

Procedures for Dispute Resolution or for Commercial Control?: Reinforcing the Status Quo in Internet Governance*

Jisuk Woo**

Abstract : This study examines how Internet domain names came to be governed by ICANN, a non-governmental, non-profit private international organization, and investigates how domain name disputes are dealt with by its newly adopted UDRP (Uniform Dispute Resolution System). The analysis examines UDRP policy and rules, and empirically assesses the relationship between decisions of the proceedings and the different factors involved. The findings show that UDRP operates in ways that maximize the commercial interests of existing, large companies at the expense of interests of individuals and small, new companies. The current regime, gives priority to preempting intellectual property-related disputes to protect intellectual property rights, rather than coordinating the use of domain names by individuals and companies. In this process, the commercial status quo of the Internet is reinforced, and the Internet is ironically placed under the most centralized control because the UDRP system is forced upon all gTLD domain names. This paper concludes excluding government and relying on private ordering and self-governance for rule making and the procedures of alternative dispute resolution, may be dangerous to individual interests, especially when the role of government is excluded and individuals' participation remains low.

INTRODUCTION

As Internet use spreads, electronic commerce is increasingly used and Internet domain names gain further importance. At the same time, disputes regarding the domain names are increasing. A few recent disputes regarding domain names that are similar to trademarks show that domain names in cyberspace and trademarks in real world commerce often conflict with each other. International policies concerning Internet governance have been established in an attempt to solve this problem. The most recent trend is to focus on adopting international dispute resolution mechanisms. The World Intellectual Property Organization (WIPO) takes a leading role as a dispute resolution agency and establishing dispute resolution procedures. After three rounds of -receiving comments from member countries, the WIPO published its final report on the Internet domain name processes in May 1999. Based on this report, the International Corporation for Assigned Names and Numbers (ICANN) approved the Uniform Dispute Resolution Policy (UDRP) in October 1999, and the first case was decided in December of that year.

ICANN is a private corporation created at the end of 1998. It assigns the domain names and IP addresses that are critical to identifying and connecting Internet users.

* This work was supported by the 2003 S.N.U Foundation & Overhead Research Fund

** Assistant Professor: Graduate School of Public Administration, Seoul National University

ICANN has generated considerable controversy regarding the appropriate methods of control and governance of cyberspace, the role of the private and public sectors, and the changing relationships between the government, commercial entities, and individuals (e.g., Radin & Wagner, 1998; Mueller, 1999; Kleinwacher, 2000). Created as an alternative to existing intergovernmental organizations, notably the International Telecommunication Union (ITU), ICANN is a private sector corporation contracted by the US government, which by passes and threatens established intergovernmental institutions. Thus, ICANN reflects a continuing power struggle between actors who want to avoid existing international institutions and the established international organizations and their constituents. ICANN is an experiment in private sector-based international governance and is often presented as an example of industry "self-regulation." A private, contract-based regime was regarded as a way to create a global jurisdiction without relying on intergovernmental organizations. The political, economic and social consequences of this "privatization" of international rulemaking seem to be complex, especially to those who are not familiar with private sector participation and the notion of self-governance, and need further research (Mueller and Woo, 2004).

ICANN's recent adoption of UDRP as a mechanism to deal with an increasing number of disputes between trademark holders and domain name registrants also raised numerous issues (e.g., Leaffer, 1998; Baratta & Hanaman, 1999; Litman, 2000; Walker, 2000; Froomkin, 2001). This so-called alternative dispute resolution system (ADR), which was formed on the principle of self-regulation and the privatization of international rulemaking, vividly demonstrates the processes and implications of Internet governance. Despite heated debates regarding this new dispute resolution system, systematic studies on the actual proceedings and results of this system are scarce. Some scholars who are critical of the UDRP proceedings have conducted empirical analyses and suggested elements of unfairness in the different outcomes of different UDRP service providers, which seem to indicate forum shopping and panel allocation bias in the UDRP (Mueller, 2000; Geist, 2001). But many questions regarding the UDRP system still remain unanswered because the variables in these exploratory studies were simple and straightforward such as the result of the proceedings and service providers. Therefore, a more comprehensive study with diverse variables that might explain the results of the proceedings may be necessary to fully understand the UDRP system and its implications.

This paper examines how the UDRP was established and the results of the system as reflected in its dispute resolution proceedings. The relationship between the UDRP decisions and various factors within and outside of the UDRP system is examined by conducting a comprehensive empirical analysis using different variables such as the nature of the dispute parties, the existence of representing professionals, the nature of domain names, the nature of the use of disputed domain names, and the existence of proper responses from the respondents, service providers, and the composition of the deciding panel. This paper assesses the statistical significance of the relationship between these variables and the decisions, and compares the finding with previous results in an attempt to provide a more systematic, broader picture of the UDRP system. This paper then explores the implications of the privatization of Internet governance.

THE CONFLICT BETWEEN DOMAIN NAMES AND OTHER RIGHTS

Domain names are Internet addresses that are used as identifiers instead of numbers to help users to find a destination. As Internet users come to view these addresses more as brands, disputes frequently arise. Most domain name disputes are related to the collision between domain names and trademarks, which are governed by different systems and rules. The first person who registers a domain name owns the domain name, as the domain name system (DNS) operates on a first-come, first-served basis. When someone claims the right to a domain name that has been already registered by someone else who claims different rights, principles, or interests in the name (such as the name of the person, the name of a corporation, product, or service, a trademark, etc), a dispute arises. Trademarks and service marks most often conflict with domain names, and they operate under very different rules from the DNS. In most of the world, trademarks are acquired through registration with government agencies after review, although in some countries like the US, "common law" trademark rights can also be acquired through use (Fromkin, 2001). In addition, trademark law is organized around geographical and sectoral boundaries, except for a small class of "famous names" such as Coca-Cola. Consequently, rights in trademarks are limited to the type of goods and the geographical location where the goods are sold. For example, Nubira, the trademark of a car in Korea can be also used as a trademark of shampoo, soap, pens, etc., especially in other countries. However, www.nubira.com can only be obtained by one entity - whoever registers it first. Thus, a great number of domain name disputes involve conflicts between domain names and trademarks. The UDRP also deals with disputes related to trademarks and service marks. In addition, "savin" is a trademark of a US company, as well as the name of a freelance web columnist in Korea. When www.savin.com was registered by the columnist, and both the columnist and Savin Corporation (which owns the "savin" trademark) claimed the right to the domain name, various issues emerged regarding whether the rights in cyberspace precede intellectual property rights in real space. In conclusion, domain name disputes reflect the conflict between domain names and trademarks, as well as the conflict between rights in cyberspace and those in real space.

