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Internet Governance

Study Claims UDRP Decisionmaking Process Is Unfairly Biased in Favor of Complainants

The current process for handling trademark-related disputes over Internet domain name registrations is badly skewed in favor of trademark owners, according to a study released Aug. 20.

Data collected in the report, *Fair.com?: An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP*, suggest that the nearly universally applicable Uniform Dispute Resolution Policy encourages forum shopping in search of what appear to be strongly pro-trademark owner tribunals.

The study found that decisions from arbitration tribunals operated by the National Arbitration Forum and the World Intellectual Property Organization continue to run strongly in favor of trademark-owner complainants--who prevail in approximately 82 percent of their cases before these providers--and that cases decided by a single-member panel are much more likely to result in victory for the complainant than those decided by three-member panels.

Making three-member panels the default approach, creating caseload minimums and maximums for individual panelists, and encouraging greater accountability through transparent decisionmaking processes is needed to instill "greater confidence and fairness" in the present system, report author Michael Geist of the University of Ottawa Law School argued.

A review of the UDRP is on the agenda for the Internet Corporation for Assigned Names and Numbers's next meeting, set for Sept. 9 in Montevideo, Uruguay.

Is Flyswatter 'Fair' to the Fly?

The charge that the UDRP is biased in favor of trademark owners emanates from a deep well of innocence. The UDRP was created to remedy a "problem" that existed entirely in the minds of trademark owners: the widespread registration of domain names containing all or part of their marks. The principal author of the UDRP was WIPO, an international agency whose mission is to advance the interests of the intellectual property community.

ICANN, which imposes the terms of the UDRP on all registrants in the top-level domains it controls, is controlled by a community of large Internet infrastructure suppliers. To the extent that ICANN has any government oversight at all, it comes from the U.S. Department of Commerce, an agency statutorily dedicated to the promotion of U.S. business interests.

The Geist study documents the UDRP decisionmaking record by four dispute resolution providers, which was adopted by ICANN in late 1999. Under the UDRP, trademark owners are afforded the opportunity to gain control of a domain name registration if they are able to prove--to the satisfaction of an arbitrator or arbitration panel in a pleadings-only proceeding--that they have trademark rights in the name and the name was registered by the respondent in bad faith.

The Geist group surveyed approximately 3,000 UDRP cases decided up until early July 2001 by the four ICANN-accredited arbitration services providers: WIPO, NAF, the Disputes.org/eResolution Consortium, and the CPR Institute.

NAF came in for particular criticism, both for its heavy-handed marketing of its services--trumpeted through press releases such as the one that proclaimed "Arbitrator Delivers Internet Order for Fingerhut"--and for its practice of assigning cases to a small handful of arbitrators with solid pro-complainant track records.

Charges of forum shopping and pro-trademark-owner bias are not new. Last year, Syracuse University professor Milton Mueller released *Rough Justice: An Analysis of ICANN's Uniform Dispute Resolution Policy*, a report that also found evidence of a pro-complainant bias in UDRP decisions (5 ECLR 1168, 12/6/00). As was the case in the Mueller study, the Geist study finds both NAF and WIPO equally receptive to complainants's petitions, each holding in favor of the complainant in 82 percent of all cases.

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Under the UDRP, complainants are allowed to select which dispute resolution provider will decide their petition, and they are also allowed to select--initially--whether the case will be decided by a single-member or a three-member panel. The respondent has the option of asking for a three-member panel in all cases. In cases where a three-member panel is involved, the complainant and respondent have large roles in selecting which panelists will decide the case. In single-member panel cases, the panelist is selected by the dispute resolution provider.

Single Panelist Cases Worrisome

The study zeroed in on one particular anomaly of UDRP decisionmaking: Among those cases handled by WIPO and NAF, complainants are winning single panelist decisions at far greater rates than in cases decided by a three-member panel. At NAF, complainants prevail in 85.4 percent of all single-member panel cases; whereas, in three-member panel cases, complainants prevail 51.9 percent of the time. At WIPO, the story is similar, though less pronounced. Complainants prevail in 84.4 percent of all WIPO single-member panel cases, and prevail in 64.0 percent of all three-member panel cases.

While it could be assumed that respondents would request a three-member panel in cases in which they had a strong claim to the domain name, thus accounting for some of the disparity between the single-member and three-member panel outcomes, data collected in the report failed to substantiate this assumption. In fact, complainants request three-member panels more often than respondents, the reported noted. One explanation for this circumstance offered by the report's authors is that three-member panels are being requested to prevent aberrant decisionmaking by a single panelist.

The study notes that at another provider, eResolution, the gap between the single-member and three-member panel cases is less pronounced: Complainants prevail in 63.9 percent of the single-member panel cases, and in 54.0 percent of the three-member panel decisions.

"The lack of transparency on issues such as panelist allocation is particularly worrisome since the data suggests that there is a significant difference in outcome when panelists are allocated exclusively by the provider in a single panelist case and when both parties influence the composition of the panel, as in the three-member panelist case," the report stated.

The study complained that no information is available indicating how panelists are selected in single-member cases. Looking at NAF decisions, it found a rough correlation between complainant success and panelist caseload. At NAF, six panelists handled 53 percent of all single-panelist cases. One arbitrator, James Carmody, alone handled 140 of NAF's 966 single-panel cases, deciding in favor of the complainant 95.7 percent of the time.

Looking at the other side of the coin, the report mentioned that two WIPO panelists with pro-respondent reputations, Mueller and California-based attorney G. Gervaise Davis III, have yet to be assigned to a single-panelist case.

Recommendations

The report makes several recommendations for reform of UDRP decisionmaking:

- Three-member panels should be the norm, paid for entirely by the complainant. In cases in which there is a default, the case could be downgraded to a single panelist.
- Controls should be placed on the number of cases any one particular arbitrator could handle.
- Arbitrators should be annually reviewed for quality of work.
- Better data should be provided on panel decisions.

"Both WIPO and NAF, the two dominant ICANN-accredited arbitration providers, feature case allocation data that suggests that the panelist selection process is not random," the report stated. "Rather, it appears to be heavily biased toward ensuring that a majority of cases are steered toward complainant-friendly panelists."

The report Fair.com?: An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP is available at <http://aix1.uottawa.ca/~geist/geistudrp.pdf>.

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