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UDRP – A Success Story:
A Rebuttal to the Analysis and Conclusions of Professor Milton Mueller in "Rough Justice"

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I. Introduction

The Internet Committee of the International Trademark Association ("INTA") has been monitoring the Uniform Dispute Resolution Policy ("UDRP") of the Internet Corporation for Assigned Names and Numbers ("ICANN"), the organization that coordinates management of the Internet's domain name system. This review shows that the UDRP is essentially fair to both complainants and respondents, and indeed has been an efficient and effective process for resolving domain name disputes between parties who are frequently from different countries.

Notwithstanding the UDRP's success, there have been a few (albeit vocal) critics of the UDRP, including Milton Mueller, an assistant professor at the Syracuse University's School of Information Studies. Professor Mueller has attempted a statistical analysis and review of the UDRP in a report sensationally entitled "Rough Justice: An Analysis of ICANN's Uniform Dispute Resolution Policy" ("Rough Justice"). The conclusions reached in "Rough Justice" are based on faulty premises and misinterpretations of gathered data. As a result, the report unfairly discredits the UDRP, which in fact is a worthy and fully functional process for resolving disputes involving the bad faith registration of domain names. In short, the analysis provided by "Rough Justice" overlooks the unprecedented and unqualified success of the UDRP.

A. Summary of Mueller's Findings and Points of Rebuttal

Professor Mueller claims to use quantitative and "qualitative" data to support his conclusion that UDRP forum shopping leads to biased results, which could increase the number and "intensity" of domain name disputes and thereby undermine the "security" of Internet users. An examination of the report, however, reveals major flaws in Professor Mueller's statistical analysis.

- The analysis shows fundamental misunderstandings of the UDRP and trademarks and draws illogical conclusions from irrelevant statistics and anecdotal evidence.
- The study does not offer appropriate statistical evidence in support of allegations of panel bias.
- The report completely fails to adequately review or account for the merits of the UDRP cases covered in the report.
- The study omits one of the most pertinent statistics to assess the fairness and effectiveness of the UDRP: the rate of challenges to UDRP decisions.

- The report does not consider the fact that disputed domain names are an extremely small percentage of all domain names registered.

- The report fails to acknowledge that by providing an effective remedy against infringement and a forum for the prompt resolution of existing disputes, the UDRP has the salutary overall effect of discouraging the registration of infringing domain names.

- The findings in "Rough Justice" show that the rate of new disputes has declined.

- The study fails to recognize that UDRP decisions benefit all Internet users. The evidence available supports a conclusion that the UDRP has created an environment of greater security in domain names than ever before.

B. Background of Dispute Resolution Providers

Since its approval of the UDRP in October 1999, ICANN has accredited five arbitration service providers to hear UDRP cases: (1) the World Intellectual Property Organization Arbitration and Mediation Center ("WIPO"); (2) the National Arbitration Forum ("NAF"); (3) eResolutions ("eRes"); (4) the CPR Institute for Dispute Resolution ("CPR"); and (5) the Asian Domain Name Dispute Resolution Centre ("ADNDRC"). All of these arbitration service providers currently provide such services except eRes, which stopped accepting UDRP proceedings commenced after November 30, 2001.

WIPO

- WIPO is based in Geneva, Switzerland. The parent body and its successors, the United International Bureau for the Protection of Intellectual Property, have been in existence since 1893. In 1970, WIPO was founded, and in 1974 became a specialized agency of the United Nations, with a mandate to administer intellectual property matters recognized by the member states of the United Nations. WIPO was approved for arbitrating UDRP cases on December 1, 1999.

NAF

- NAF was founded in 1986, and is based in Minneapolis, Minnesota. It has been an arbitration forum for banks, insurance companies, and computer makers. The panelists are largely retired judges and attorneys. NAF was accredited by ICANN for UDRP arbitration cases on December 23, 1999.

eRes

- eRes was a relatively new organization based in Montreal, Canada. It came into existence in 1999 with the primary objective of specifically arbitrating domain name disputes. eRes was approved by ICANN as a forum for UDRP cases on January 1, 2000. The eRes panelists were primarily attorneys from Canada and the United States. As stated above, eRes no longer accepts UDRP cases.