THE PROCESSES OF ADOPTING THE UDRP

Domain name disputes were on the increase, but the registrars did not want to involve themselves in dispute resolution. The registrars follow the principle of the first-come, first-served for domain name registration. Those who claim the right to domain names registered by others, especially trademark holders, had relied on national courts for dispute resolution. Soon they began to ask for easier, more effective ways of prohibiting domain names that are the same or similar to their trademarks from being registered by others and acquiring them from the original registrants if they have already been registered. As the trademark holders demanded that ICANN do something about the situation, in 1998 ICANN, although its mandate is limited to technical coordination, asked the WIPO to conduct a consultative study on domain name and trademark issues.

WIPO conducted the study and delivered its final report to ICANN in April 1999. This report recommended the institution of a uniform policy to be followed by all registrars in the dot com, dot net, and dot org domains. After consultations with the ICANN Board, the Names Council, working groups and staff and a minor revision after public comments, the UDRP was finally adopted and approved in October 1999. In November 1999, ICANN approved the WIPO as the first dispute resolution provider, and in December 1999, the first proceeding was commenced. At present, four providers are in service and 7,753 proceedings involving 13,262 domain names have been decided as of April 2004.

The ways in which the UDRP was established show that the ICANN acknowledged that it does not have expertise in dealing with the issue of dispute resolution and replied upon the WIPO, the institution charged with the protection of intellectual property rights. Consequently, the WIPO report focused on finding effective ways to prevent cybersquatting and protect intellectual property rights from the trademark holders' perspective rather than striking a balance between the rights of trademark holders and domain name registrants. ICANN established the UDRP based on this report, without fundamental discussion or substantial revision. In the process, ICANN did form a working group to study the WIPO report and make recommendations, but the content of these recommendations reflect the WIPO report almost in its entirety. The Names Council adopted this working group report with minor revisions and sent it to the ICANN Board as a consensus recommendation. The ICANN staff also presented Staff Reports and followed the public comment procedures, but the UDRP that was finally adopted is vastly based upon the WIPO report in terms of the scope of disputes handled by the UDRP, procedures of the resolution, etc. Therefore, the UDRP was established at the request of intellectual property owners and based on the framework and recommendations made by the organization for the protection of intellectual property, the WIPO. The WIPO also provides a dispute resolution service that deals with the most UDRP proceedings. This procedural background to the establishment of the UDRP suggests that the UDRP would operate more for the most effective protection of intellectual property interests than for balanced resolution of domain name disputes between different stakeholders. Whether and how the policy and rules of the UDRP actually reflect this speculation is analyzed in the next chapters.

THE ANALYSIS OF THE UDRP POLICY AND RULES

The Framework

The UDRP is expedited administrative proceedings that the holder of trademark rights initiates by filing a complaint with an approved dispute-resolution service provider when the holder alleges abusive registration and use of the domain name. The UDRP is different from court proceedings, which are based on national legal systems and national laws, and also different from international arbitrations or other alternative dispute resolution policies in many ways. The UDRP does not exclude the possibility of court proceedings before or after its decisions are made. If a party initiates legal proceedings

prior to or during the proceedings, the panel may suspend or terminate the proceedings, or proceed to a decision. If a party initiates a legal proceeding within 10 days after a UDRP decision has made, the registrar will not implement decision until the legal decision is made. In that sense, the finality of the UDRP decision is somewhat different from other ADR decisions.

Also, application of the UDRP is not optional. The UDRP applies to all dot aero, dot biz, dot com, dot coop, dot info, dot museum, dot name, dot net, and dot org top-level domains. All registrars of top-level domains follow the UDRP decisions according to the contract between ICANN and the registrars made when the registrars are approved by the ICANN. All the registrants of the aforementioned registrars follow UDRP proceedings and decisions according to the agreement made upon registration. Unless applicants agree to follow the UDRP proceedings and decisions when a trademark holder files a complaint in one of the UDRP service providers, they cannot register a domain name in any of the top-level domains. It is a take it, or leave it situation.

Only trade or service mark holders may initiate UDRP proceedings, and the domain name registrants must follow the proceedings. The remedies available to a complainant are limited to requiring the cancellation of the domain name or the transfer of the domain name to the complainant. No other remedies such as monetary compensations are available.

The UDRP is purported to be a less expensive dispute resolution than court proceedings and can proceed online without the complex issues of jurisdiction, choice of law, and enforcement that often make international dispute resolution so difficult to handle in the courts. However, an examination of the basic framework of the UDRP system suggests that the UDRP allows trade or service mark holders an easier, less expensive, and more effective method to acquire domain names that are registered by others. An analysis of substantive rules of the UDRP follows.

Substantive Rules

It is important to note that the UDRP does not apply to every domain name dispute but only to specific disputes that involve a clear abuse of domain name registration and use. In order to seek UDRP remedy, the complainant must prove each of the following three elements: (1) the respondent's domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; (2) the respondent has no rights or legitimate interests in respect of the domain name; and (3) the respondent's domain name has been registered and is being used in bad faith.¹⁾ How these three elements are applied to specific disputes is now analyzed.

