

Quality in WIPO Domain Name Arbitration Decisions

Abstract

Over the last decades, linguists have drawn special considerations to define specialized discourse. Basically, the complexity of describing specialized discourse lies in its multi-dimensional nature. The main purpose of this paper is to characterize specialized discourse in WIPO Domain Name Arbitration as the result of social and institutional conditionings. First, the study focuses on characterizing text-external factors associated with this highly-specialized professional practice. More in particular, the study focuses on the analysis of 'Quality' in WIPO Domain Name Arbitration decisions. Second, the study found useful to define the boundaries of 'specialized discourse' Third, the study limited the focus of attention on analyzing 'Quality' in relation to 'Objectivity' and 'Neutrality' as factors associated with specialized discourse and also to 'Impartiality' and 'Independence' as conditionings specifically related to WIPO domain name arbitration professional practice. Following Bhatia (Bhatia 2004) this study conceptualizes specialized discourse as a concept highly dependent on social and institutional conditions.

1. Introduction

Over the last decades, linguists have drawn special considerations to define specialized discourse. Basically, the complexity of describing specialized discourse lies in its multi-dimensional nature. Since the analysis of specialized discourse should cover lexical, rhetorical-grammatical and generic devices, linguists have come close to the notion of 'specialized discourse' from multifarious perspectives (Bhatia 1993, 2004; Fairclough 1995, 2001, 2003; Gotti 2003, 2008). These divergent approaches have advanced our knowledge about what is specialized discourse. Fairclough, for example, understands that discourse is a form of social practice. Texts are thus "social spaces in which two fundamental social processes simultaneously occur: cognition and representation of the world and social interaction" (Fairclough 1995: 6). A similar perspective is found in Bhatia's conceptualization of discourse. For him, discourse refers to "*language in use* in institutional, professional or more general contexts" (Bhatia 2004: 3). Bhatia conceives that linguistic investigation should include research on conventionalized genres in the context of specific professional practices. Following this spirit, Gotti advocates for a linguistic and non-content oriented analysis considering specialists' epistemological perceptions for shedding light to particular choices in regards to the structuring of discourse. These inspired thoughts contribute to clarify the definition of specialized discourse to the point of making us see that it is the result of a series of interconnected elements (i.e. pragmatic, lexical, morphosyntactic and textual) working to fulfill the private intentions of professionals. Taking into account that these linguistic devices are embedded within particular socio-cultural domains, it is important to conceive 'specialized discourse' as a dynamic and variable entity which needs to be specified within the actual domain of realization.

The main purpose of this paper is therefore to approach 'specialized discourse' as a concept highly dependent on social and institutional conditions. More in particular, the present study focuses on Domain Name Arbitration in the World Intellectual Property Organization. In a nutshell, Domain Name Arbitration is an alternative dispute resolution process in which one or more panels of the World Intellectual Property Organization (WIPO) make a binding decision over the

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legitimacy of a domain name. This professional activity addresses domain name abusive registration, trademark infringement and cyberpiracy, whether defined in terms of cybersquatting¹, typosquatting² or domain name parking³. Due to the distinctive nature of domain name disputes, WIPO Domain Name Arbitration is not only characterized by being a private and confidential procedure like other types of arbitration, but it is also required to be international, technical, urgent and binding. In this study, WIPO Domain Name Arbitration actually serves as a reflection of specialized discourse in professional communication. This study explores, thus, how pragmatic, lexical, morphosyntactic and textual elements weave a particular discursive structuring oriented to fulfill the panelists' private intentions and, at the same time, forge a professional identity based on the quality of WIPO Domain Name Arbitration decisions.

Having these assumptions in mind, the study is interested in reviewing Hoffman's requirements (Hoffmann 1984). According to the German scholar, specialised discourse should satisfy rigorous claims and quality requirements (e.g. specialization, conceptuality and exactitude) and as such, it should be characterised by being precise, systematic and self-evident. The present paper sets out to investigate some of the linguistic features suggested by Hoffmann in the light of WIPO domain name arbitration decisions. In so doing, the paper revises whether Hoffmann's list of desirable attributes may still work to characterize 'specialised discourse' or it is necessary to escape narrow and often constricting labels to broaden our perspective. More specifically, the study focuses on the purposeful exploitation of 'Objectivity' to satisfy a number of professional requirements dealing with 'Quality' among others text-external conditionings which will be later explained in the Section 3. My hypothesis, here, is that panelists of the World Intellectual Property Organization seem to see 'Objectivity' as synonym of neutrality and impartiality. Discourse analysis brings to the light that this search for objectivity is not always a one-to-one correlation to professional independence. Breaking down the notion of 'objectivity' may be relevant inasmuch as it provides specific knowledge of particular linguistic devices in Domain Name Arbitration, a relatively new type of discourse which has not been thoroughly analysed in the field of linguistics. As research on this field has been extensively published by and for the professionals only, this approach to WIPO arbitral discourse from the linguistic perspective offers us an excellent opportunity to analyze a new type of professional writing.

2. Methodology

To carry out the study, I have compiled a corpus of 20 arbitration decisions retrieved from the online caseload of the World Intellectual Property Organization⁴. The selection of WIPO Domain Name Arbitration decisions has been carried out under the guidance of three major design features related to the professional background of WIPO Domain Name Arbitration: accessibility, distinctiveness and language.

The first criterion for the selection of the corpus has to do with confidentiality. When dealing with arbitration, irrespective of whether it is international commercial arbitration, investment arbitration, consumer arbitration or domain name arbitration, the myth of confidentiality appears as an impassible barrier to non-legal researchers. Confidentiality has been widely assumed to be a fundamental principle for arbitration because it gives arbitration an advantage as compared to court procedures (Bagner 2001: 243). Until the late 80s, this principle was sacrosanct and was not even debated. Confidentiality was taken for granted and, for this reason, the rule – or the routine

1 Cybersquatting entails the pre-emptive, bad faith registration of trademarks as domain names by third parties who do not possess rights in such names.

2 One variant of cybersquatting is typosquatting, the bad faith registration of domain names containing variants of popular trademarks.

3 Domain Name Parking refers to the bad faith registration of a domain name without using it for a particular service (i.e. e-mail, website, virtual advertisement of a trademark), that is, without placing any content on the domain with the hope of reselling it to the legitimate trademark holder.