CPR

- CPR was established in 1979 and is located in New York City. CPR is a group comprised of the general counsel of five hundred international corporations and the partners of numerous major law firms. Its initial purpose was to integrate the

concepts of alternate dispute resolution into the mainstream of law departments and law firms. ICANN approved CPR as a forum for arbitrating UDRP cases on May 22, 2000.

ADNDRC

- ADNDRC is a joint undertaking between the China International Economic and Trade Arbitration Commission and the Hong Kong International Arbitration Centre. According to the ADNDRC website, the panel of arbitrators are selected Chinese and foreign specialists in trade, economics, law and science. ICANN approved ADNDRC as a forum for UDRP arbitration cases on December 3, 2001.

II. Professor Mueller's Analysis

A. Forum Shopping

"Rough Justice" largely focuses on "forum shopping," the ability of UDRP complainants to select a panel from any of the approved providers (WIPO, NAF, eRes, or CPR). In his report, Professor Mueller criticizes this approach, arguing that it leads to biased UDRP results.

1. Professor Mueller's Statistics

Professor Mueller only considered three dispute resolution organizations - WIPO, NAF, and eRes - in his study and excluded CPR because of the small number of times CPR was selected as an arbitration forum.[1] Professor Mueller's study shows that from December 1999, the time the UDRP became effective, until June 2000 a total of 621 cases were decided. The cumulative market share by organization was as follows:

WIPO	61%
NAF	31%
eRes	7%

According to Professor Mueller, the absolute numbers for the outcomes by provider in these 621 cases are as follows:[2]

[1] ADNDRC was not included in the study because it was only recently accredited by ICANN.

[2] Interestingly, elsewhere in his report, Professor Mueller includes a table showing outcomes by provider in 934 cases. In that table, complainant wins only amounted to 76.5% for WIPO, and 71.5% for NAF. These figures are lower than the 80% rates reported in the smaller sample of 621 cases. *Rough Justice* at 11.

Service Providers	Outcome (cases with decisions only)		Total
	Complainant loses	Complainant wins	
eRes	24 (49%)	25 (51%)	49
NAF	49 (19%)	203 (81%)	252
WIPO	57 (18%)	263 (82%)	320
Totals	130 (21%)	491 (79%)	621 cases

Professor Mueller also provides the following month-by-month chart showing what percentage of UDRP cases were handled by each organization from December 1999 to October 2000.

Market share	Jan-Feb	March	April	May	June	July	Aug	Sept	Oct
WIPO	48%	58%	58%	63%	61%	65%	66%	63%	66%
eRes	10%	4%	9%	8%	9%	7%	7%	8%	4%
NAF	43%	38%	33%	29%	29%	27%	26%	28%	27%

Professor Mueller concludes from this chart that "WIPO's share grew steadily until August, when a price increase produced a slight shift back to NAF." "Rough Justice" at 15. Professor Mueller offers no statistical evidence to support this statement. Professor Mueller also states that eRes's share has always been the smallest and may be declining slightly.

In evaluating his statistics, Professor Mueller observed that selection of resolution service providers ("RSPs") is not random. He suggests four factors that could influence the selection:

- filing fee;
- complainants' winning percentage;
- reputation of the organization; and
- time for the RSP to issue a decision.

Professor Mueller statistically analyzed these factors to determine which factors influence complainant's selection of a particular forum. He concludes that "complainant loss rate which, though not the only factor correlated with choice of provider, is a highly significant one." "Rough Justice" at 18.

2. Reputation, Not Bias, Primarily Influences Forum Selection

At the UDRP's inception in December of 1999 (the beginning date of Professor Mueller's statistical analysis), there is little question that a complainant's selection of an RSP was overwhelmingly influenced by reputation. Since no decisions had been issued, there were no outcomes or decision times to evaluate. Consequently, only filing fees and reputation could have been influential factors. Accepting Professor Mueller's assessment that arbitration cost is a minimal influential factor between WIPO, NAF, and eRes due to

minor price differentials, the only factor affecting selection of an RSP during the first several months of the UDRP was the RSP's reputation

Under these circumstances, it is hardly surprising that WIPO and NAF, the two most well known RSPs, received the most disputes. WIPO, the most frequently selected RSP, had been deeply involved in intellectual property issues worldwide for many years, and was instrumental in promulgating the UDRP. Likewise, NAF, the second most frequently selected arbitration forum, also has significant experience in dispute resolution, whereas eRes was a new forum with no track record or reputation.

