The UDRP by All Accounts Works Effectively
Rebuttal to Analysis and Conclusions of Professor Michael Geist
in “Fair.com?” and “Fundamentally Fair.com?”

INTA Internet Committee

May 6, 2002
I. Introduction

The International Trademark Association ("INTA"), through its Internet Committee, has been monitoring the Uniform Dispute Resolution Policy ("UDRP") of the Internet Corporation for Assigned Names and Numbers ("ICANN") since the inception of the process in December 1999. Our review indicates that the process works efficiently and is essentially fair to both complainants and respondents. INTA notes, however, that there are a few (albeit vocal) critics of the UDRP who believe that the UDRP is biased against respondents and favors complainant trademark owners. One such individual is Professor Michael Geist of the University of Ottawa.

In August 2001, Professor Geist published the provocatively titled paper "Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP" (hereinafter "Fair.com"). In Fair.com, Professor Geist, relying almost exclusively on statistical data, asserted (among other things) that the UDRP is biased towards trademark owners and promotes forum shopping among UDRP providers. The Fair.com study and Professor Geist's methodology were almost immediately challenged and criticized, prompting Professor Geist to revisit his initial study and to publish an update thereto titled "Fundamentally Fair.com? An Update on Bias Allegations and the ICANN UDRP" (hereinafter the "Update").

A. The Nature of Professor Geist's Complaints

In both Fair.com and the Update, Professor Geist focuses almost exclusively on complainant win percentages for three of the five ICANN accredited UDRP dispute resolution providers – the National Arbitration Forum ("NAF"), the World Intellectual Property Organization Arbitration and Mediation Center ("WIPO") and eResolution. From this statistical data, Professor Geist draws several conclusions and makes numerous assumptions and allegations, the most important of which are:

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1 Professor, University of Ottawa, Faculty of Law.

2 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>.


4 The other two ICANN accredited UDRP dispute resolution providers are the Asian Domain Name Dispute Resolution Centre and CPR Institute for Dispute Resolution, see online at <http://www.icann.org/dndr/udrp/approved-providers.htm>.
In order for a dispute resolution system to be fair, Professor Geist suggests that complainants should not win more than 50% of the time.

Cases decided by three-member panels (compared to single member panels) give respondents a more fair chance and reduce alleged abuses of provider influence.

Too many cases within some providers have an inappropriate short list of panelists deciding the cases.

Transfers of domain names in the majority of default cases might lead observers to conclude that respondents are guilty until proven innocent.

Forum shopping is an integral part of the UDRP system and creates bias in favor of complainant trademark holders.

B. Professor Geist’s Conclusions Are Inherently Flawed

The following rebuttal demonstrates how Professor Geist's methodology and analysis in both Fair.com and the Update are flawed. For example, in both studies Professor Geist fails to:

- Analyze the relative merits of the cases decided and instead relies almost exclusively on bare statistics which rarely, if ever, provide an adequate measure of the fairness of a decisionmaking process.

- Sufficiently consider the effect of default cases on the complainants’ winning percentage.

- Discuss and critique the UDRP rules and to consider other alternative reasons that could justify a high complainant win percentage; for instance, the UDRP is designed specifically for simple, straightforward cases of egregious acts of cybersquatting.

- Consider that forum selection may be the result of other factors – such as quality and reputation of panelists, familiarity with dispute resolution provider, quality, cost, and timeliness of decisions – rather than bias in the system.

Following is a more detailed review of the failures and inadequacies of both Fair.com and the Update.

II. Bare Statistics Rarely Provide a Satisfactory Measure of the Fairness of a Decisionmaking Process

Throughout both Fair.com and the Update, Professor Geist uses statistics as the principal means of substantiating his criticisms of the UDRP and in concluding that the UDRP is biased. Merely reviewing statistics, however, provides very little value unless the merits of the cases are reviewed and assessed. None other than the United States
Supreme Court has questioned the reliance on statistics as a measure of determining fairness when that Court stated that:

"(b)are statistics *rarely* provide a satisfactory measure of the fairness of a decisionmaking process."\(^5\) (emphasis added).