It is relatively less common that the first element is in dispute. However, there is some inconsistency regarding which domain names are determined to be similar to a trademark or a service mark. If a hyphen is added or omitted, words are added or spellings changed, the domain names are usually considered to be the same as, or confusingly similar to the trademark. In case of the dispute regarding "walmartsucks. com," the relevant trademark is Wal-Mart, owned by Wal-Mart Stores, Inc. The hyphen was

1) UDRP Policy 4. a. Applicable Disputes.

omitted and the word “sucks” was added, but the panel decided that the domain name is confusingly similar to the trademark. That adding generic words do not make the domain names dissimilar to the trademark is troublesome because it implies that Wal-Mart Stores, Inc. is entitled to own all the domain names that include the word “walmart” such as walmartshop.com, walmartcenter.com, walmartbusiness.com, etc. When generic words themselves are considered trademarks, this problem is compounded. For example, “crew” means a team or a troop, but in a UDRP proceeding involving www.crew.com, it was decided that crew.com should be transferred to J. Crew, which owns the trademark, J. Crew.²⁾ This type of decision is criticized as being anti-competitive (CPT, 2000). However, in a decision regarding www.franceinfo.com, the complainant owns a trademark “FRANCE INFO + mark,” and the respondent claimed that he registered the domain name for a business providing travel information on France.³⁾ The panel decided that exclusive rights in generic words such as “info” should not be acknowledged for the purpose of cancellation or transfer of a domain name, and thus he cannot accept that the complainant proved the element of the similarity between the domain name and the trademark. On the other hand, in a decision regarding www.biofield.com, the panel decided that the domain name transferred to Biofield Corporation that owns the trademark “biofield,” although the trademark involved the combination of generic words. Therefore, UDRP decisions are not only inconsistent regarding the circumstances under which domain names are considered confusingly similar to trademarks, but also they are quite different from the rules of real space, which provide for limited ownership on generic words.

The second element is whether the respondent has no rights or legitimate interests in respect of the domain name. The Policy provides the following circumstances in which the respondent could be considered to have demonstrated her rights or legitimate interests in the domain name: (1) before any notice to the respondent of the dispute, the use of, or demonstrable preparation to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or (2) the respondent (as an individual, business, or other organization) has been commonly known by the domain name, even if they have acquired no trademark or service mark rights; or, (3) the respondent is making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.⁴⁾ For example, in a proceeding regarding www.penguin.org, the panel rejected the complainant Penguin Books, Inc.’s request to have the domain transferred from a person, Mr. Katz, who was known by the nickname Penguin.⁵⁾ It was acknowledged that Mr. Katz holds rights and legitimate interests in the name penguin. However, the UDRP decisions seem to be inconsistent regarding whether noncommercial or fair use of a domain name should be acknowledged. In the proceeding regarding www.walmartsucks.com, the site was noncommer-

2) WIPO D2000-0054. See www.icann.org or www.wipo.org for UDRP proceedings and decisions made by WIPO.

3) WIPO D2000-1567

4) UDRP Policy 4. c.

5) WIPO D2000-0204.

cial as it was operated for unsatisfied Wal-Mart customers, but the decision was made to transfer the domain name to Wal-Mart Stores, Inc. On the other hand, in a proceeding regarding www.scientologies.org, it was decided that the use of the domain name for a critique site can be considered fair use, thus the complainant's request for transfer was rejected. However, most decisions regarding anti-sites or critique sites did not acknowledge them as fair use, which is a very different trend from other kinds of disputes where anti sites and critique sites are easily considered fair use.

For the purpose of the third element, the following circumstances are considered evidence of the registration and use of a domain name in bad faith: (1) circumstance indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or (2) you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or (3) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or (4) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location.⁶⁾ In most proceedings, proving the third element of bad faith, especially whether the registrant registered and used the domain name for the purpose of selling, is in dispute. Most UDRP decisions tend to apply the bad faith principle liberally, accepting the complainants' claims of bad faith very easily. Where there was an offer to sell the domain name from the respondent, the panel is most likely to decide that bad faith is proven. If the complainant offered to buy the domain name, and the respondent responded by offering to negotiate, the panel tends to decide that there is bad faith. For example, in a case regarding www.biofield.com, Biofield Corporation in the US, who owns the trademark biofield, registered the domain name and used it for several years. However, one year Biofield Corporation failed to re-register for the domain name, and the name became available to anyone. At that time, an individual who had a plan to operate a non-commercial website on organic farming legitimately registered this domain name. Biofield Corporation contacted the individual and offered to buy the domain name for \$1,000.

The individual responded that he was almost ready to start the site and considering his inconvenience and the advantage that Biofield would gain, he expected a more realistic offer. Biofield Corporation filed a complaint to a UDRP service provider, and the panel decided that the individual negotiated regarding the price of the domain name, and thus was acting in bad faith. The decision was made to transfer the domain name to Biofield Corporation, which had mistakenly failed to secure its own interests by forgetting to re-register the domain name.

When there were no offers or negotiations regarding the sale of the domain name,

6) UDRP Policy 4. b.

putting the domain name on the auction block was considered to constitute bad faith in a proceeding regarding *www.toefl.com*. Even when there were no activities regarding the sale of the domain name, providing visitor count on the web site was considered to be an “offer to sell” by predicting and showing of the site’s value, and thus bad faith. These decisions regarding bad faith show that the UDRP system does not allow a domain name registrant to register a domain name and then change their mind and sell it to someone else. Also, the UDRP system does not seem to acknowledge the monetary value of a domain name as property that an individual registrant can invest in and sell to another, even if the other person or business recognizes the value of the domain name and is willing to pay for it. This position suggests that UDRP employs a double standard because registrants should not view domain names as property with commercial value, yet trademark holders’ commercial rights and their financial investments must be protected in domain names as well as in trademarks, and in cyberspace as well as off-line.