Although eRes's low market share is undoubtedly attributed to its lack of a track record or reputation, Professor Mueller stubbornly concludes it is evidence of bias. Even though WIPO increased its market share from January 2000 through October 2000,[3] this increase was primarily at the expense of NAF, not eRes, and NAF had the same winning percentage as WIPO. Inexplicably, Professor Mueller does not provide a rationale for this shift. Moreover, during this same time period, eRes's market share remained stable even though its winning percentage for complainants was lower than WIPO and NAF.

Notwithstanding these facts, according to Professor Mueller, bias is supposedly to blame for eRes's low market share. Even though there is no discernible trend that eRes was losing its market share, Professor Mueller manages to conclude that eRes's relatively high complainant loss ratio was the reason for its continuing low selection. Professor Mueller ignores that the more likely cause of such forum selection was complainants' professional comfort with selecting a familiar forum that had a track record of reliable decisions. In fact, Professor Mueller's failure to consider this possible alternative rationale suggests a disturbing bias on his part.

3. Alleged Bias Against Respondents Is Unsubstantiated By Data

On the basis of sketchy data susceptible of numerous interpretations, Professor Mueller makes a giant leap in concluding that not only does bias exist in the UDRP process, but it is solely directed against respondents. Professor Mueller appears to equate bias with a difference between the frequency with which each organization is selected. The problem, of course, is that such a difference does not amount to bias any more than the difference in the frequency of use of certain federal courts proves that the U.S. federal judicial system is infected by bias. Furthermore, the UDRP was designed to allow for multiple choices of RSPs to provide for an adequate supply of arbitrators to insure an efficient determination of all disputes. This policy was obviously sensible, given that eRes is no longer taking UDRP cases and other RSPs are available for complainants to seek relief.

[3] According to Professor Mueller's chart, from January through May, WIPO's share started at 48% and then immediately climbed to 58% and by May was at 53%. On the other hand, NAF started at 43% and by May had dropped to 29%. eRes started as the lowest at 10%, then dropped to 4% in March, and was back up to 8% in May. *See Rough Justice* at 15.

Moreover, to the extent any bias does exist, there is no data or evidence to suggest that it is directed against respondents. Professor Mueller argues that if eRes had a larger market share and if eRes's higher outcome percentage for respondents were applied to those additional cases, then we would see more decisions favorable to respondents. This analysis is far too simplistic to be credible.

- First, it treats all cases as if they are interchangeable (*i.e.* have identical fact patterns). This is simply untrue. Each case is different and Professor Mueller presents no evidence to indicate why those factual differences do not completely control the outcomes of the cases.[4]

- Second, there is no statistical evidence that eRes would have decided those cases any differently from WIPO and NAF.

- Third, Professor Mueller fails to include any statistical analysis of the percentage of cases decided pursuant to the UDRP stayed or reversed on appeal.

- Fourth, it assumes that anything different than a 50/50 outcome establishes bias against one party.

Indeed, a fresh look at Professor Mueller's own statistics can yield an opposite conclusion. The statistics are just as likely to prove that eRes has a bias against complainants, since complainants have a smaller chance of winning before an eRes panel. After all, nothing suggests a forum should have an approximately 50/50 outcome, as eRes had. Given that the UDRP is aimed at abusive cases, a relatively high winning percentage (over 50%) is not only unsurprising, but expected. Indeed, cases brought to panels pursuant to the UDRP are brought by entities with a grievance that can show that the decision should be clear-cut.

4. Ambiguous Evaluation of Case Outcomes Does Not Prove Bias

Statistics alone cannot prove bias without some evaluation of the relative merits of the UDRP cases in question or the quality of analysis in RSP decisions. Significantly, Professor Mueller does not submit any objective evidence that NAF and WIPO panels are making incorrect or biased decisions. In an effort to provide some support for his arguments, Professor Mueller cites seven decisions issued by these two panels, which he describes as "really bad decisions ("RBDs").[5] While Professor Mueller conveniently states this is not an exhaustive list, he fails to cite any other cases that fall under this category. Even assuming that these seven cases were decided erroneously, seven cases

[4] Professor Mueller's appears to believe that each forum should have the same statistical winning percentage because the complainants who select these forums will tend to "punish" those with lower name transfer rates and "reward" those with higher name transfer rates. This assertion is completely theoretical and, again, does not establish bias when there is no analysis of the merits of each case.