Despite such cautionary comments, Professor Geist relies almost solely on such statistics and fails to provide a substantive review of the merits of the over 4300 cases he is analyzing.\(^6\) Rather, he makes bald assertions that there have been a “plethora of inconsistent and clearly incorrect decisions” but provides no footnote or other reference to support this statement.\(^7\) Moreover, Professor Geist gives us no external benchmark from which to judge his numbers and without knowing what the “right” number should have been, it is difficult to make any definite conclusions based on these numbers.

At one point in Fair.com, Professor Geist asserts that “only one panelist had a respondent winning percentage of under 50%.”\(^8\) The use of the word “only” and the use of 50% as a point of reference suggest that Professor Geist is treating 50% as “the norm.” However, 50% is not a norm for litigation; 50% is a norm for probability.

### III. Case Outcomes Do Not Show Bias Against Respondents

In addition to his heavy reliance on pure statistical data, Professor Geist fails to review, analyze or assess other plausible explanations that would justify a seemingly high (according to Professor Geist) success rate for complainants. For example, Professor Geist fails to mention the history of the UDRP and its purpose. The UDRP, unlike traditional civil litigation, calls for administrative resolution for “only a *small, special* class of disputes” (emphasis added).\(^9\) The history further states that:

“[e]xcept in cases involving ‘abusive registrations’ made with bad-faith intent to profit commercially from others' trademarks (e.g., cybersquatting and cyberpiracy), the adopted policy leaves the resolution of disputes to the courts (or arbitrators where agreed by the parties) and calls for registrars not to disturb a registration until those courts decide.”\(^10\)

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\(^6\) Update, supra, note 3 at 5.

\(^7\) Fair.com, supra, note 2 at 26.

\(^8\) Ibid. at 27.

\(^9\) See Section 4.1(c) of *Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy*, see online at <http://www.icann.org/udrp/udrp-second-staff-report-24oct99.htm>.

\(^10\) Ibid.
The fact that the UDRP does not extend to legitimate disputes between domain name registrants and trademark owners was said to be “a feature of the policy, not a flaw.”

Given the narrow focus of the UDRP and the fact that it was designed for clear cases of abusive registrations, complainants are justifiably cautious before they bring a UDRP action. In our experience, most complainants are able to provide both compelling and substantial evidence of the respondent's bad faith before they bring a UDRP action. Therefore, it should not be at all surprising that the majority of cases are decided in favor of the complainant.

It is also important to note that Professor Geist does not attack the basic rules set down for determining whether a domain name should be transferred. To the extent the merits of any case are attacked, Professor Geist could only come up with three or four cases where there is believed to be an incorrect or inconsistent decision. With over 4300 cases purportedly reviewed, this amounts to less than .1% of such cases. Given the extremely - and very surprisingly - limited review and analysis conducted by Professor Geist, the reader is left wondering whether the results in the over 99.9% of the cases that Professor Geist failed to review or reference were both fair and just.

Finally, Professor Geist fails to mention the fact that the UDRP has several features that are very favorable to respondents. For example, the UDRP requires panelists to consider the complaint on the merits even in cases where the respondent defaults by failing to file a response. According to the Update, over 20% of default cases brought in front of eResolution panelists were decided in favor of respondents despite the fact that respondents did not submit any reply. Such a feature, which is largely unheard of in traditional litigation, is a significant benefit to respondents and is arguably complainant unfriendly.

IV. The Significant Impact of Default Cases

Although we believe it is difficult, if not impossible, to determine whether a system of decisionmaking is just and fair without reviewing the merits of the cases decided, it is interesting to note that in Fair.com, Professor Geist failed to give any substantial weight to the fact that a large number of cases decided in favor of complainants are default judgments. According to the Update, respondents default over 54% of the time, and complainants’ winning percentage, when default cases are included, is significantly higher than when they are excluded. Professor Geist’s failure to discuss

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11 Ibid.

12 Fair.com, supra, note 2 at Footnotes 84, 85 and 86.

13 Section 14, Rules for Uniform Domain Name Dispute Resolution Policy, see online at <http://www.icann.org/dndr/udrp/uniform-rules.htm>.