4 Caseload of the World Intellectual Property Organization [online]. <http://www.wipo.int/amc/en/domains/cases.html>

– was that most final awards remained private and unavailable. Fortunately, this is changing and professionals have started to question whether confidentiality is still a fundamental principle in arbitration. In 2010, White & Case LLP, together with Queen Mary School of International Arbitration conducted an empirical survey on corporate attitudes and practices regarding international arbitration⁵. According to this survey, the key findings were that confidentiality was important to users of arbitration, but not the essential reason for recourse to arbitration. In the case of the WIPO, the WIPO Arbitration and Mediation Centre, as an ICANN dispute resolution service provider⁶, follows the UDRP Rules⁷. This policy compels WIPO to publish all decisions full over the Internet, except when an Administrative Panel determines in an exceptional case to redact portions of its decision⁸. Second, distinctiveness, conceived as the capacity of making a trademark different from any otherwise identical trademark, is one of the most common criteria on which panelists rely on to sit in judgment on trademark infringement and trademark dilution. This study has favored to compile WIPO Domain Name decision whose domain names were based on distinctive trademarks because they are much more susceptible to trademark dilution and cyberpiracy actions than unknown trademarks. In so doing, this study has a glimpse of how WIPO panelists use discourse to build a strong bridge between IP assets and trademark rights. Third, a matter affecting the selection of WIPO domain name decisions has been that of language. Selected WIPO decisions have been all written in English. At the time of collecting the corpus, there was a heated debate between arbitration professionals concerning the International top-level domains (ITLDs). Experts considered including domain names or Web addresses, represented by local language characters such as Spanish eñe (ñ), Greek alfa (α) or Cyrillic жэ (Ж). This analysis focuses on arbitration decisions written in English because it has been preferred – or imposed – as *lingua franca* in the World Intellectual Property Organization According to WIPO statistics, 88.99% of WIPO Decisions have been written in English followed by Spanish (3.95%) and French (2.76%)⁹, which indicates the salience of English as *lingua franca* in the XXI Century globalized arbitration culture.

Selected texts include decisions addressing disputes over Generic Top Level Domains (gTLDs) and decisions related to disagreements regarding Country Code Top Level Domains (ccTLDs). GTLDs refer to the top-level domain of an Internet address (i.e. .com, .net and .org) and ccTLDs allude to top-level domains related to particular countries (i.e. .mx for Mexico, .es for Spain or .dk for Denmark). Selected WIPO Domain Name Arbitration decisions cover a 9-year span of time, concretely from 2000 and 2009.

On theoretical grounds, this study follows discourse analysis in the line of Bhatia's multi-perspective and multi-dimensional model (Bhatia 2004: 18), since discourse is understood in relation to socio-cultural circumstances. If we consider why WIPO panelists use language the way they do, we should be aware that professional discourse cannot be understood without comprehending those contextual factors and the circumstances that rule the arbitration communicative process. For that reason, notions such as *discourse as text*, *discourse as genre*, *discourse as professional practice* and *discourse as social practice* remain central to understand the mirror image of text-internal conventions and text-external conditionings.

5 White & Case (2010 International Arbitration Survey: Choices in International Arbitration) [online]. http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf

6 ICANN dispute resolution service providers [online]. <http://www.icann.org/en/dndr/udrp/approved-providers.htm>

7 UDRP Rules [online]. <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>

8 Uniform Domain Name Dispute Resolution Policy (Paragraph 4(j)) [online]. <http://www.icann.org/en/dndr/udrp/policy.htm#4j>

9 World Intellectual Property Organization (Statistics: All Case Languages Ranking) [online]. http://www.wipo.int/amc/en/domains/statistics/languages_yr.jsp?year=

3. Specialized Discourse: From Hoffmann to Kant

Specialized discourse is implicitly linked to the professional community in which it emerges (Bhatia 2004). If we agree specific socio-cultural factors constrain the way discourse is produced, inasmuch as rhetorical-grammatical and textual elements shape linguistic frontiers, then specialised discourse is the result of how experts make linguistic devices work to fulfil the social requirements that their professional activity requires. In WIPO Domain Name Arbitration, Idris (Idris 2002) has identified a number of conditioning factors that characterize this professional activity.

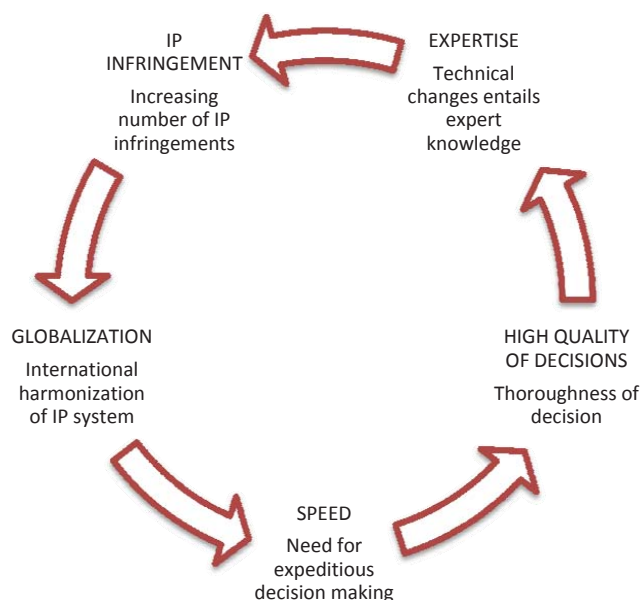


Figure 1. Conditioning Factors in WIPO Domain Name Arbitration

In Idris' proposal, one conditioning stands out due to its 'intangible' nature: 'Quality'. Understood in terms of "superiority in kind"¹⁰ or excellence, quality remains debatable since it is necessary to re-define it in the light of text-internal factors. Now, the central question shifts from identifying the text-internal properties of quality to addressing the defining characteristics of specialized discourse. Hoffmann (Hoffmann 1984), for instance, offers a list of desirable attributes appropriate for describing specialized discourses. In his article 'Seven Roads for LSP' (Hoffmann 1984), Hoffmann distinguishes a number of functional styles (i.e. official communication, science, journalism, conversation and literature) based on the various communicative functions of language and on significant deviations from the zero-prose (i.e. literary prose). When addressing scientific discourse, the German scholar suggests that specialized discourse should cover a list of eleven desirable attributes (Hoffmann 1984: 31):

1. Be exact, direct and clear;
2. Be objective;
3. Be abstract;
4. Be general;
5. Be dense in terms of informational weight;
6. Be brief;
7. Be emotionally neutral;
8. Be unambiguous;
9. Be impersonal;
10. Be consistent in argumentation;
11. Use defined technical terms, symbols and figures.

