

# **FUNDAMENTALLY FAIR.COM? AN UPDATE ON BIAS ALLEGATIONS AND THE ICANN UDRP**

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## Background

In August 2001, the author released *Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*.<sup>1</sup> The study canvassed over 3,000 ICANN UDRP decisions (all cases through July 7, 2001), focusing primarily on concerns regarding forum shopping among complainants who launched UDRP claims as well as potential bias within the case allocation practices of the ICANN accredited dispute resolution providers.

The study concluded that:

1. There is clear evidence that forum shopping exists within the ICANN UDRP.

As the study noted:

Simply put, complainants win more frequently with WIPO and the NAF than with eResolution. The statistical data, which has remained consistent since the introduction of the UDRP, shows that complainants win 82.2% of the time with the WIPO, 82.9% of the time with the NAF, but only 63.4% of the time with eResolution. Since outcome is what matters most to complainants, they have rewarded WIPO and the NAF with an overwhelming share of the UDRP caseload. Despite the highest fees, neutral rules, and low-key marketing, WIPO commands 58% of the UDRP caseload, compared with 34% for the NAF and a paltry 7% for eResolution.<sup>2</sup>

2. There is a significant difference in outcome when comparing complainant win percentages in single panel versus three-member panel cases. The data showed that complainants win just over 83% of the time with single panel cases, while that percentage drops to 60% in three-member panel cases.<sup>3</sup>

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<sup>1</sup> Michael Geist, *Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, online at <<http://aix1.uottawa.ca/~geist/geistudrp.pdf>>.

<sup>2</sup> Ibid. at 6.

<sup>3</sup> Ibid. at 8.

Since arbitration providers assign panelists for all single panel cases (unlike three-member panel cases where participants largely determine panel composition), they have the power to influence case outcome based on their case allocation practices.

Although the providers claim random allocation of panelists, the study found that the practices of the National Arbitration Forum (NAF) and the World Intellectual Property Organization (WIPO) do not support these claims. In NAF's case, 53% of its single panel cases – 512 of 966 – were decided by only six panelists. The complainant win percentage in those cases was 94%. The skewed caseload was unique to the NAF as the six busiest single panelists at WIPO accounted for 17.2% of its single panelist caseload, and the six busiest single panel panelists at eResolution accounted for 17.3% of its total.

A review of all WIPO panelists that had decided five or more single panel cases (and thus had a track record), meanwhile, found that there were 104 such panelists, all of whom had a complainant win percentage that was higher than at least two respondent-friendly WIPO panelists who had never been selected for sole panelist duty. In fact, of the 104 panelists, only one had a complainant winning percentage below 50%.

3. One might have expected that the difference between single and three-member panels would have been attributable to substantively stronger respondent cases in three-member panel cases. The data conclusively found otherwise, however. Contrary to expectations, complainants actually requested three-member panels more frequently than did respondents. Although the data was somewhat incomplete, since some decisions do not disclose which party requested the three-member panel, the author was able to ascertain this information for 238 of the 292 three-member panel cases. In that sample, complainants requested the three-member panel 62% of the time (148 of 238 cases). Furthermore, three-member panel cases actually did include a

significant number of defaults. Of the 292 three-member panel cases, the respondent failed to provide a response 24% of the time (70 of 292).

The study's primary recommendation was that all contested UDRP actions should involve three-member panels. Establishing the three-member panel as the default would remove most provider influence over panelist selection and ensure better quality decisions by forcing panelists to justify their reasoning to their colleagues on the panel. As with the current system, both parties would play a role in selecting one panelist, who may be part of any ICANN-accredited providers' roster, while the provider would select the third panelist from among a list that both parties have reviewed and accepted.

### Reaction to the Study

The study generated considerable interest among those involved in the ICANN UDRP process as well as with the media. The findings received coverage from major news sources such as the Wall Street Journal,<sup>4</sup> Reuters,<sup>5</sup> USA Today,<sup>6</sup> Chicago Tribune,<sup>7</sup> Washington Post Newsbytes,<sup>8</sup> Globe and Mail,<sup>9</sup> and various online media sources.<sup>10</sup>

Not surprisingly, the reaction from ICANN and the arbitration providers was generally critical. An ICANN spokesperson said that the organization was gratified that the study was completed, but that since the "overwhelming majority" of single panel cases involved a default, the findings were not surprising.<sup>11</sup>

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<sup>4</sup> Julia Angwin, *Do Cyberspace Court Panels Favor Trademark Holders?*, Wall Street Journal (20 August 2001).

<sup>5</sup> *Domain Disputes Don't Get Fair Hearing*, Reuters (20 August 2001).

<sup>6</sup> Eric Sinrod, *Fixing the Domain Name Dispute Process*, USA Today (5 September 2001).