In addition, many of the UDRP proceedings do not strictly apply Policy 4a, which requires the complainant to prove each of the three elements, including bad faith of the registrant. Even in disputes where bad faith is unproven, panels tend to draw conclusions based on a combination of other factors. For example, in a proceeding regarding *www.volvoaero.com*, the complainant was unable to prove the respondent’s bad faith, but the panel considered that the bad faith was proven because “volvo” and “volvoaero” are famous registered trademarks, the respondent was not yet using the domain name at the time the complaint was filed, and because of the absence of any apparent “good faith” of the respondent. This kind of decision illustrates that panels often switch the burden of proof from the complainant to the respondent, and liberally use their discretion to ignore application of the rule that each of the three elements must be proven by the complainant. As a result, under the UDRP system, the scope of bad faith registration and use of the domain name registrants is very broadly interpreted.

Procedural Rules

Many of the procedural rules also influence the balance of power between the complainants and the respondents. The complainant selects the service provider by choosing to file a complaint, and the respondent has no power to change it. There are four service providers at present:⁷⁾ the WIPO,⁸⁾ the National Arbitration Forum (NAF),⁹⁾ CPR Institute for Dispute Resolution (CPR),¹⁰⁾ and Asian Domain Name Dispute Resolution Centre (ADNDRC).¹¹⁾ Each has a list of panelists, and when a complaint is filed, the provider appoints the panelist for the proceeding. In principle, one panelist makes a decision, unless either the complainant or the respondent opts for a three-

7) There was another provider, eResolution, which was approved effective January 1, 2000, but ceased to take any more proceedings after November 30, 2001. The background to this situation will be discussed in a later chapter.

8) approved effective December 1, 1999

9) approved effective December 23, 1999

10) approved effective May 22, 2000

11) approved effective February 28, 2002

member panel. Fees are paid by the complainant, unless the respondent elects for a three-member panel instead of the usual one-member panel.

After the respondent is notified that the complaint was filed, the respondent has only 20 days to submit a response. This has created considerable difficulties for many respondents since most domain name registrants aren't even aware of the existence of the UDRP system, let alone understand the procedures. Complainants, on the other hand, have as much time as they need to understand the rules and prepare their complaint. The consequence is reflected in the many "default" cases in which the respondents failed to file a response. The problem is compounded because 95% of these default cases are decided in favor of the complainants, and the respondents are often considered to be acting bad faith only because they failed to submit responses.

The language barrier also presents a burden for respondents. The language of proceedings, unless otherwise agreed to by the parties, is the language of the registration agreement. Thus, foreign registrants who registered domain names through English using registrars have even greater difficulty in responding within the required period. Although this problem is diminished as more registrars use other languages, non-English speaking registrants still have relatively greater difficulty dealing with dispute resolution. Remedies are limited to domain name transfer or cancellation, and there is no appeal process, so this may also burden registrants unfamiliar with the new system. Whether the UDRP system purports speed, convenience, and simplicity at the expense of neutrality and fairness remains an important question regarding the procedural issues of the UDRP.

ANALYSIS OF THE PROCEEDINGS

General Trends of the UDRP Decisions

Since the first case, 7,753 proceedings have been decided regarding 13,262 domain names.¹²⁾ Table 1 shows the status of UDRP proceedings as of April 2, 2004. Among the 7,753 proceedings, names transfers were ordered in 6,182 proceedings, registration cancellations were ordered in 60 proceedings, respondents won 1,887 decisions and there were 640 split decisions. Thus, 80% of the proceedings favored the complainants, and only 18% of the proceedings favored the respondents. In general, the UDRP system is more favorable to trademark holders than to the respondents.

Previous Studies of UDRP Decisions According to Providers and Market Shares of the Providers

There have been several analyses of UDRP decisions according to service providers, and the results seem consistent. The first systematic study of UDRP decisions by Mueller (2000) analyzed 621 proceedings decided between December 1999 and June 2000 and showed that WIPO decided 61% of the cases, NAF decided 31%, CPR 1%,

12) <http://www.icann.org/udrp/proceedings-list.htm>.

Table 1. Summary of the Proceedings

Proceedings	Domain Names	Proceedings Status
545	817	Pending
24	34	Case suspended at complainant's request
30	36	Case suspended, other
599	887	Total undisposed proceedings
6182	10675	Name transfer
47	60	Registration cancelled
1464	1887	Decision for respondent
60	640	Split decision
7753	13262	Disposition by decision
8	15	Settlement with transfer
20	20	Settlement, unspecific result
10	13	Dismissal with prejudice
706	1040	Dismissal without prejudice
205	271	Dismissal, unspecified
949	1359	Dispositions without decision
12	13	Proceedings terminated for recommencement

and eResolution 7%. Mueller suggests that this difference in the market share stems from forum shopping by the complainants, who prefer service providers that are more likely to decide for the complainants. The favorable decision rates for the complainants differ vastly among the providers: 82% were favorable at WIPO, 81% at NAF and 51% at eResolution. Therefore, the complainants had no incentive to choose eResolution because it decided more cases in favor of the respondents. In the UDRP system where the complainants select the provider, forum shopping may seriously endanger the neutrality and independence of the dispute resolution system. Furthermore, the service providers may consciously try to make more decisions in favor of complainants, in order to attract more disputes and/or to survive in the provider market. The fact that eResolution, which tended to favor respondents stopped services in November 2001 due to the lack of the complaints filed, vividly illustrates this problem.

A related problem is how the providers could affect the outcomes of the decisions. The issue of the provider selection and market share is thus related to the independence and neutrality of the panelists. A study by Geist (2001) that analyzed 3,094 decisions made up to July 2001 demonstrated the systematic bias of the UDRP. The analysis of the market shares of the service providers showed that WIPO decided 58% of the proceedings, NAF decided 34%, eResolution 7%, and CPR 1%. This result is quite similar to Mueller's results, with a 3% increase for NAF and a 3% decrease for WIPO. This result seems to be related to NAF having the highest complainant-win rate among the providers as well as NAF being preferred by US trademark holders because it is based in the US and engaged in a strong marketing campaign that promoted their decisions in favor of the trademark holders. Comparing the Geist data with Mueller's study shows that the WIPO retained its complainant-win rate at 82%, while NAF increased it to 83% and eResolution increased it from 51% to 63%. This suggests that the providers competed to attract clients, who are trademark holders, by increasing or maintaining their decision rate favorable to complainants. Even with this increase, eResolution had a relative disadvantage to other providers and ceased operation.