As such, Hoffmann's proposal presents some theoretical inaccuracies. First, Gotti (Gotti 2003) points out that Hoffmann's categorization can not be entirely applied to conceptualise 'specialized discourse' since not all the criteria are valid for distinguishing this type of discourse and general

¹⁰ Merriam Webster Online [online]. <http://www.merriam-webster.com/dictionary/quality>

language. For him, not all the points are applicable to the realm of specialized discourse. Second, Hoffmann suggests a direct correlation between reality and language which not always works in specialised discourse. WIPO Domain Name Arbitration discourse, for example, achieves ‘self-evidence’ by means of argumentation and not by the particular exploitation of technical terms and formulaic expressions. Third, Hoffmann advocates for a static conceptualisation of specialised discourse without acknowledging that, although one may find concrete devices that appear frequently in discourse, this does not mean that fixation is to be the rule. Interestingly enough, Hoffmann himself stands in contradiction when claiming that specialized terminology is subject to planning and systematic management on the part of the professional community. Basically, Hoffmann distinguishes three different phases regarding terminology: (i) standardization (ii) homogenization of terminologies at a national level and (iii) internationalization. Hoffmann’s staging of discourse reveals that discourse is not static but intrinsically dynamic inasmuch as language regulates itself to optimize the discursive resources of the professional community. My hypothesis here is that specialised discourse is subject to minimal variation within the discursive constraints that distinguish it from general discourse. WIPO Domain Name arbitration discourse presents defining conventions on its own (e.g. plain language, intertextuality, interdiscursivity, cross-references, legal argumentation as a narrative). Nevertheless, discursive practices have changed slightly over the last years, introducing prone-to-litigation elements which are transforming the non-litigant WIPO discursive style.

These observations stress the necessity to reconsider Hoffmann’s model and conceptualize these characteristics in terms of maxims, rather than desirable attributes. As maxims, they are conceived as subjective principle of action which are “cogitated as universally determined” (Kant, 2005: 435). This change implies the possibility to accept as true these characteristics as the basis for argument, and at the same time combine them with a certain intention to become universal principles. In Kantian words: “It is merely a regulative principle or maxim advancing and strengthening the empirical exercise of reason, by the opening up of new paths of which the understanding is ignorant, while it never conflicts with the laws of its exercise in the sphere of experience” (Kant 2005: 417).

On linguistic grounds, the relevance of this change lies on the fact that his model is ample enough to encompass factors intrinsically text-internal (i.e. intertextuality) and those closer to the text-external side of discourse analysis (i.e. quality). In considering Hoffmann’s list not as a definite set of characteristics but as general conditions, these maxims embed an unlimited number of instances of domain-name communication. Maxims, as fundamental truths, should be contextualized in accordance to domain specificity since it is “the very process of reducing the particularity of experience that reveals inherent factors of form and relation” (Cunningham 1992: 1331). In actual fact, this assumption has an impact on the way domain-specific discourse is conceived since the emphasis is on the choice and use of language means and not so much on specific characteristics of specialized discourse (Engberg 2010).

If maxims should be narrowed down to the sphere of experience, it is, thus, necessary to look at ‘Quality’ in relation to Hoffmann’s maxims and WIPO Domain Name Arbitration Discourse.

4. The Construction of Quality and The Four-space Relationship

This section is devoted to explore ‘Quality’ in relation to two of the maxims suggested by Hoffmann: ‘Objectivity’ and ‘Neutrality’. The reason why this study concentrates on these maxims is that arbitration’s quality is solidly grounded on the principles of impartiality and independence since WIPO Domain Name Arbitration processes may be challenged by a party if circumstances arise that give rise to justifiable doubt as to the arbitrator’s impartiality or independence. The study questions, thus, whether objectivity and neutrality, as general maxims, encompass the principles of impartiality and independence within their realm of significance. My main presumption here is that WIPO panelists seek to be objective and emotionally neutral so as to avoid any Party feel unrepresented. Apparently, WIPO professionals support this liason in being compelled to

ensure integrity and fairness, when “deciding **objectively** on the basis of the arguments and evidence submitted” (WIPO 2009: 25). Yet, discourse analysis unveils that being impartial does not imply being neutral. I suggest that objectivity, neutrality, impartiality and independence are closely connected in a four-space relationship operating for safeguarding quality in WIPO Domain name arbitration decisions. To me, the quality of decisions lies on the harmonious balance of the four characteristics in the unfolding of discourse. This discursive gear model operates dynamically and it is precisely this capacity that helps us clarify that specialized discourse is not static *per se* as Hoffmann suggested. Specialized discourse varies depending on how objectivity, neutrality, independence and impartiality are operationalized in accordance to the private intentions of the WIPO panelists. Before going on, I would like to clarify how I conceive this four-space relationship using some visual aid:

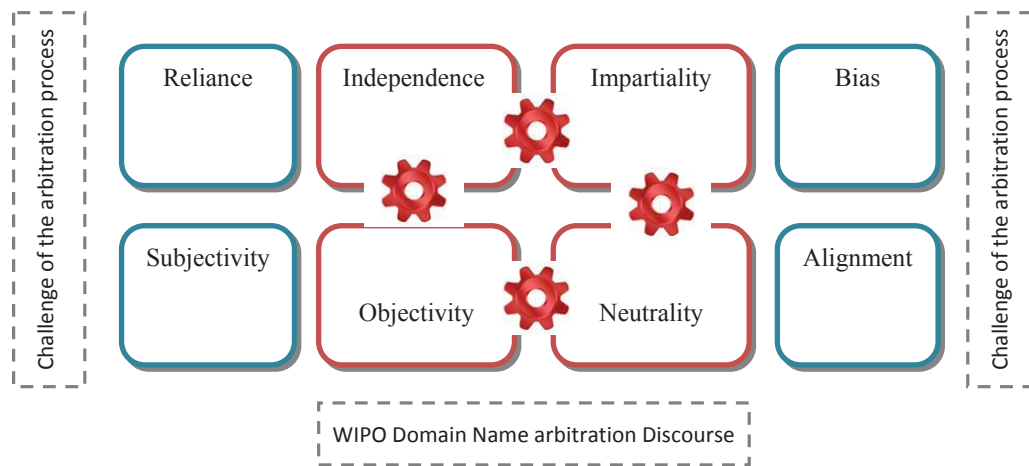


Figure 2. Four-space Relationship (I)

Without extending theory unnecessarily, let me now move to the first section of the analysis where we will study the model not in this *status quo* version, but in the actual sphere of experience.