<sup>7</sup> Joe Salkowski, *Big Guys Usually Win Best Addresses*, Chicago Tribune (3 December 2001).

<sup>8</sup> Steven Bonisteel, *Law Expert Charges Bias In Domain-Dispute Arbitrations*, Newsbytes (20 August 2001).

<sup>9</sup> Patrick Brethour, *Web Arbitration Biased: Study*, Globe and Mail (20 August 2001).

<sup>10</sup> Gwendolyn Mariano, *Web Address Disputes Deemed Unfair*, CNET News (4 December 2001); Kieran McCarthy, *Professor Tears ICANN Domain Dispute Policy To Pieces*, The Register (21 August 2001).

<sup>11</sup> Dugie Standeford, *Use of 3-Judge Panels Could Cure Major UDRP Flaws, Report Says*, Warren's Washington Internet Daily (21 August 21 2001).

The NAF's Managing Director, Edward Anderson, said the company was not pleased with the "tone" of the report, arguing that had default cases been excluded, complainant win percentages would have dropped to 60%.<sup>12</sup> Eresolution, however, expressed its concern with the appearance of injustice and announced plans to revise its supplemental rules so that both parties could participate in the selection of single panelists.<sup>13</sup>

Scott Donahey, one of the most active UDRP panelists, wrote the most direct response to the study, publishing *The UDRP – Fundamentally Fair, But Far From Perfect*, a five page rebuttal soon afterward.<sup>14</sup> The NAF trumpeted the response, issuing a press release headlined *Report Pronounces Domain Dispute Process Fair; Earlier Study Flawed*.<sup>15</sup>

Donahey argued that there "is 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."<sup>16</sup> Further, he claimed that "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."<sup>17</sup> Donahey did not address the NAF and WIPO case allocation findings in his response.

#### Developments Since the Study's Release

Since the release of the study in August 2001, there have been at least three events of note. First, forum shopping claimed its first arbitration provider victim in December 2001 as eResolution shut down its operations.<sup>18</sup> The company is currently in bankruptcy proceedings. Second, the Canadian Internet Registration Authority (CIRA) approved a

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<sup>12</sup> Ibid.

<sup>13</sup> Dugie Standeford, *Eresolution Eyes Method to Make Solo Panelist Selection Fairer*, Warren's Washington Internet Daily (23 August 2001).

<sup>14</sup> M. Scott Donahey, *The UDRP – Fundamentally Fair, But Far From Perfect*, 2001 (online at <http://www.dnso.org/clubpublic/nc-udrp/Arc00/doc00002.doc>).

<sup>15</sup> On file with author.

<sup>16</sup> Donahey, *supra*, note 14 at 2.

<sup>17</sup> Ibid. at 3.

<sup>18</sup> Steven Bonisteel, *Arbitration Firm Quits Domain Name Business*, Newsbytes, (3 December 2001).

dispute resolution policy for the dot-ca domain that became the first in the world modeled after the UDRP to mandate that all contested disputes feature a three-member panel.<sup>19</sup> Third, the Domain Names Supporting Organization launched its long-awaited public consultation on the UDRP.<sup>20</sup> The findings of that consultation are expected in the spring 2002.

### The Deal with Defaults – A Statistical Update

The author has now updated the Fair.com study by conducting a complete review of all 4332 ICANN UDRP decisions released as of February 18, 2002. The review included a detailed examination of all cases surveyed in the original study to verify the accuracy of the data, the collection of default information, and the addition of all new decisions decided since July 7, 2001. All study data can be accessed at <http://www.udrpinfo.com>.

The updated data provides compelling evidence that forum shopping and suspect case allocation concerns continue to taint the fairness of the ICANN UDRP. Moreover, it leaves little doubt the inclusion of default cases do not explain Fair.com's conclusions. Contrary to the assertions of the NAF and Mr. Donahey, there are significant differences among providers with regard to how often a complainant prevails in both default and non-default cases.

Key findings based on the updated data include (July 2001 data in brackets for comparison purposes):

1. Until the demise of eResolution in December 2001, provider caseload shares remained largely unchanged, indicating that forum shopping continues unabated. As of February 18, 2002, WIPO's share of the UDRP caseload was 59.2% (58%), NAF's was 34.5% (34%), and eResolution's was 5.6% (7%).

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<sup>19</sup> CIRA Domain Name Dispute Resolution Policy, online at [http://www.cira.ca/official-doc/95.policy\\_final\\_\\_November\\_29\\_2001\\_\\_en.pdf](http://www.cira.ca/official-doc/95.policy_final__November_29_2001__en.pdf).

<sup>20</sup> <http://www.dnso.org/clubpublic/nc-udrp/Arc00/maillist.html>.