Geist further examined the possibility of a bias in panel allocation by the service providers. Among the 131 panelists on the NAF list, a mere six panelists decided 53% of the proceedings. The panelists' complainant favorable rates were respectively 95.7%, 97.2%, 93.5%, 94.7%, 93.2% and 81.5%. This means that on average, 94% of the decisions made by these panelists were in favor of the complainants. WIPO also tended to allocate more disputes to those panelists who tended to decide in favor of the complainants. The procedures by which panelists are allocated in each proceeding are generally informal, as the providers do not provide specific rules for allocating panelists, and thus it is difficult to analyze whether there actually exists any bias in the process. Further study needs to be done on this subject.

The previous studies suggested possible unfairness in the UDRP system in terms of a provider selection, forum shopping and panel allocation bias. To further explore how the UDRP decisions are made and what factors influence the decisions, this study conducted a systematic analysis of UDRP proceedings using a more comprehensive list of factors.

Statistical Analysis of the Proceedings

This paper analyzed 483 proceedings to examine the relationship between different variables and decisions. Most were decided in 2001, and about 60 proceedings were decided in 2000. Although the cases were not randomly drawn, it seems that there is no systematic bias in the sample, as the distribution of the decisions is consistent with that of the universe of 7,753 proceedings.¹³⁾ The variables used in the analysis include the nature of the decisions (in favor of the complainant or the respondent), the nature of the parties (whether the party was a company or an individual), the use of representing professionals, the nature of the domain name, the nature of the respondent's use of disputed domain name, the submission of response, the selection of a service provider, and the composition of the panel. Cross-tabulation analyses were used in order to examine the relationship between the results of the proceedings and other variables.

Panel decisions

Complainants: v. Respondents: Three hundred and eighty five, or 79.7% of the decisions were made in favor of the complainants (transfer or cancellation of disputed domain name), and 20.3% (98) of the decisions were made in favor of the respondents. The result is consistent with the decision trend of the universe of UDRP proceedings. The complainants who own trademarks or service marks seem to have advantage over respondents who had registered the domain names prior to the complainants.

Reverse Domain Name Hijacking: Among the 483 proceedings, the panels of only five proceedings rejected the complaint based on the panels' determination that the complaint is an attempt at reverse domain name hijacking. It shows that reverse domain name hijacking is only acknowledged under limited circumstances.

13) See page 18. Also, see Table 1 of this paper for the general trend of the UDRP proceedings.

Nature of the Parties

Company v. Individual: Of the complainants, 91% are firms, 5% non-profit organizations and government agencies, and 4% are individuals. However, 56.3% of the respondents are firms, and 36.9% are individuals, while 6.8% are un-defined. Thus, there are more individual respondents than individual complainants.

No statistically significant relationship between the nature of the complainants and the results of the decisions was found,¹⁴⁾ but there is a significant relationship between the nature of the respondents and the decisions (Table 2). When the respondent is a firm, decisions were made in their favor in 25.8% of the proceedings, which is higher than that of the whole sample. However, when the respondent is an individual, the decisions were made in their favor in only 11.7% of the proceedings, which is even lower than when the respondent is unknown. Therefore, individual respondents have much more difficulty emerging victorious in UDRP proceedings.

Pairing the complainants and the respondents presents the same findings. When both the complainant and the respondent are firms, the complainant wins the 74.7% of the proceedings, which is lower than average (Table 3).¹⁵⁾ However, when the complainant is a firm and the respondent is an individual, the complainant wins 88.9% of the proceedings and the respondent wins in only 11.1% of the proceedings. The respondents have the best chance of winning when the respondent is a firm and the complainant is an individual. When both parties are individuals, the complainant wins every time. Therefore, individuals have a significant disadvantage to firms in the UDRP proceedings. There may be many reasons why individuals are at a disadvantage, and this will be discussed with the results of the analyses of other variables.

Use of the Representative: Of the complainants, 52% had legal representation, while only 14% of the respondents had representatives. Both the complainants and the respondents were more likely to win the case if they have representatives. 85.5% of the complainants who had representatives won, while 73.4% of the complainants without

Table 2. Nature of the Respondents and Decisions

Respondents	Decisions		Total
	Complainant wins	Respondent wins	
Firm	204 74.2%	71 25.8%	275 56.3%
Individual	158 88.3%	21 11.7%	179 36.9%
Un-defined	23 79.3%	6 20.7%	29 6.8%
Total	385 79.7%	98 20.3%	483 100.0%

14) This is probably because a large number of the complainants (91%) are firms.

15) To compare commercial firms with individuals, this analysis excluded non-profit organizations and government agencies as complainants and undefined respondents, although their inclusion does not weaken the statistical significance of the analysis. Thus, the total number of proceedings in this particular analysis is 431 instead of 483.

Table 3. Paring of the Parties and Decisions

Respondents	Decisions		Total
	Complainant wins	Respondent wins	
Firm v. firm	189 75.0%	63 25.0%	252 58.5%
Firm v. individual	144 88.9%	18 11.1%	162 37.6%
Individual v. firm	5 55.6%	4 44.4%	9 2.1%
Individual v. individual	8 100.0%	0 0%	8 1.9%
Total	346 80.3%	85 19.7%	431 100%

$\chi^2=17.461$, $df=3$, $p=0.001$

representatives won (Table 4). Among the respondents, 16.7% of the respondents without representatives won, while 42% of the respondents with representatives won (Table 5). The 42% winning rate is quite high for respondents. Consequently, if the party hires a representative, especially if they are the respondent, they have a much better chance to win.