4.1. Central Elements in the Four-space Relationship

In WIPO Domain Name arbitration, independence means “that the arbitrator has no relationship with a party” (WIPO 2009: 25) and impartiality “requires absence of bias in favor or against any of the parties or in relation to the issue in dispute” (WIPO 2009: 25). Both definitions coincide in that any kind of bias compromises the integrity – or better said, the quality – of arbitration conclusions. In Donahey’s words, “if the system is to gain the acceptance and the respect of the public, it must not only be fair, but also appear to be fair” (Donahey 2002: 35). To resemble impartial, WIPO panelists take advantage of several discursive strategies. First, they promote temporal references to frame the process in reality. Example [1] and [2] illustrate how WIPO panelists reconstruct reality in accordance to a chronologically sequenced criterion. Panelists introduce temporal references so as to disentangle events by selecting those relevant for deciding. As a consequence, discourse is oriented to organize information and clarify the narration of events. This idea of reconstructing facts through a narrative can be also seen when WIPO experts recall events either by means of summarising the Parties’ contentions or reporting arguments discussed in the arbitral process. Panelists recreate narratives so as to be able to disentangle events by selecting those relevant for deciding.

1. **Prior to issue of the Complaint**, the Respondent had a number of telephone conversations with Mr. Carlos Villalobos, the Press Attaché at the British Embassy in Caracas, Venezuela [...] **Upon being told** by Mr. Villalobos that the Complainant as a public broadcaster and un-

der the terms of its Charter does not advertise on any of its public broadcasting stations, the Respondent suggested that the domain names could be sold to the Complainant for a sum of US\$75,000. **In a subsequent conversation**, the Respondent told Mr. Villalobos that he had launched a web site at bbcdelondres.com which displayed the Complainant's content below advertising banners. (D2000-0050)

2. Complainant **first** registered the MEN'S HEALTH mark on the Trademark Supplemental Register of the United States Patent and Trademark Office ("USPTO") in connection with a periodical magazine **on 12, June 1987**, and on the Trademark Principal Register **on October 29, 1996**. The mark has subsequently been registered with the USPTO **on December 16, 1997** (in connection with luggage, suit bags and garment bags for travel), **December 30, 1997** (in connection with a mask which may be used for treatment of face, eye and head discomfort), **on May 11, 1999** (in connection with an online magazine containing articles and columns on fitness, diet, exercise and lifestyle) **on April 20, 1999** (in connection with pre-recorded audio and video tapes in the field of health and fitness), and **on April 18, 2000** (in connection with an informational web site on health and fitness.) (DTV2000-0005)

Second, panelists provide detailed descriptions on who did what and in which way so as to include not only a series of events shaping the background of the dispute, but all the conditions included in the process. As displayed in Examples [3] and [4], WIPO panelists underline the companies' assets so as provide legitimacy of the company. One reason for that emphasis on concrete, tangible and strategy-aligned business outcomes is that companies responsible for controlling the "purse strings" have not always found it easy to link multi-year investments in security and the Internet (PWC Survey 2010: 3). As an indication of this emphasis, suffice it to mention example [3], when the panelist puts a premium on the multinational character of Oracle University. In the same spirit, example [4] shows how the panelist stresses not only the firm's volume of sales and quality of products including consumer electronics, domestic appliances, security systems and semi-conductors, but also its well-known reputation as a multinational corporation using the trademark since 1982 and registered in 145 countries worldwide.

1. Oracle provides, through an education service called Oracle University, training for Oracle technologies and products. Oracle University offers comprehensive training services to help executives, managers and end users make the most of new Oracle technology. Oracle University offers thousands of in-class, onsite, web-based and CD-ROM courses for learners around the world. **Oracle University supports 99 countries and 24 languages, and it trains 320,000 students per year at its 446 worldwide locations. There are 480 Oracle University instructors and 670 classes are held per week.** (D2009-0070)
2. **The Complainant is the Netherlands based multinational corporation which owns (and through its predecessors) has used the PHILIPS trademark since 1892.** The trademark PHILIPS is used for a wide spectrum of products varying from consumer electronics to domestic appliances and from security systems to semi-conductors. **The Complainant states that it has registered the PHILIPS trademark in 145 countries worldwide.** (DPH2000-0001)

As a sign of 'impartiality', WIPO panelists promote reported speech in discourse so as to detach themselves from their own argumentation. Reported speech helps panelists dilute their role as judging *arbiter* of the process. WIPO panelists appear to form an 'objective' opinion after having listened to both Parties equally, and having included the Parties' contentions as part of their weighing of evidence. By inserting reported speech in the panelists' remembrance of facts, WIPO professionals not only distance themselves from events, but also create some discursive space for the Parties and their contentions. This break in the narration of the panelist is the appropriate place where Parties pursue to convince panelists of the legitimacy of their claims. Of

particular interest here is that we always reach the Parties by means of the argumentation of panelists themselves and not directly. Panelists are the ones who select and filter information. One frequent strategy to show legitimacy on a domain is either to refer to normative or provide data (i.e. registered patents or trademarks) about the business. Example [5], for instance, mirrors how Broadcast America explains its development from a broadcasting network limiting its scope to the Internet to encompassing all manner of audio and video content. The panelist allows the Claimant to establish its credentials as a legitimate owner of the domain name in dispute. In order to provide legal justification for its contentions, the company refers to the Uniform Domain Names Dispute Resolution Policy or UDRP Rules, namely the Policy that sets out the legal framework for the resolution of disputes between a domain name registrants and a third party. Yet, contrary to what one may expect, the Parties prefer discrediting the Respondents, associating them to cyberpiracy. Example [6] illustrates how the Complainant associates the Respondent's conduct to bad faith intent. The Claimant's allegations go in the line of binding the Respondent to cybersquatting, namely the practice to register trademarks as domain names to profit from the goodwill of a trademark belonging to someone else (ACPA, 15 U.S.C. § 1125(d)).

1. *Complainant states in its own words as follows:*

- “15. **In Accordance with the Rules, paragraph 3(b) (viii)**, Complainant states that the service mark and trade name on which this Amended Complaint is based is BROADCASTAMERICA.COM [...] BroadcastAmerica.com was founded in December 1998 under the name ‘BroadcastMusic.com, Inc.’ for the purpose of developing an Internet broadcasting network [...] However the company found that its business grew far beyond its original conception to encompass all manner of audio and video content. Accordingly, **the company changed its name in December 1999 to BroadcastAmerica.com, Inc. to better reflect the breadth of its business.** The ‘broadcastamerica.com’ domain name was acquired from a third party prior to the time this name change took effect. (DTV2000-0001)
2. 4. A.7 **The Complainant says** that its first knowledge of the disputed domain name was when one of its franchisees received an unsolicited email from the Respondent on November 15, 2008. **The Respondent offered to sell two domain names, <baskinrobbins.ae> and <dunkindonuts.ae> for \$15,000.00, failing which it would be auctioned off to the highest buyer.** On December 17, 2008 the Complainant counter offered to pay AED 150.00 per domain name [...] The Complainant also advised the Respondent that it **owned registered trademarks in the UAE for BASKIN-ROBBINS.** (D2009-0003)
3. WIPO panelists also introduce –if appropriate- any kind of discursive material that could be relevant for the arbitration process such as E-mails, Cease and Desist Letters or telephone conversations. The inclusion of this material is justified given the fact that WIPO arbitration may include Online Dispute Resolution (Kallel 2008: 351), namely an online adaptation of the ADR process. Particularly in the case of the e-mail, debate arose among law professionals when examining its ‘legal appropriateness’ (Bergsten 2001: 485). Yet, this question was not problematic since the UNCITRAL Model Law includes ‘writing’ as a means of telecommunication which provide[s] a record of agreement (UNCITRAL Model Law Article 7). Even though it is relevant for the conformation of arbitral decisions, intertextuality, as such, is not frequent since it is mainly restricted to one or two particular sections of the arbitration decision: the ‘Factual Background’ and the ‘Parties’ contentions’. WIPO panelists primarily provide letters and emails crossed among the Parties before the arbitration process. Their main purpose is to offer a better understanding of the arbitral decision. As Cunningham points out,

