases, the consideration or object of an agreement is said to be unlawful. **Every agreement of which the object or consideration is unlawful is void.***

24. Agreements void, if considerations and objects unlawful in part.-- *If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is lawful, the agreement is void.*

Hence, any contract that would have for its object an illegal purpose or is considered by a Pakistani Court to be immoral or opposed to public policy would be void and hence, no contractual or legitimate interest would arise nor would be enforceable which in turn would be a violation of the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1.

The Panel therefore concludes that the Appellant does not have a legitimate interest in registration of the domain name "porno.pk".

III. Registration and use in bad faith

Clearly, since the use of the domain name would inevitably involve the breach of the law and a violation of the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1, its registration and use would be in bad faith.

The Panel therefore concludes that the registration of the domain name "porno.pk" would be in bad faith.

IV. Discretion as to appropriateness

It must also be noted that under the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1, the Respondent exercises 'discretion' under paragraph 1 and registration is subject under paragraph 1 (f) to the Respondent's opinion as to appropriateness. The Panel thus, concludes that the contention of the Respondent and its opinion that such registration is "*considered offensive to the sensibilities of the user population to which PKNIC has the primary obligations to serve.*" would be a valid determination of appropriateness given the discussion and reasons detailed above.

For the sake of clarification of this and future dispute resolution decisions it is clarified that this decision is based upon the Rules applicable to PKNIC under ICANN and PKNIC's own Internet Domain Registration Policy June 20, 2006 version 4.1. Pakistani law would not directly impact, be effective against or have jurisdiction over any of the procedures, substantive part, activities or workings of PKNIC. The only reason for determination of Pakistani law and its effect on the decision is based upon the incorporation of the same as a substantive part of the PKNIC-Internet Domain Registration Policy June 20, 2006 version 4.1. As such all violations of Pakistani law as interpreted herein are applicable to the extent that they constitute a breach of PKNIC's own Internet Domain Registration Policy June 20, 2006 version 4.1 and the Rules.

8. Decision

In light of the foregoing, the Panel decides that the Appellant's application for registration is in contravention of the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1 and each of the three elements in paragraph 4(a) of the Policy in relation to the domain name "porno.pk".

Pursuant to paragraph 2 of the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1, the Panel recommends that the Appellants application for registration was rightly determined invalid by the Respondent.

For the foregoing reasons, the Panel finds that:

- The Domain Name applied for registration by the Appellant is in contravention of and would be a contravention by the Appellant and Respondent of the applicable Pakistan Penal Code and the Pakistan Constitution constitute a breach of the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1 ; and

- The Domain Name applied for registration by the Appellant is Illegal, unlawful and otherwise invalid; and

- The Appellant has no rights or legitimate interests in respect of the Domain Name; and

- The Domain Name has been registered and is being used by the Respondent in bad faith.

Pursuant to Paragraphs 2 of the PKNIC - Internet Domain Registration Policy June 20, 2006 version 4.1, the Panel therefore recommend to the Registrar and the Respondent to reject the registration of the domain name "porno.pk" and upholds the decision of the Respondent.

Zahid Jamil, Barrister-at-law

Sole Panelist

Dated: September 9, 2006