

**THE UDRP -  
FUNDAMENTALLY FAIR, BUT FAR FROM PERFECT**

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Vol. 6, No. 34 *Electronic Commerce & Law Reports* 937 (Aug. 29, 2001)  
M. Scott Donahey  
Tomlinson Zisko Morosoli & Maser LLP  
200 Page Mill Road  
Palo Alto, California 94306  
Telephone: (650) 325-8666  
Facsimile: (650) 324-1808  
Email: [msd@tzmm.com](mailto:msd@tzmm.com)  
World wide web: [www.tzmm.com](http://www.tzmm.com)

The latest in a series of articles questioning the fairness of the UDRP procedures is that of Professor Michael Geist of the University of Ottawa, Faculty of Law, entitled "Fair.com?: An Examination of Systematic Unfairness in the ICANN UDRP" (the "Study").<sup>1</sup> While one certainly agrees with the proposition that the UDRP process can be improved, and, indeed, this author has made some specific recommendations for its improvement,<sup>2</sup> and while one may agree that a three-person panel is preferable, albeit more expensive, than a single-person panel, the statistics presented in the Study do not in fact prove the points for which the author argues: *i.e.*, that single person panels are biased in favor of complainants, or that providers select panelists who are biased in favor of claimants. Rather they establish what should be obvious to anyone who has engaged in civil litigation for any period of time - that in a default situation, the plaintiff/complainant prevails more than 90% of the time.

The Study notes that complainants prevail in 82% - 83% of the cases decided by panelists from the World Intellectual Property Organization ("WIPO") and the National Arbitration Forum (NAF) and in more than 63% of the cases decided by panelists from the provider eResolution.<sup>3</sup> From these results, the author concludes that "[s]ince outcome is what matters most to complainants, they have rewarded WIPO and NAF with an overwhelming share of the UDRP market."<sup>4</sup> If, indeed, complainants have selected providers on the basis of these figures, as this author believes they have not, then complainants have failed to look behind the numbers and to determine that there is

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<sup>1</sup> Found at <http://aix1.uottawa.ca/~geist/frameset.html>.

<sup>2</sup> Donahy, "A Proposal For an Appellate Panel for the Uniform Domain Name Dispute Resolution Policy," Vol. 18, No. 1 *Journal of International Arbitration* 131 (February 2001).

<sup>3</sup> Geist, *supra*, at 6. This statement is made while acknowledging that several panelists are members of the panels of multiple providers. *Id.*, at 7. This author acknowledges that he is a member of the panels of all four of the currently authorized providers and admits that he is a member of the Board of Directors of eResolution.

actually no real difference among the providers on how often a complainant prevails in a default setting and how often a complainant prevails in a contested setting.

Historically, across all providers, a case has gone by default between 50% and 60% of the time.<sup>5</sup> One would expect that better than 90% of the default cases would be decided in favor of the complainant.<sup>6</sup> Indeed, the Study shows that in the case of three-person panel decisions that are made in a default situation, 69 out of 70 such cases were decided in favor of the complainant, a percentage of 98.6%.<sup>7</sup> Using a 90% expected win figure and applying it to 55% of the cases (midway between the 50-60% default rate), complainant could be expected to win 49.5% of the time. Assuming that complainant and respondent would evenly split the remaining 45% of the cases, complainant would prevail in an additional 22.5% of remaining cases, giving complainant a conservative expected success ratio of 72%. Given such an expectation, the 82%-83% success rate at WIPO and NAF is hardly out of line.

What then of the anomalous result at eResolution, where the complainant prevails only 63.4% of the time? A look behind the percentages shows that this number, also, is in keeping with expectations. On August 21, 2001, the author reviewed all of the decisions on the eResolution web site<sup>8</sup> as of that date. Contrary to the historical default rate across all providers of between 50-60%, the cases which went by default at eResolution constituted only 39.2% of the case load (85 default cases out of 217 total

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<sup>4</sup> *Id.*

<sup>5</sup> Donahey, Watson, and Wei, "The ICANN Cybersquatting Decisions, February 16, 2001 through March 15, 2001," available at <http://www.adrworld.com>, through the library link on that page.