2. Differences in case outcome between single versus three member panel decisions also remain virtually unchanged. Complainants win 83% (83%) of single panel cases with the following provider percentages:

- WIPO – 83% (84%)
- NAF – 86% (85%)
- ERes – 64% (63%)

Complainant win percentages drop dramatically to 58% (60%) in three-member panel cases with the following provider percentages:

- WIPO – 62% (64%)
- NAF – 49% (52%)
- ERes – 50% (54%)

3. NAF and WIPO case allocation trends have not changed, if anything they have become even more pronounced over the past seven months. The six busiest NAF panelists<sup>21</sup> have now decided 56.4% (53%) of all NAF single panel cases.<sup>22</sup> Complainant win percentage in those cases has increased to 95.1% (94%).

WIPO, meanwhile, now features a roster with 121 panelists who have decided at least five cases as single panelists, up from 104 panelists in July 2001. In the earlier study, all but one of the 104 panelists had a complainant win percentage of 50% or better. Today, all 121 panelists have such a record. Moreover, Professor Milton Mueller and G. Gervaise Davis III, the two WIPO panelists identified in *Fair.com* as having never been selected to decide a case as a single panelist, still hold that distinction, despite now having participated as

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<sup>21</sup> The six busiest NAF single panel panelists are Carmody (185 cases), Marks Johnson (163 cases), Yachnin (123 cases), Buchele (123 cases), Upchurch (77 cases), and Kalina (70 cases).

<sup>22</sup> 778 of 1379 cases.

panelists in 40 three-member panel cases. Once again, assuming random allocation, it seems unlikely that neither Mueller's nor Davis's name would surface even once in what now stands as 2250 WIPO single panel cases.

4. Default cases constitute 54% of all cases,<sup>23</sup> with complainants indeed prevailing 94% of the time.<sup>24</sup> There are differences in case outcome as between the providers, however. While complainants win 98% of NAF default cases,<sup>25</sup> that win percentage drops to 92% with WIPO<sup>26</sup> and to 79% with eResolution.<sup>27</sup>

In fact, the default track records of some of NAF's busiest panelists might lead observers to conclude that the ICANN UDRP has reversed the traditional maxim of innocent until proven guilty. The Honorable Carolyn Marks Johnson, James P. Buchele, and Harold Kalina have **never** ruled in favor of a respondent in a default case, with complainants winning an amazing 324 of 324 cases between the three panelists. Not far behind sit Ralph Yachnin and John J. Upchurch, who have a combined complainant win record in default cases of 184 in 187 cases.

5. Since criticism of the Fair.com study centered primarily on its failure to account for default cases, the new data on non-default cases is particularly noteworthy. Although overall complainant win percentage drops as some predicted, the differences between providers actually remain roughly the same. Moreover, the difference in case outcome between single and three-member panels in non-default cases also remains largely unchanged, suggesting that rather than explaining away the study's damaging findings, the default data actually lends further credence to its conclusions.

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<sup>23</sup> 2339 of 4332 cases.

<sup>24</sup> 2194 of 2339 cases.

<sup>25</sup> 796 of 810 cases.

<sup>26</sup> 1309 of 1418 cases.

<sup>27</sup> 77 of 98 cases.

Complainant Win Percentage - Non-Default Case Outcome Only

	<b>Single Panel</b>	<b>Three Member Panel</b>
<b>Overall</b>	68% (1109 of 1639)	46% (145 of 314)
<b>WIPO</b>	70% (636 of 914)	48% (98 of 203)
<b>NAF</b>	69% (400 of 579)	42% (39 of 93)
<b>eResolution</b>	50% (65 of 131)	47% (7 of 15)

This data points to two conclusions. First, the inclusion of defaults is largely immaterial in determining provider differences in complainant win percentages (19 – 22% difference between WIPO/NAF and eResolution when all cases are included; 19 – 20% difference between WIPO/NAF and eResolution for non-default cases only). Accordingly, claims that there are no differences between providers, or that default cases adequately explain any differences, are not supported by the data.

Second, the inclusion of defaults does not affect the difference in complainant win percentage when comparing single and three-member panels (23% difference for all cases; 22% difference for non-default cases only). This data also provides clear evidence that critics’ reliance on the failure to exclude default cases from the Fair.com study as the basis for challenging its conclusions is not supported by the data.

The Fair.com study concluded by arguing that there was “compelling evidence that forum shopping has become an integral part of the UDRP and that the system may indeed be biased in favor of trademark holders.”<sup>28</sup> In the seven months since the release of that study, evidence to that effect has continued to mount, while the explanations of UDRP supporters have been proven incorrect. With eResolution now in bankruptcy court, NAF granting an ever-larger share of its caseload to a small group of panelists, and the red

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<sup>28</sup> Fair.com, *supra*, note 1 at 32.



herring of defaults vs. non-defaults conclusively disproved, the need for ICANN UDRP reform has become increasingly urgent.