[5] Professor Mueller does not provide any criteria for this determination, except to say that in his view, they "stray from a strict interpretation of the policy." *Rough Justice* at 22. Such a criticism appears purely subjective and not based on any legal or empirical principles.

out of 572 decisions issued by WIPO and NAF at worst represents less than a 2% error rate of the UDRP cases in Mueller's sample. Under any benchmark, such a small error rate would be evidence of an extremely successful and fair procedure.

In addition, Professor Mueller cannot point to any other indicators of biased or invalid decision making by RSP panels. Indeed, none of these RBDs have been stayed or reversed by courts on appeal. In fact, during the period studied (December 1999 through October 2000), there were 2,166 cases filed pursuant to the UDRP and approximately a thousand decisions issued by UDRP panels. Of these thousand decisions, only a few have been stayed pending a court appeal filed by a respondent after a panel decision was issued. None of these courts on appeal reversed a panel decision.[6] Moreover, the thousand decisions involved domain names comprised of many well-known trademarks, such as Microsoft, Guinness, Nike, Yahoo, Sony, and Canon, which were taken from bad faith registrants and awarded to their rightful trademark owners.

B. UDRP Protection and Enhancement of Internet User Confidence

1. UDRP Decisions Benefit All Internet Users

INTA wholeheartedly disagrees with Professor Mueller's assessment that "attempts to use the UDRP to broaden the scope of trademark coverage can only increase the number and intensity of disputes, and thereby undermine the security of users." "Rough Justice" at 26. It has been estimated that, as of fall 2000, over 17.7 million domain names were registered[7] and between 2-3 thousand cases filed under the UDRP.[8] Under these figures, only .01 % of all domain names have been contested, or about one in ten thousand registrations. Such a small percentage of contested domain names provides no rationale for the theory that the number of disputes will rise. Professor Mueller's use of the word "intensity" is simply hyperbole; all contested cases are "intense" to the litigants, but no more or less so because they are UDRP cases.

Professor Mueller also fails to acknowledge that UDRP cases serve a critical function directly related to increasing Internet stability and security. Because the UDRP provides cost-effective and efficient procedures for challenging domain names registered in bad faith and reduces the financial incentives for cybersquatters, over time the UDRP should curtail the number of disputes, not increase them. Professor Mueller's own statistics show that the number of newly-filed cases is declining. WIPO also recently reported a decrease in UDRP cases: the total number of UDRP cases filed with WIPO in

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[6] Professor Mueller's only discussion of the process by which UDRP decisions are appealed appears in his discussion of whether a UDRP appeal process would correct the "bias" that his statistical research found. Professor Mueller calls the current appeals process "narrow" and discounts it because he does not believe respondents can afford to use national courts. Professor Mueller's characterization of the appellate process as "narrow" again reveals his own bias. There is no evidence indicating that respondents cannot afford to appeal. Moreover, the current appeal process provides for a trial de novo, allowing the respondent to a full judicial determination of its rights under the UDRP.

[7] United States Internet Council & ITTA Inc., *State of the Internet 2000* 4 (2000), online at <http://www.usic.org>

[8] *See Rough Justice* at 1.

2001 was 1,506, as compared to 1,841 in 2000. WIPO believes that the figures suggest that the UDRP "has been effective in dissuading Internet pirates from hijacking names."[9] In other words, the UDRP is meeting its objectives and ensuring a more secure Internet.

The UDRP increases consumer confidence in the Internet because it ensures that trademark owners are identified by domain names corresponding to their legitimate brand names. This in turn fosters confidence among Internet users, who have learned to rely on these brand names in the marketplace and expect that they are not going to be deceived when accessing websites bearing those brand names. Without the UDRP and similar measures to protect consumers, Internet users risk being confused or exploited by the deceptive and bad faith practices of those intending to benefit from legitimate trademark owners' efforts. Moreover, Professor Mueller's study fails to show that the UDRP has any adverse effect on the ability of Internet users to adopt reliable domain names quickly without conflicting with others' trademark rights.

2. Challenges to Older Registrations Do Not Impact Internet Stability

Although Professor Mueller did not find any specific trends relating to the registration date of disputed domain names, he unequivocally asserts that if most UDRP cases challenge domain name registrations that have been held for a long time, then it indicates that the legal status of domain name registrations generally is less stable than it "ought" to be. He also suggests that a large number of challenges to older domain name registrations indicates systematic reverse hijacking efforts by trademark owners.