<sup>6</sup> The study agrees that this is a conservative expectation. "Of the 292 three-member panel cases, the respondent failed to provide a response 24% of the time (70 of 292). Complainants, as would be expected, won all but one of those cases. Geist, *op. cit.*, at 20 (emphasis added).

<sup>7</sup> *Id.*

<sup>8</sup> Available at <http://www.eresolution.ca/services/dnd/decisions.htm>.

cases).<sup>9</sup> Again, expecting that complainant would win 90% of such default cases, an eResolution complainant would expect to win 35.3%. Assuming that respondents and complainants would split evenly the remaining 60.8% of the contested cases at eResolution, complainant would prevail in 30.4% of these cases. Therefore complainant would have an expected success rate of 65.7%, virtually identical to complainant's actual success rate of 63.4%. Indeed, what is interesting in the eResolution percentages, is not the lower percentage of complainant successes, but rather the significantly higher percentage of cases that are contested by the respondent. It would be far more productive to study what in the eResolution system (perhaps the ability to file a response online, through the completion of forms, which is not possible through any of the other current providers) encourages more participation by respondents in the process.

Therefore, it is not the fact that providers select sole panelists that leads to decisions in favor of complainants. It is the fact that vastly more default cases arise in the single-panelist context that explains this result. Indeed, the Study's figures bear this out. Of the 292 three-person panel cases in the Study, seventy went by default. Of those seventy, sixty-nine, or 98.6%, were won by the claimant. The Study reports that of the remaining 222 three-person panel cases which were contested, complainant's percentage dropped to 45%.<sup>10</sup> Once again the distinguishing feature is not who selected the panelists, but whether the cases were default cases or contested cases. This is not in the least surprising or different from what exists in any form of dispute resolution.

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<sup>9</sup> This of course indicates that the overall default percentage applied to WIPO and NAF, above, was much lower than the actual figure, since eResolution averages would have brought the overall results for the other two providers down. This could well account for the slight discrepancy in actual results at WIPO and NAF when compared to expected results.

<sup>10</sup> Geist, *op cit.*, at 20.

The UDRP procedure is far from perfect, but it is not unfair. No fair minded person could honestly believe that a provider would risk its reputation by selecting panelists who would decide cases in a pre-determined way. No panelist could hope to uphold her reputation, if she were to find for one party regardless of the law or the facts. Indeed, such conduct would be so transparent that users would lose all confidence in the process. Clearly, this has not happened.

The truth is that the UDRP is a protector of the rights of the respondent, and rightfully so. Too often in the court system of the United States, a party with ample resources will file suit against an individual or entity with little or no resources. While the latter may have legitimate rights and defenses, the individual may be forced to cede what is rightfully his because the cost of defending that right is beyond his means. Under the UDRP the individual registrant is not faced with horrific court costs. The claimant bears all costs of the proceeding (except for legal representation, if any), and the respondent need bear only 50% of very modest costs if respondent elects a three-person panel. Since the proceeding is expedited and without hearings, the costs of legal representation are far more modest than they would be in court litigation, as the Study correctly points out.<sup>11</sup>

While the UDRP is fundamentally fair, the Study is correct that it could be improved. Party participation in all panel selection would be an improvement. As the Study suggests, having three person panels allows both parties to participate in the panel selection, and therefore gives both parties additional confidence in and involvement in the process. Another, less costly, procedure might be for each party to give the name of a preferred panelist to a provider without disclosing the name to the other party. The

provider could then add three additional names and provide both parties with a list of five names. The parties would then rank the five candidates in order of preference, with the candidate ranked highest in this mutual ranking to be designated as sole panelist.

The Study also correctly criticizes the inconsistency of many rulings and the presence of anomalous decisions that seem at odds with the facts of the case, and the application of the rules and the Policy to those facts. I have advocated, and continue to advocate, an appellate panel to which such cases can be referred. If ICANN truly wants to establish confidence in the system, it needs to establish the rule of law. A user should not be able to shop for a panelist who the user believes will be sympathetic to his position. In the same vein, an attorney should be able to counsel her client as to the probability of success under the facts presented. That advice should consist of more than, "It depends on what panelist(s) we draw." To the extent that the Study seeks to improve the UDRP, I agree with its goals. To the extent that the Study seeks to brand the UDRP as unfair, I must firmly disagree.

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<sup>11</sup> Id., at 28.