Table 4. Complainant's Use of Representatives and Decisions

	Decisions		Total
	Complainant wins	Respondent wins	
With representative	213 85.5%	36 14.5%	249 52.0%
Without representative	171 73.4%	62 26.6%	233 48.0%
Total	384 79.7%	98 20.3%	482 100%

$\chi^2=10.97$ $df=1$ $p=0.01$

Table 5. Respondent's Use of Representatives and Decisions

	Decisions		Total
	Complainant wins	Respondent wins	
With representative	40 58.0%	29 42.0%	69 14.0%
Without representative	344 83.3%	69 16.7%	413 86.0%
Total	384 79.7%	98 20.3%	482 100.0%

$\chi^2=23.404$, $df=1$, $p=0.00$

Having a representative may be the most important factor for individual respondents in the outcome of the proceedings. If respondents are not represented, they were clearly disadvantaged to firms (Table 6). However, if the respondent had a representative, the negative effect of being an individual representative disappeared (Table 7).

Table 6. Nature of Respondents and Decisions (Respondents Unrepresented)

	Decisions		Total
	Complainant wins	Respondent wins	
Firm	172 78.9%	46 21.1%	218 52.7%
Individual	150 89.8%	17 10.2%	167 40.3%
Undefined	23 79.3%	6 20.7%	29 7.0%
Total	345 83.3%	69 16.7%	414 100.0%

$\chi^2=8.484$, $df=2$, $p=0.014$

Table 7. Nature of Respondents and Decisions (Respondents Represented)

	Decisions		Total
	Complainant wins	Respondent wins	
Firm	32 56.1%	25 43.9%	57 82.6%
Individual	8 66.7%	4 33.3%	12 17.4%
Total	40 58.0%	29 42.0%	69 100.0%

$\chi^2=0.451$, $df=1$, $p=0.502$

Domain Names

Nature of Domain: The domain names in dispute break down to 76.2% being dot coms, 6.9% dot orgs, 12.7% dot nets, and 0.5% dot tvs. The decisions were not statistically different for dot com as for other domains.

Use of Domain Names: Among the respondents, 40.7% did not use the domain name, or there was no content in the web sites using their domain names, while 19.6% of the respondents proved that they had specific plans to use the domain names even if the sites were not yet up and running. 24.5% of the respondents used the domain name in

competition with the complainant, such as using the web site in direct competition, or by linking the domain to the complainant’s or the respondent’s sites or advertising sites. The domain name was used non-commercially, or commercially but with no relationship with the complainant’s business, by 15.2% of the respondents.

The nature of the respondent’s use of the domain name relates significantly to how the panels made decisions (Table 8). When the respondent did not use the domain or it was void of content, 84.2% of the respondents lost their domain name. When the respondent used the domain name competitively, they lost the domain name in 88.4% of the proceedings. Even if the respondent proved they were preparing a project associated with the domain name, the domain name was lost in 76.3% of the cases. If the respondent was using the domain name non-commercially, or commercially but not unrelated to the complainant, the domain name was lost in only 57.6% of the cases. Therefore, the respondent had a best chance of preserving the domain name if it is used non-commercially or non-competitively.

Table 8. Respondent’s Use of Domain Names and Decisions

Nature of the Use	Decisions		Total
	Complainant wins	Respondent wins	
No use/no contents in websites	133 84.2%	25 15.8%	158 40.7%
Plans to use	58 76.3%	18 23.7%	76 19.6%
Competitive use	84 88.4%	11 11.6%	95 24.5%
Non-commercial use/irrelevant use	34 57.6%	25 42.4%	59 15.2%
Total	309 79.6%	79 20.4%	388 100.0%

$\chi^2=24.673$, $df=3$, $p=0.000$

Respondent’s Compliance: Submitting the Response

The respondent must submit a response to the service provider within 20 days of being notified of the complaint, otherwise the proceedings continue without the respondent’s participation and the panel decides solely on the complaint. This is called a default proceeding.

A strikingly large number of the respondents fail to submit a response. 53% of the proceedings were default cases and 47% were not. It means that more than half of the respondents did not or could not file their response in time. This suggests that many of the domain name holders are unfamiliar with the new UDRP system, and find it difficult to comprehend the significance of the proceedings and the need to submit responses. Even when a domain name holder understands this significance, it might still be difficult

to read the complaint and the service provider notification, and write a proper response. This is often because the notification is in English, and must be responded to within the 20 days allowed by the system. It is also possible that many of the respondents decide that they would not be able to maintain their domain names even if they submit the response, so they just give up on proceedings. It is difficult to assess how many of these default cases result from informed, voluntary decisions and how many of them result from the lack of knowledge, time and resources. What is most disturbing is that there is extremely limited participation from the respondents, who comprise the critical half of the system. This seems to be detrimental to the fairness of the system.

Examining the relationship between the submission of the responses and the decisions presents results that are even more striking because 94.3% of the default proceedings are decided in favor of the complainants, as opposed to 66.8% of the non-default proceedings (Table 9). When a respondent fails to submit a response in time, there is very little chance of maintaining the domain name. The low decision rates in favor of the respondents seem to be partly due to many of the respondents being unable to submit their responses, and that the panels tend to be strict about the failure to respond. Because the UDRP system is structured so that the panel decides based on the evidence that is presented by the parties, it is natural to decide in favor of the complainant if only the complainant has submitted evidence. The UDRP requires the complainant to prove all three elements of the Policy 4 (3), including bad faith of the respondent, but it is difficult to imagine that 94.3% of the complainants would have proven the bad faith of the respondents. Many complainants do not have enough evidence to prove bad faith, but the panels often decide that the respondent's failure to submit a response is proof enough of bad faith. In 21% of the proceedings in which the panel decided that the respondent has registered and used the domain name in bad faith, the respondent was deemed to be in bad faith purely by not submitting a response. When more than half of the respondents fail to follow the administrative procedures of the system, treating the failure itself is sufficient grounds to lose the case suggests a serious problem in the fairness of the UDRP system.