14 Update, supra, note 3 at page 7.

15 Ibid. at page 7.
the impact of default cases in Fair.com was a critical omission that resulted in Fair.com being immediately criticized.16

In the Update, Professor Geist responds to his critics by providing more statistical data to establish that even when default judgments are taken into consideration, there is still a significant success rate for complainants in UDRP proceedings - especially in single panel cases where Professor Geist finds that single panels rule for complainants 68% of the time.17 However, complainant winning percentage rates, even with the exclusion of defaults, do not prove that the UDRP is unfair. Again, one would need to review the merits of individual cases and consider possible reasons other than bias, such as the fact that the UDRP is designed only for the most straightforward and egregious cases of cyber-piracy.

In short, in Fair.com Professor Geist touted inflated complainant winning percentages in order to support his allegations of bias against respondents. When this glaring oversight was uncovered, Professor Geist released the Update to bolster his arguments and further substantiate his conclusions. However, the Update still fails to provide any objective evidence of bias against respondents, which only a review of the merits of individual cases could do. Professor Geist has presented no such evidence.

V. The Differential in Winning Percentages Between Single and Three Member Panels Does Not Prove that Three Member Panels are More Fair

In both Fair.com and the Update, Professor Geist focuses on “the dramatic difference” in case outcomes in single panel cases versus three-member panel cases. In the Update, Professor Geist provides statistics for the differences in complainant win rates in three member versus one-member panels in non-default cases, as set forth below:18

<table>
<thead>
<tr>
<th></th>
<th>Single Member Panel</th>
<th>Three Member Panel</th>
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</thead>
<tbody>
<tr>
<td>Overall</td>
<td>68%</td>
<td>46%</td>
</tr>
<tr>
<td>WIPO</td>
<td>70%</td>
<td>48%</td>
</tr>
<tr>
<td>NAF</td>
<td>69%</td>
<td>42%</td>
</tr>
<tr>
<td>eResolution</td>
<td>50%</td>
<td>47%</td>
</tr>
</tbody>
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Relying on such statistical information, and information provided in Fair.com, Professor Geist concludes that three member panels are more fair and recommends that they should be mandatory.19 Professor Geist’s conclusions are based on an incorrect inference that one-member panels are biased and that three member panels will more correctly decide UDRP proceedings. The more logical conclusion, however, is that

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16 Ibid. at pages 3 and 4.

17 Ibid. at page 8.

18 Ibid. at page 8.

19 Fair.com, supra, note 2 at page 26.
respondents are more likely to choose three member panels when they believe they have a viable defense and want a say in the selection of the panel. This is especially true given the fact that respondents must pay for a portion of the dispute resolution costs if they elect to have the dispute heard in front of a three-member panel.\textsuperscript{20} It is far more likely that a respondent would be willing to undertake such an expense when it believes in the merits and worthiness of its case. This reason alone likely explains the differences that exist between the win percentages between single and three member panels.

Regardless, unless a thorough analysis is done to show that the decisionmaking system and the actual merits of a significant number of one member panel cases were decided unjustly, there is no basis for requiring a three member panel in all cases. At present, Professor Geist has failed to conduct any such analysis.

\section*{VI. The Panelist and Provider Selection Process is Fair}

In both Fair.com and the Update, Professor Geist suggests that the panelist selection process - especially that of NAF - may be biased since only a small percentage of panelists decide a significant percentage of all decisions.\textsuperscript{21} Presumably, Professor Geist finds it inappropriate that panelist selection is not random and that all panelists are not sharing the caseload equally. However, due to the nature of their business, it is unlikely that providers could ensure that all panelists will preside over an equivalent number of cases given that the time limitations on each panelist is very different and likely changes from day to day. As such, it would seem virtually impossible for any provider to allocate cases randomly and evenly amongst panelists.