“the metaphor of representation as text suggests not only a transcription of the attorney-client interaction, but also the initial distancing of that activity from one participant-the legal professional- so that he can also become an observer. Once the activity is textualized so that it can be examined other than in the attorney’s memory, so that it is presented in a stable form which inherent, autonomous meaning, then it can be brought close again, close for microscopic examination.”(Cunningham 1992:1349)

As an intertextual support, these pieces of writing enable WIPO experts to bring to the fore the Parties' own discourses. WIPO panelists become external observers who analyse the unfolding of events from a distant perspective. Examples [7] and [8] show how the Claimants and the Respondents use e-mails, Cease and Desist Letters or telephone conversations to convince Panelists of their good will.

4. **On August 12, 2009 the Respondent emailed the Center and the Complainant's counsel in the following terms:**

"These domains will expire in 2 days on August 14, 2009, so there is no need to proceed with the case since I don't plan on renewing the domain." [...]

On August 19, 2009 the Complainant's counsel reiterated the Complainant's wish to proceed with the Complaint given the Respondent's inaction and the history of the matter. **On the same date, the Respondent emailed the Complainant's counsel as follows:**

"Hello [the Complainant's lawyer] I have reviewed all the recent emails and no final settlement was offered for the domains. Also to transfer the domains it will cost me about \$100 each domain via IP Mirror. If you are willing to refund me this amount for each domain plus \$500 for each domain which includes registration costs and operations, I will happily conclude this ASAP.

Thanks

Ali Aman." (DAE2009-0003)

5. No evidence has been submitted in support of this assertion. **The exchange of written correspondence in evidence begins on October 8, 2008 with a strongly worded cease and desist letter from the Complainant to the Respondent with references to "Infringing Domain Names" and potentially heavy penalties under the law. There appear to have been telephone conversations in the interim in which, the Complainant says, by February 9, 2009 the Respondent had offered to change its business name, yet on February 16, 2009 the Respondent was still writing to the Complainant, "Hi Todd, Why do we have to transfer the names if we are not using them? Is this really an issue? Audrey". (D2009-0700)**

Another worth-commenting strategy regarding objectivity is that of mentioning normative and WIPO arbitration cases. In referring to other types of legal documents, both Parties and WIPO panelists align themselves with a particular line of thinking that has received the *legal imprimatur* of the WIPO professional community. On the one hand, Parties emphasize the legitimacy of their contentions by displaying decisions that are content-related to the particular dispute or decisions that even concern the Party itself. This discursive strategy serves Parties to show external endorsement. As displayed in Example [9], the Complainant makes reference to previous WIPO arbitration decisions seeking to ground their contentions on various precedents under the UDRP Policy, the legal framework for domain names disputes established by the ICANN and adopted by the WIPO, as the ICANN's dispute resolution service provider. On the other hand, WIPO panelists take some distance from their narration in the sense that they shift their responsibility over the wording of decisions and place it over previous arbitration decisions that have already set a precedent or are related to the dispute. That is, WIPO panelists make reference to arbitral awards granted by the organism or to law policies that administer the whole arbitration process. In taking advantage of previous arbitral cases, the purpose of panelists is to clarify their line of reasoning to the parties, hence using awards as the basis for their decision. Regarding law normative, panelists allude to them to clarify the organizational procedure itself. These assumptions are well illustrated in Examples [10] and [11] where references to normative and WIPO de-

cisions are mainly oriented to provide legal justification for the Panelist's impressions. Panelist take advantage of this discursive strategy either to support the Claimant's position, as in Example [10], or to rebut The Claimant's contentions without being face-threatening, as occurs in Example [11].

6. **Under each of these grounds, the Complainant refers to various precedents under the Policy, including cases previously involving the Complainant's marks.** Those include, for example, *Research in Motion Limited v. Louis Espinoza*, [WIPO Case No. D2008-0759](#); *Research in Motion Limited v. Jumpline.com*, [WIPO Case No. D2008-0758](#); *Research in Motion Limited v. Domains by Proxy, Inc. and Kafiint*, [WIPO Case No. D2008-0164](#); *Research in Motion Limited v. One Star Global LLC*, [WIPO Case No. D2008-1752](#). (D2000-0218)
7. In consideration of the Complainant's contentions set out at paragraphs (c) to (f) listed above at 5A, the Panel finds that the Complainant has made out a *prima facie* case in respect of the Respondent's lack of rights or legitimate interests in the Domain Name. **Paragraph 2.1 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions states that once a complainant makes a prima facie case in respect of the lack of rights or legitimate interests of the respondent, the respondent carries the burden of demonstrating it has rights or legitimate interests in the subject domain name.** Where the respondent fails to do so, a complainant is deemed to have satisfied paragraph 4(a) (ii) of the Policy. (DRO2009-0003)
8. **First, UDRP panels disregard the domain name suffix in evaluating confusing similarity.** E.g., *Shangri-La International Hotel Management Limited v. NetIncome Ventures Inc.*, [WIPO Case No. D2006-1315](#). This same approach has been used by panels under the irDRP when considering allegations that disputed domain names were identical to a complainant's trademarks. See, e.g., *Facebook, Inc. v. Majid Karimian Ghannad*, [WIPO Case No. DIR2009-0001](#) (“[t]he ‘.ir’ suffix is generic, and numerous Panel decisions under the Uniform Dispute Resolution Policy (‘the UDRP’), (the relevant part of which is identical to paragraph 4(a)(i) of the [.ir] Policy), have held that ‘.gtd’ and ‘.cctld’ suffixes are not taken into account in the comparison between a complainant’s trade mark and the disputed domain name”, quoting *Deutsche Telekom AG v. Kaweh Kalirad*, [WIPO Case No. DIR2008-0002](#). (DIR2009-0002)

This section has shown us how most of the times, being impartial and independent presupposes being objective and neutral to the events occurred in reality. This is what O’Barr (O’Barr 1982) refers to when suggesting that a particular style of phrasing gives “legality” to the communicative event. But, as we will see in sub-section 4.2, neutrality is sometimes blurred when WIPO panelists ‘ally’ to one of the Parties more than necessary, menacing the arbitration process.