Another aspect of the default cases relates to the disadvantage individuals have compared to firms in the UDRP system. It is possible to believe that one of the reasons of the disadvantage individuals have may be related to their failure to submit responses to the complaints. However, an analysis of the relationship between the existence of the responses and decisions shows that in default cases whether the respondent was an individual or a firm did not influence the decision of the proceedings. In non-default cases, however, there was a significant relationship between the nature of the respondents and decisions. Even if the respondent submitted a response, individual respondents were more likely to lose than a firm (Table 10). Thus, individuals are disadvantaged not only because they did not respond. This finding suggests that the often-held belief that it is the respondents' responsibility to respond, and when they fail to do so, they deserve to lose their domain names is not valid. Individual respondents are still disadvantaged in this privatized resolution system, even if they have fulfilled their responsibilities by submitting responses.

Table 9. Submission of Responses and Decisions

	Decisions		Total
	Complainant wins	Respondent wins	
Response submitted	171 66.8%	85 33.2%	256 53%
Response not submitted	214 94.3%	13 5.7%	227 47%
Total	385 79.7%	98 20.3%	483 100.0%

$\chi^2=56.162$, $df=1$, $p=0.000$

Table 10. Nature of Respondents and Decisions (When Respondents Submitted Responses)

Nature of Respondents	Decisions		Total
	Complainant wins	Respondent wins	
Firm	104 61.9%	64 38.1%	168 56.3%
Individual	63 78.8%	17 21.3%	80 36.9 %
Un-defined	4 50.0%	4 50.0%	8 6.8%
Total	171 66.8%	85 33.2%	256 100.0%

$\chi^2=7.984$, $df=2$, $p=0.018$

Decision-making Body

Service Provider: Market shares of the service providers in the proceedings data of this paper are as follows: WIPO has the most with 56.9%, followed by NAF with 38.7%, eResolution with 3.9% and CPR with 0.4%. Comparing this with the findings of a previous study by Mueller (2000) indicates that NAF's share slightly increased, and eResolution's share slightly decreased. This trend must have continued since eResolution ceased service in November 2002. This result shows that the forum shopping that Mueller noted had such a serious consequence that the service provider that decided relatively more favorably for respondents finally went out of business. This conclusion is supported by an analysis of the decision rates of each service provider. NAF has the highest decision rate for the complainants, 83.4% (Table 11). WIPO's decision rate was also high at 79.3%. On the other hand, eResolution made decisions quite evenly: 52.5% in favor of the complainants and 47.4% in favor of the respondents. This striking difference of the decision rates between service providers certainly explains why NAF managed to increase its market share while eResolution did not have enough clients (complainants) and thus went out of business.

Table 11. Service Providers and Decisions

Providers	Decisions		Total
	Complainant wins	Respondent wins	
WIPO	218 79.3%	57 20.7%	275 56.9%
NAF	156 83.4%	31 16.6%	187 38.7%
eResolution	10 52.6%	9 47.4%	19 3.9%
CPR	1 50%	1 50%	2 0.4%
Total	385 80%	98 20%	483 100%

$\chi^2=11.332, df=3, p=0.010$

Service providers also differ in their way of dealing with default cases. WIPO and NAF clearly deal with default cases and non-default cases differently. In WIPO, 93.4% of the default proceedings were in favor of the complainants (Table 12). NAF shows results that are even more striking: 97.6% of the proceedings were made in favor of the complainants (Table 13). However, eResolution showed no significant difference between way they handled default cases and other cases (Table 14). This not only shows that service providers are handling similar cases differently, but also that eResolution panels could in fact make their own decisions without entirely relying on the complaints briefs, which are the naturally one-sided arguments of the complainants.

Table 12. Submission of Responses and Decisions (When Provider is WIPO)

	Decisions		Total
	Complainant wins	Respondent wins	
Response submitted	91 65.5%	48 34.5%	139 50.5%
Response not submitted (default)	127 93.4%	9 6.6%	136 49.5%
Total	218 79.3%	57 20.7%	275 100.0%

$\chi^2=32.600, df=1, p=0.00$

Table 13. Submission of Responses and Decisions (When Provider is NAF)

	Decisions		Total
	Complainant wins	Respondent wins	
Response submitted	73 71.6%	29 28.4%	102 54.5%
Response not submitted (default)	83 97.6%	2 2.4%	85 45.5%
Total	156 83.4%	31 16.6%	187 100.0%

$\chi^2=24.673$, $df=3$, $p=0.00$

Table 14. Submission of Responses and Decisions (When Provider is eResolution)

	Decisions		Total
	Complainant wins	Respondent wins	
Response submitted	7 50.0%	7 50.0%	14 73.7%
Response not submitted (default)	3 60.0%	2 40.0%	5 26.3%
Total	10 52.6%	9 47.4%	19 100.0%

$\chi^2=0.148$, $df=1$, $p=0.701$

Composition of the Panel: UDRP proceedings are usually decided by one-person panels, unless either or both parties request a three-member panel and pay the additional fees. This one-person adjudicator system is criticized for giving too much discretion to panelists and resulting in inconsistent decisions.

A one-person panel decided 90.9% of the proceedings, and 9.1% of the proceedings were decided by three-person panels. There is a significant relationship between the composition of the panels and the decisions. Decisions were made in favor of the complainants in 81.7% of the one-person panels, whereas 59.1% of the three-person panels decided in favor of the complainants (Table 15).

This is partly because three-person panels are able to overcome the problem associated with the unilateral discretion of the one-person panels, which suggests that three-personal panels might be able to make fairer, although more costly, decisions. Also, since the respondents are allowed to provide a list of prospective panelists for one of the panel members, at least one of the panelists may be someone who tends to decide in favor of domain name holders. Therefore, the decisions made by three-member panels seem to be less one-sided. There is also the possibility, though, that the three-person panels tend to involve more complex and less clear-cut cases. In any case, if the

Table 15. Panel Composition and Decisions

Panel Composition	Decisions		Total
	Complainant wins	Respondent wins	
One-person panel	357 81.7%	80 18.3%	437 90.9%
Three-person panel	26 59.1%	18 40.9%	44 9.1%
Total	385 79.7%	98 20.3%	483 100.0%

$\chi^2=13.138, df=2, p=0.001$

respondents are aware of the three-person panel option and are able to pay the additional fees, then they are more likely to have a favorable decision.