What is unsettling about this portion of Professor Geist's study, however, is the fact that he references specific panelists and - based again on statistical win percentages - suggests that these panelists are biased towards trademark owners.\textsuperscript{22} Before making such harmful and inflammatory allegations, Professor Geist should have at least reviewed the merits of the cases decided by these panelists to determine whether his allegations were at all justified. This is especially true since panelists are required to be “impartial and independent” and must disclose any circumstances that may give rise to justifiable doubt as to a panelist’s impartiality or independence.\textsuperscript{23}

In addition to questioning the impartiality of the panelist selection process, and the impartiality of specific panelists, Professor Geist alleges that forum shopping has become an integral part of the UDRP process.\textsuperscript{24} Moreover, Professor Geist asserts that such forum shopping has recently claimed its first victim when eResolution declared

\begin{itemize}
\item \textsuperscript{20} Rules, supra, note 13, Section 19.
\item \textsuperscript{21} Fair.com, supra, note 2 at 24, and Update, supra, note 3 at 6.
\item \textsuperscript{22} Update, supra, note 3 at 7.
\item \textsuperscript{23} Rules, supra, note 13, Section 7.
\item \textsuperscript{24} Fair.com, supra, note 3 at 32.
\end{itemize}
bankruptcy. Professor Geist presumes that the small percentage of UDRP cases that eResolution was able to attract was due to the fact that its complainant win percentage was the lowest of the three dispute resolution providers. However, the fact that individual complainants favor one provider over others is not a basis to conclude that the system is biased in favor of trademark holders. In fact, complainants will tend to choose a particular forum based on a number of factors. For instance, the complainant may favor a particular provider based on costs, its familiarity with the provider and its rules, the reputation of the provider for delivering fair results, geographic location of the provider, reliability in delivering decisions in a timely fashion, etc. Both Fair.com and the Update fail to adequately explore these other potential sources of provider differentiation.

With respect to cost, NAF was the lowest cost service provider, followed by eResolution and then WIPO. The dispute resolution systems of both NAF and WIPO have been around for quite some time, 1986 and 1994 respectively, and have built up a reputation in the industry of delivering timely and fair results. WIPO has numerous well-trained and impressive arbitrators from a number of different countries. Such an international perspective may have significant appeal to certain complainants who may desire panelists who are familiar with the local laws, customs and language of the complainant. It is perhaps one or more of the above reasons that complainants preferred WIPO and NAF to eResolutions.

Moreover, the fact that eResolutions is now in bankruptcy may have been due to a number of factors wholly unrelated to alleged forum shopping. Corporations go bankrupt for a number of reasons; for instance, they are poorly managed, one or more key employees leave the company, etc. Without conducting an in depth review of the inner workings of eResolution and its management, Professor Geist's conclusion that its demise was due to the fact that it was a "victim" of forum shopping seems misplaced.

Finally, Professor Geist's statistics may also lead to the conclusion that eResolution was biased against trademark owners. For example, both NAF and WIPO have similar win percentages, whereas eResolution's win percentages are comparatively

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25 Update, supra, note 3 at 4.

26 Ibid. at 6.

27 NAF's Uniform Domain Name Dispute Resolution Policy UDRP Fees, see online at <http://www.arbitration-forum.com/domains/UDRP/fees.asp>, eResolution's Supplemental Rules, Section 19, see online at <http://www.eresolution.com/services/dnd/p_r/supprules.htm>, and WIPO's Schedule of Fees under the ICANN Policy, see online at <http://arbiter.wipo.int/domains/fees/index.html>

28 See Frequently Asked Questions About the Forum, online at <http://www.arbitration-forum.com/about/questions.asp#14>, and see WIPO Arbitration and Mediation Center, online at <http://arbiter.wipo.int/center/index.html>

29 Fair.com, supra, note 2 at 4.

30 Update, supra, note 3 at 4.

31 Ibid. at 4.
low. If one were to follow Professor Geist's lead in relying solely on statistics, one could easily draw the inference that some eResolution panelists were biased and impartial against complainants. Of course, we would prefer that the merits of such cases were reviewed prior to making any such allegations.

VII. Conclusion

In both Fair.com and the Update, Professor Geist relies almost exclusively on statistics to draw inferences and make conclusions that the UDRP is biased and unfair. However, bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process. Without analyzing the merits of the cases, both of Professor Geist's studies fall far short of providing a meaningful or useful analysis of the UDRP.

32 Ibid. at 8.