4.2. Peripheral Elements in the Four-space Relationship

The four-space model changes insofar as WIPO panelists’ private intentions vary and so does the gear dynamic established between objectivity, neutrality, impartiality and independence.

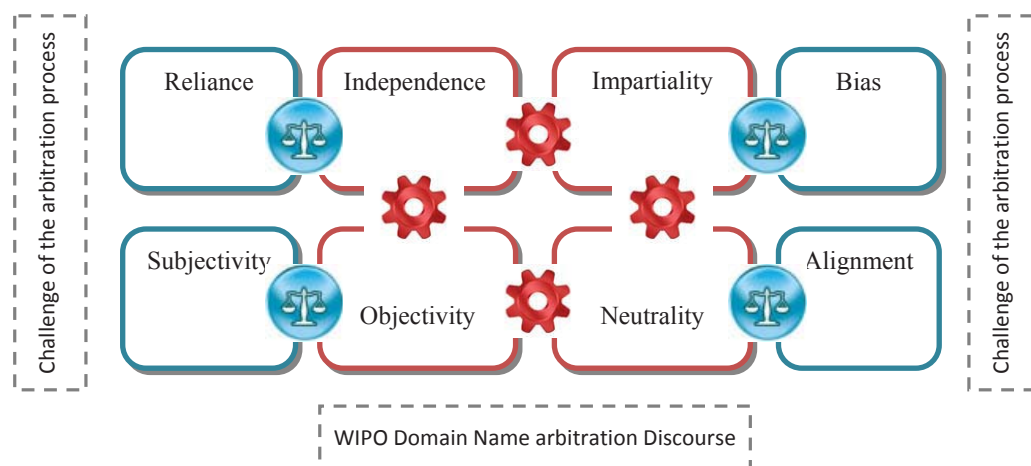


Figure 3. Four-space Relationship (II)

The four-space relationship characterizes not only by the discursive gear system which most of the times holds together specialized discourse. It also includes some ‘scales’ that are constantly reorienting themselves toward the pull of professional needs. This implies that, depending on the professional requirements of the communicative events, the four-space relationship will vary, giving way to an infinite spectrum of discursive possibilities. To me, this is the idea behind Bhatia’s ‘colonies of genre’ (Bhatia 2004) and Swales’ constellation of genres (Swales 2004). In conceptualizing discourse as a fluid, permeable and dynamic organism, it is possible to understand the rhythmic inner workings of genres.

Going back to the actual scope of this paper, WIPO panelists are expected to get involved in the process as *arbitri* so as to put an end to the domain name dispute. Due to the professional requirements of arbitration practices, Parties are well aware that solving a dispute implies forming an opinion about through careful weighing of evidence and testing of premises. In this critical moment (Bhatia 2004), it is crucial for the quality of the arbitration process- and ultimately for the success of the arbitration as professional activity- that WIPO panelists move within the discursive limits of impartiality, rather than those of neutrality. In contrast to neutrality, impartiality remains necessary to avoid the challenge of the arbitration process, whereas neutrality not. As we will focus on Neutrality in section 4.3, let us move on to explore impartiality in WIPO Domain Name Arbitration decisions.

In most cases, panelists convey an aura of impartiality especially when evaluating information. This conscious effort to keep aside from the Claimant and the Respondent’s argumentations turns out to be vital for the professional activity of WIPO members. They allude to legal policies or recall the Parties’ argumentation in order to create certain discursive distance between the Parties and themselves. In fact, WIPO panelists always refer to themselves either as the *Panelist* or the *Administrative Panel* where more than one or two arbitrators decide over the dispute. Such an effective use of impersonalization can be seen as motivated “by the desire to save the addressee’s face” (Luukka/Markkanen 1997: 169). This assumption is well illustrated in the wording of the final decision. Even when judging the Parties’ contentions, they appear not to get involved within events so as not to impinge any of the Parties. As illustrated in Examples [12] to [14], WIPO panelists hide themselves behind the UDRP Policy, which serves in these cases as the guiding normative for WIPO Domain Name Dispute Resolution Processes. The consequence of such wording is that WIPO panelists appear to dodge responsibility for their own assessment of the Parties’ arguments, as occurs in Example [15]

9. **Based on the significant degree of renown of the Complainants' protected identifier(s) in the island of Ireland and the Registrant's failure to respond in writing to the Complainants' letter explain either (i) the circumstances in which the disputed domain name was chosen and is subsequently being used or (ii) whether the Registrant has any rights and/or legitimate interests in the disputed domain name under paragraph 3.1 of the Policy,** the Registrant does not have any rights or legitimate interests in the disputed domain name. (DIE2000-0001)
10. **Based on its finding that the Respondent, TOEFL, has engaged in an abusive registration of the domain name "toefl.com" within the meaning of paragraph 4(a) of the Policy,** the Panel directs the registrar to transfer the domain name to the Complainant, Educational Testing Service. (D2000-0044)
11. Accordingly, **pursuant to paragraph 4(i) of the Policy,** the Panel requires that the registration of the domain names "philips.com.ph" and "philips.ph" be transferred to the Complainant. (DPH2000-0001)
12. **In light of the foregoing [Parties' Argumentation],** the Panel decides that the domain name registered by Steggles is identical to the trademark of Easyjet, that Steggles has no legitimate interests in respect of this domain name, and that the domain name in issue has been registered and is used in bad faith. Accordingly, the Panel requires that the registration of the domain name www.easyjet.net be transferred to Easyjet. (D2000-0024)

4.3. The Association between Central and Peripheral Elements in the Four-space Relationship

The four-space model helps us explain why discourse makes particular characteristics more 'fundamental' than others.