A more careful analysis of the data reveals that the nature of the parties is not significantly related to the composition of panels. In other words, whether the complainants and the respondents are firms or individuals does not influence whether they opt for a three-member panel. Neither was it significant to the composition of the panel whether the complainant had representation. However, when the respondents had representatives, the proceedings were twice as likely to be adjudicated by three-member panels (Table 16). This finding indicates that knowledge of the issues and of the UDRP system clearly are to the advantage the respondents, who are usually disadvantaged by the system.

Table 16. Respondent's Use of Representatives and Panel Composition

	Panel Composition		Total
	One-person Panel	Three-person Panel	
With representative	57 83.8%	11 16.2%	68 14.1%
Without representative	380 92.0%	33 8.0%	413 85.9%
Total	437 90.9%	44 9.1%	481 100.0%

$\chi^2=6.759, df=2, p=0.034$

CONCLUSION

This study examined the processes by which the UDRP was established, its policies and rules, and its proceedings. The UDRP policies and proceedings clearly illustrate processes of Internet governance, i.e., with whose initiatives and influences and under

what rules important issues of the Internet are decided. In the process of establishing new rules regarding domain-name dispute resolution, neither national governments nor inter-governmental international organizations played a substantial role. Instead, the US government and other Internet stakeholders preferred the “privatization” of the rule-making procedure. As a result the WIPO, an organization of which primary job is to protect intellectual property interests in the real world, has assumed the role of the primary dispute resolution agency in regard to the ownership and use of domain names. Although most disputes do involve intellectual property issues, core issues related to domain names are new and separate. However, with WIPO as the central agency to establish dispute resolution procedures, the intellectual property interests of existing trademark holders to use the Internet domain names are likely to be protected ahead of the rights of the Internet users. In this context, it is not surprising that the current dispute resolution procedures gives priority to preempting intellectual property-related disputes and protecting intellectual property rights rather than facilitating and harmonizing the use of domain names by various parties.

The results of the study also show that such values as the balance between different stakeholders and fairness to individual domain name holders are sacrificed for procedural convenience and simplicity. The convenience and simplicity that was one of the guiding principles of the UDRP has come to mean the convenience and simplicity for trademark holders and those with financial and intellectual resources. This process reinforces the commercial status quo for the Internet’s future. This situation evolved from the principle of the so-called, “self-governance,” “self-regulation,” and “privatization of the government structure” of the Internet, which was promoted by commercial stakeholders and later became important rhetoric for the exclusion of input from various governments that may represent different interests from multinational companies. In the ICANN process that minimizes government input and maximizes contributions from the commercial sector, relying upon the WIPO to establish and apply policies and rules to the domain-name dispute resolution process has resulted in judgments that are made in support of the extreme commercialization of the Internet.

This study on the domain name dispute resolution policies and the Internet governance system suggests that under the current regime, not only are the commercial interests of large companies maximized at the expense of individual and small, new companies’ interests, but also that, ironically, the new medium of the Internet is placed under the most centralized control because the UDRP system is forced upon all gTLD domain names. This paper concludes that relying on private ordering or self-governance in the process of rule making for alternative dispute resolution procedures may turn out to be detrimental to individual interest when the role of governments is excluded and individuals’ contribution is low.

Bibliography

Computer Project on Technology. 2000. Comment on Terms of Reference, Procedures and Timetable for the Second WIPO Internet Domain Name Process, Aug 11, 2000. www.cptech.org/ecom/icann/wipo-rfc-aug11-2000.html.

- Olivia Maria Baratta and Dana L. Hanaman. 2000. "A Global Update on the Domain Name System and the Law: Alternative Dispute Resolution for Increasing Internet Competition - Oh, the Times They are A-Changin'!" 8 *Tulane Journal of International and Comparative Law* 325.
- A. Michael Fromkin. 2001. "The Collision of Trademarks, Domain Names and Due Process in Cyberspace." *Communications of the ACM*, Vol. 44, No. 2, February.
- Michael Geist. 2001. "Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP."
<http://www.udrpinfo.com/resc/fair.pdf?PHPSESSID=68d4cd4d04e4089a3bfb9d22315656a8>.
- Volfgang Kleinwachter. 2000. "ICANN as the 'United Nations' of the Global Information Society? The Long Road towards Self-Regulation of the Internet." *Gazette* Vol. 62(6): 451-476.
- Marshall Leaffer. 1998. "Domain Names, Globalization and Internet Governance." 8 *Indiana Journal of Global Legal Studies* 139.
- Jessica Litman. 2000. "The DNS Wars: Trademarks and the Internet Domain Name System." 4 *Journal of Small and Emerging Business Law* 149.
- Milton Mueller. 1999. "ICANN and Internet Governance: Sorting Through the Debris of 'Self-Regulation.'" *Info: The Journal of Policy, Regulation and Strategy for Telecommunications Information and Media*, vol. 1, no. 6, December.
- Milton Mueller. 2000. "Rough Justice: An Analysis of ICANN's Uniform Dispute Resolution Policy." November, 2000. <http://dcc.syr.edu/roughjustice.htm>.
- Milton Mueller and Jisuk Woo. 2004. "Participation in International Governance Regime by the 'Rest of the World:' An Analysis of ICANN." Paper presented at the Annual Convention of the International Communication Organization in New Orleans, U.S., May 2004.
- Margaret Jane Radin and Polk Wagner. 1998. "The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace." 73 *Chicago-Kent Review* 1295.
- Luke A. Walker. 2000. "ICANN's Uniform Domain Name Dispute Resolution Policy." 15 *Berkeley Technology Law Journal* 289.