These premises are without merit. The domain name registration process was in effect years before the adoption of the UDRP. As such, it is not surprising that many of the cases brought under the UDRP were against domain names that were registered many years ago. More importantly, the number of cases against older domain names offers no insight as to how the UDRP is affecting the stability of the domain name system. Undoubtedly, one reason these domain names were not challenged earlier is because there was no effective forum in which to do so. To draw conclusions as to the stability of the domain name system when the UDRP has only been in existence for such a short time is meaningless. Any attempt to measure Internet "stability" on the basis of UDRP challenges to older domain names is particularly irrelevant when there is such a small number of disputes relative to the entire number of registrations to begin with.[10]

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[9] Press Release, World Intellectual Property Organization, WIPO Continues Efforts to Curb Cybersquatting (February 26, 2002). <http://www.wipo.org/pressroom/en/index.html>

[10] Today, there are more than 27 million domain names registered. *See* NetNames *Domain Stats*, online at <http://www.domainstats.com/main.html> [April 25, 2002]; Snapnames.com *State of the Domain February 2002* 10 (2002). The current number of domain name disputes exceeds 5600. *See* ICANN *Statistical Summary of Status of Proceedings Under Uniform Domain Name Dispute Resolution Policy*, online at <http://www.icann.org/udrp/proceedings-stat.htm> [April 29, 2002]. In other words, the number of disputes relative to the number of registrations is approximately .02%.

C. Report Shows Researcher Bias and Fundamental Misunderstanding of the UDRP and UDRP Procedures

Throughout his study, Professor Mueller makes incorrect statements about the UDRP, cites irrelevant statistics, and makes illogical assessments that can only be attributed to his own preconceptions and inexperience. Some examples include:

- Professor Mueller incorrectly describes the UDRP as a "binding" arbitration. In fact, the UDRP is a mandatory arbitration with a right to challenge. By definition, there is no appeal from a "binding" arbitration.

- Professor Mueller claims that the number of UDRP cases allows researchers and the public to realistically assess the scope of the cybersquatting problem. In actuality, the number of filed UDRP disputes does not account for civil court proceedings, disputes that settle before filing, or disputes in which the trademark owner has not yet decided to take formal legal action. Professor Mueller's statement indicates a lack of appreciation of the various aspects of trademark-related domain name disputes and as such, the factors involved in determining the whether the problem is being adequately addressed.

- Professor Mueller offers no objective evidentiary support for his assertion that RSPs engage in unfair panel selection practices. He merely states that he has been used as a WIPO panelist "only when a respondent specifically requested his presence on a three-person panel." *See* "Rough Justice" at 11. As evidenced by this statement, Professor Mueller's unsubstantiated assertion that panel selection is unfair is based on entirely on his own preconceptions and bias.

- Professor Mueller calls the 34% default rate "surprising" and suggests that such a "high" default rate may indicate that UDRP procedures are too fast for ordinary domain name registrants to receive notice or to defend themselves adequately. There is no evidence to support this contention. Although Professor Mueller ultimately and correctly leans toward an alternate theory (that many of the challenged names were abandoned by registrants who saw little point in defending the case), he refuses to rule out faulty UDRP procedures despite evidence that many panelists accepted delayed respondent responses. *See* "Rough Justice" at 11-12.

- Finally, Professor Mueller recommends that allowing registrars, instead of complainants, to select dispute providers, can eliminate bias caused by forum shopping. *See* "Rough Justice" at 19-20. Acknowledging that "there will always be differences in outcomes among RSPs," Professor Mueller nevertheless insists that registrar selection of RSPs would eliminate the supposed bias that allegedly exists without clarifying how his recommended method eliminates the forum shopping that is the alleged source of such bias. Indeed, Professor Mueller fails to explain why registrar selection would not be subject to a greater incidence of forum shopping, since only a few registrars would be selecting the RSPs for all UDRP cases.

III. Conclusion

"Rough Justice" distorts facts and misuses statistics to achieve a predetermined end – to show that the UDRP is somehow biased in favor of trademark owners and does harm to the domain name system. Nothing could be further from the truth. In reality, the UDRP has been a principal means for ensuring a reliable domain name system - one that all Internet users can rely upon to ensure that they have reached their intended destination in cyberspace.