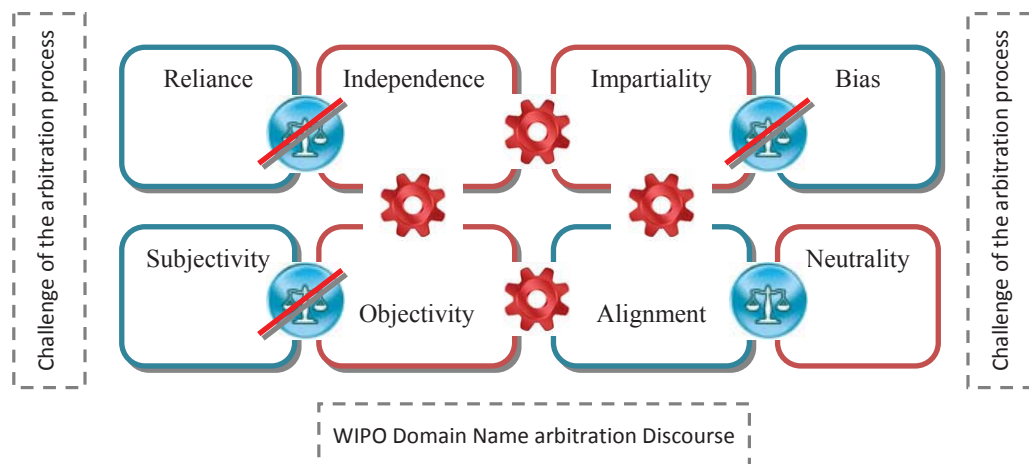


Figure 4. Four-space Relationship (III)

My hypothesis here is that the four-space relationship determines which discursive characteristics are deciding factors in a genre to be this – and only **this** – genre and not other. The specific configuration between the central and the peripheral elements fix the boundaries of how a genre is instantiated through discourse. To put it simple, private intentions are linguistically realised through discourse. Accordingly, the four-space relationship stresses one or more central characteristics and, at the same time, minimizes the impact of other medium and peripheral elements. The fluctuant relationship between these characteristics, either being text-internal or text-external

in origin, serves to optime discursive devices in relation to the private intentions of professionals. The configuration of the four-space relationship gives us a glimpses of a genre's generic integrity (Bhatia 2004) in clarifying which discursive characteristics are central and which are medium or peripheral.

In the case of WIPO Domain Name Arbitration, objectivity, neutrality, impartiality and independence seem to follow different discursive trajectories. One finds that objectivity, impartiality and independence are key elements necessary for discourse to be identified, recognised and accepted as 'appropriate' within the professional standards of the arbitration practice. Without them, discourse does not accomplish the discursive requirements settled by the WIPO Domain Name Arbitration professional community. In contrast, neutrality is not so central. For example, the correlation between 'impartiality' and 'neutrality' is not always based on a balanced relation in WIPO Domain Name Arbitration. Essentially, WIPO panelists have authority under applicable law to question the conduct of the Parties more extensively than any other person involved in the arbitration process. Accordingly, "the assessment of the evidence is inevitable subjective" (Rubino-Sammartano 2008: 167). This comes into conflict with 'neutrality', understood as "refusal to take part in a war between two powers"¹¹ or, in a less belligerent tone, with the definition of 'neutral' which implies "not saying or doing anything that would encourage or help any of the groups involved in an argument or war"¹². In the case of WIPO Domain Name arbitration, panelists assess whether the use of a controversial Domain Name is legitimate or not depending on their own understanding of events. After a careful evaluation of data, they should assess the legitimacy of the Parties over a Domain Name and provide arguments to prove their engagement to one of the Parties. Example [16] shows how the Panelist derives his *ratio decidendi* after a process of evaluating the materials submitted by the parties as burden of proof. In contrast, Example [17] illustrates how WIPO panelists can be guided by the distinctiveness of the trademark in dispute when determining the admissibility, relevance, materiality and weight of the evidence. In this spirit, Example [18] mirrors how the Panelist infer bad faith and potential trademark dilution on the part of the Respondent after one of the Claimant's major clients inquired about the Registrant's website, giving rise to trademark confusion.

13. **For the reasons set out above, the Panel is of the view that the Respondent, [...] was probably entitled to that registration. Despite the Complainant's insinuations that the Respondent's registration of the disputed domain name was made in anticipation of the formal termination of its distributorship, the evidence is not strong enough to support a finding to that effect.**(DAU2009-0004)
14. **However, in view of the well-known status of the Complainant's GILLETTE trade mark and the uniqueness of the word "Gillette", it is clear that the Domain Name can only refer to the Complainant.** The obvious implied reference to such a well-known trade mark by a party with no connection to the trade mark has been consistently found to be an indicator of opportunistic bad faith, even where the disputed domain name is not in use, see *Parfums Christian Dior v. Javier Garcia Quintas and Christiandior.net*, WIPO Case No. D2000-0226. (DRO2009-0003)
15. **Proof of the confusing similarity can be seen from an email sent by Alstom, one of the Complainants' major clients, querying whether they should mention the Registrant's website to their financial community.** (DIE2000-0001)

What is of particular interest here is that panelists especially detach from the narration of events when providing a negative assessment. Referring to themselves as *The Panel* or *The Administra-*

11 Merriam Webster Online [online]. <http://www.merriam-webster.com/dictionary/neutrality>

12 Cambridge Dictionary Online [online]. http://dictionary.cambridge.org/dictionary/british/neutral_1

tive Panel, WIPO members hide themselves behind the institutional shadow created by the WIPO as a world organization. One might be inclined to consider that panelists bring about solidarity between WIPO professionals and, at the same time, effect distance to the Parties to prevent counterclaiming. By not taking full responsibility of the content, panelists avoid possible criticism on the part of the Claimant and Respondent (Luukka/Markkannen 1997). In so doing, WIPO panelists create some distance to arrange a discursive shield for what they are going to say next. In that sense, impersonality serves them to make use of heavily-loaded evaluative terms oriented to reassure the Panelist's stance. In the light of the analysis, we can observe that Examples [19] to [21] offer interesting instances (i.e. *to be unwilling*, *to be reluctant* or *there is no convincing evidence*) where it is difficult to overlook the emotional-driven boost.

16. **The panel is thus unwilling** to draw the inference that offering the “toefl.com” domain name for sale on a publicly accessible website to any party willing to pay its price constitutes an offer to sell the domain name to the Complainant or to a competitor of the Complainant. Certainly the Complainant and its competitors are potential purchasers. However, if the drafters of paragraph 4(b) (i) of the Policy had intended to broadly cover offers to any and all potential purchasers as evidence of bad faith, it would have been a simple matter to refer to all offers to sell the domain name, and not offers to sell to specific parties or classes of parties. (D2000-0044)
17. **This Administrative Panel is reluctant** to engage in the activity of policing how much development the owner of a clearly personal Web site must do, in the absence of any other evidence of bad faith. Any attempt to apply any objective minimum standards for development **could well impose a significant economic burden on innocent registrants** as a precondition of holding their domain names. (D2000-0204)
18. On reviewing the submissions and evidence of in these Administrative Proceedings, **this Administrative Panel finds that there is no convincing evidence** that the Respondents registered the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the Complainant and the Respondent has rebutted the Complainant's allegations in this regard. (D2000-0204).

There are scarce but interesting moments when panelists evaluate events without the aforementioned resemblance of impersonality, hence stressing the shifting dynamics in discourse. As Rubino Sammartano signals,

“When one turns to party-appointed arbitrators, several of them being steadily on the side of the appointor, the scenario becomes not merely psychologically different, but that of a not partial decision-maker” (Rubino-Sammartano 2008: 4).

On these occasions, panelists not only go direct to the point, but also take advantage of the situation to put their expertise knowledge on record as in *to be clear on its face* (direct translation to the Latin term *prima facie*) as in Example [22], *to be plain from the circumstances* as in Example [23] or the use of *we* instead of *The Administrative Panel* in Example [24]. In evaluating the Parties' contentions, WIPO panelist also uses this discursive strategy to criticize abusive zeal on the part of the Claimants for continuously linking the Respondent's conduct with cyberpiracy, as occurs in Example [25]. The effect of this kind of wording is not that of a neutral Panelist, but that of a legal professional giving his subjective opinion.

19. **It is clear on its face that** the domain name in issue is identical to most of the trademarks of Easyjet. (D2000-0024)
20. **It is plain from the circumstances** set out in paragraphs 4 and 5 above that the Respondent cannot demonstrate any of the circumstances of paragraph 6(c) of the Policy. Nor, in the

absence of a Response, is there any indication that the Respondent could show rights or legitimate interests in either of the disputed domain names on any other basis.(DAE2009-0003)

21. **We must first determine** whether the domain name at issue is identical or confusingly similar to a mark in which Complainant has rights. There is no dispute that Complainant has rights in the MEN'S HEALTH mark. Interestingly, both parties urge that the Panel, in performing its analysis of confusing similarity, take into consideration the country code suffix ".tv". (DTV2000-0005)
22. **The omission by the Respondent to submit a formal Response does not lead to a finding for the Complainant by default.** The Policy under paragraph 4(a) requires the Complainant to prove its case under all three of paragraphs 4(a) (i), (ii) and (iii). **The Panel is required to ensure that the Parties are treated with equality** (paragraph 10(b) of the Rules). Whilst not providing a formal Response, the Respondent did not ignore the Complainant's concerns. (D2009-0700)

As this section has shown, neutrality is not always present in WIPO Domain Name Arbitration discourse. Panelists prefer being objective, impartial and independent rather than neutral so as to prevent the potential challenge of the arbitration process. In that sense, one can observe that 'Quality' in WIPO Domain Name Arbitration discourse is not entirely associated to neutrality but to objectivity, impartiality and independence, hence contradicting the apparently ingrained perception of professionals about these conditionings.

5. Conclusions

The main purpose of this paper was to characterize specialized discourse in WIPO Domain Name Arbitration as the result of social and institutional conditionings. First, the study focused on characterizing text-external factors associated with this highly-specialized professional practice. In that sense, Idris' description of IP-related factors (i.e. Expertise, High Quality, Speed, Globalization and increasing IP Infringement) (Idris 2002) proved to be an excellent tool in describing the inner mechanisms of WIPO Domain Name Arbitration, as well as in questioning the discursive realization of these conditioning criteria. Since it was necessary to reduce the scope of analysis, the study concentrated on analyzing 'Quality' due to its debatable nature.

Second, the study found useful to define the boundaries of 'specialized discourse' so as to provide a path for hypothesis generation in relation to the discursive description of 'Quality'. Accordingly, the study reviewed Hoffmann's list of desirable attributes (Hoffmann 1984) in the light of Gotti's analysis. Gotti (Gotti 2003, 2008) basically acknowledged that Hoffmann's categories, as a whole, did not offer a consistent framework when defining 'specialized discourse'. Bearing this in mind, this study suggested a new re-conceptualization of Hoffmann's model. The relevance here was to discuss Hoffmann's attributes as universal maxims, rather than narrow them to mere properties closely associated with or belonging to a specific type of specialized discourse. In doing so, Hoffmann's list of desirable attributes needed to be understood as general principles to be specified according to socio-cultural circumstances. As a consequence, the emphasis shifts from identifying the discursive factors that characterize 'specialized discourse' to contextualizing specialized discourse on the basis of its social and institutional-dependent conditionings.

Third, the study limited the focus of attention on analyzing 'Quality' in relation to 'Objectivity' and 'Neutrality' as factors associated with specialized discourse and also to 'Impartiality' and 'Independence' as conditionings specifically related to WIPO domain name arbitration professional practice. The study found that panelists of the World Intellectual Property Organization used these terms differently depending on their private intentions. Having this assumption in mind, the study aimed to conceptualize the relationship between objectivity, neutrality, impartiality and independence through the four-space relationship model. In a first phase, the proposal conceptualized the

relationship between these four central factors as a gear dynamic system. Here, one could observe that WIPO panelists met the four discursive requisites. One example of that emphasis for appearing impartial is WIPO panelists' reliance on impersonality, intertextuality and legal referencies. In a second phase, the four-space relationship discussed that the connection between objectivity, neutrality, impartiality and independence varied when peripheral elements such as subjectivity, alignment, reliance and bias were introduced in discourse. Essentially, one found that WIPO panelists controlled the rhythmic inner workings of discourse in the sense that they are able to evaluate and balance the relationship between the central and peripheral elements. In the sphere of practical experience, one could observe that, despite this constant resemblance of trustworthy neutrality, WIPO panelists assess the Parties' contentions, providing hence subjective impressions in the unfolding of arbitration discourse. In a third phase, the four-space relationship introduced a number of restrictions on the connections between the central and the peripheral elements, which conditioned the generic integrity of WIPO Domain Name arbitration discourse. To put it simple, WIPO panelists tended to be impartial and objective, but they were not always neutral, even though they appeared to be so. This discursive distinction between 'impartiality' and 'neutrality' is understandable since the ultimate mission of a WIPO panelist is that of solving a dispute over a conflictive Domain Name. If WIPO panelists aim to secure the validity of the arbitration process, they should guarantee that their discourse is impartial, but not necessarily neutral. For example, when evaluation occurs, panelists discard their detached image of independent authorial narrators and go directly to the point, sharing their thoughts in very a clear and straightforward way.

To sum up, the four-space relationship contributed to understand that the 'Quality' of WIPO Domain Name Arbitration decisions was based on how Objectivity, Neutrality, Impartiality and Independence are associated. This proved to be central for emphasizing the hypothesis behind this study, that is, that of conceiving specialized discourse as a concept highly dependent on social and institutional conditions.

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