



Washington Internet Daily

Covering Legislative, Regulatory and Judicial News Affecting Internet Business. From the Publishers of **Communications Daily**.

Vol. 2, No. 162

Tuesday, August 21, 2001

Today's News

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INFO REGISTRATION 'fix' floated to mixed reaction. (P. 2)

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Use of 3-Judge Panels Could Cure Major UDRP Flaws, Report Says

Cybersquatting cases increasingly are being steered to Uniform Dispute Resolution Policy (UDRP) arbitrators biased toward trademark owners, a study released over the weekend by Canadian law prof. Michael Geist said. The more control arbitration providers have over case allocation, the more often complainants win, said the report, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*. The solution to the problems of bias and forum-shopping may be the use of 3-member arbitration panels, rather than solo arbitrators, Geist said.

Since its debut 2 years ago, ICANN's UDRP has provoked both strong praise — from trademark holders — and persistent criticism from those who accuse the process of promoting forum-shopping and being biased against individual domain-name owners. Geist's study examined the difference among the 3 most prominent UDRP providers — the World Intellectual Property Organization (WIPO), the National Arbitration Forum (NAF) and eResolution. "Simply put," he said, "complainants win more frequently with WIPO and the NAF than with eResolution. The statistical data, which has remained consistent since the introduction of the UDRP, shows that complainants win 82.2% of the time with the WIPO, 82.9% of the time with the NAF but only 63.4% of the time with eResolution." Complainants have rewarded WIPO and NAF with an overwhelming share of the caseload, he said.

Given the existence of forum-shopping, Geist said, the critical question is how arbitration panelists are allocated by the various providers. By analyzing all UDRP cases decided through July 7, he said, he found that when providers controlled who decided a case — as they did where the dispute was handled by a single arbitrator — complainants won 83% of the time. However, when the parties chose to have a 3-judge panel, the winning percentage dropped to 60%.

What's more disturbing, Geist said, is that cases appear to be assigned to complainant-friendly panelists. Despite a stable of 131 possible panelists, he said, NAF single-panel cases are assigned to little more than a handful of arbitrators. WIPO's track record also rings alarm bells, he said: Of 104 panelists, only one has a complainant winning percentage lower than 50%. Moreover, he said, WIPO's roster contains 2 arbitrators — Cal. lawyer Gervaise Davis and Syracuse U. law prof. Milton Mueller — who never have been assigned to cybersquatting cases as solo panelists.

The easiest way to reform the UDRP is for ICANN to require 3-member panels, Geist said. ICANN also should adopt NAF's rule on respondent defaults, to allow a complainant to switch to a single panelist

when a respondent defaulted. Moreover, he said, each provider should have quality control mechanisms in place — as does eResolution — to review problems with panelists. And the entire process should be more open, Geist said.

NAF Managing Dir. Edward Anderson questioned Geist's findings. “We’re not pleased by the tone of the report,” he said. Once one controls for default cases, it’s much harder to make the argument that the win-loss results are disproportionate, he said. Geist can make that argument, Anderson said, “but we disagree.” Once default cases are out of the picture, he said, NAF statistics show that claimants in single-panelists cases win 3 out of 5 times, with a lower success rate in disputes where respondents ante up for 3-member panels. Anyone who argues that a win rate of 3 out of 5 is unfair, he said, must look at each case on its merits. Nevertheless, he said, “we’re going to look at every detail” to see whether improvements are possible.

Most people assume that arbitrators are selected randomly or sequentially, as trial judges are in most courts, Davis told us. Geist’s study said that’s not the case, and that the results have biased the outcomes, “for better or worse, depending on your point of view.” Three-judge panels often craft more reasoned decisions, he said, because they take time to think through the issues, hold “spirited discussions” and combine years of intellectual property law experience.

Davis said he wished Geist had not “picked me out because it will, I fear, make it more difficult for me to objectively rule on cases where I am appointed by one of the parties, since it identifies me with the respondent side of things.” As a lawyer in a small firm, he said, he has “almost always” represented “the little guy.” However, he said, he doesn’t represent only the domain-name owners point of view and has “strongly supported trademark owners in the few cases I have been on where they were correct.” Too often, though, he said, trademark holders appear to believe that “they have some God-given right to all domains that might in any way be construed to refer to them. That is simply not the law.”

Mueller never has been selected as an individual judge in an UDRP case, he told us, and as long as the current system is in place, “I do not ever expect to be... This is a somewhat delicate topic.” To WIPO’s credit, he said, it added him to its roster of arbitrators to provide “some gesture of greater fairness.” That effort, however, doesn’t extend to actually using him as a solo judge, he said. Mueller, who earlier this year released a study critical of the UDRP, said Geist’s proposals deserved serious consideration. It may be that “we will have to go with 3-person panels, even if raises the cost,” he said. However, he said, raising the bar might eliminate some frivolous domain-name challenges.

ICANN, which is conducting its own review of the UDRP, is “gratified” that Geist has contributed his study, an ICANN spokeswoman said. However, she said, UDRP respondents can choose to accept either a single arbitrator paid for by the complainant or a 3-member panel paid for by both parties. The overwhelming majority of single-member panel cases are ones where the respondent doesn’t show up, she said. “It’s not surprising that a large majority of these cases result in a finding that the [domain-name] registration was abusive.” — *Dugie Standeford*

Bogus Domains ‘Sad and Avoidable’

Potential Lack of Available .info Domains Spurs Proposed Remedy

A proposal to clear up the mess created by the registration of hundreds of bogus trademark domain-names during the sunrise period for new top-level domain (TLD) .info has prompted enthusiastic support from some in the Internet community — but a lukewarm response from .info registry Afiliias. Robert Connor, an assoc. prof. in the U. of Minn.’s Dept. of Healthcare Management, decided a year ago to become involved in registering, developing and perhaps selling domain names. He became interested in the upcoming rollout of .info domains and started DomeBase.com, a site containing information on Afiliias’s “land rush” as well as preregistration services offered by various registrars, he said on the site. When he became aware that many nontrademarked domains were being registered fraudulently during the .info sunrise period, he said, he worried that it would “erode the availability” of such names when the new TLD opened to the public.

To remedy the situation, Connor floated a proposed 4-pronged fix: (1) Include all names, even those registered during the sunrise period, in the land rush. (2) Award names not registered during the sunrise period to land-rush winners as originally planned. (3) Give land rush winners the opportunity to contest sunrise registrations after the 120-day sunrise challenge period — and any other challenges — are complete, for a minimal fee. Registrants who can’t prove they have valid trademarks will lose them to land-rush applicants, who won’t have to

prove the names are trademarked. (4) Allow those who mistakenly registered names during the sunrise period to cancel those registrations before .info is opened to the public.

Connor posted his plan earlier this month

Ivanov used the system as a shell for attacking other systems, prosecutors said, and attempted to extort money from victims whose computers he accessed. Ivanov and associate Vasili Gorchkov were arrested Nov. 10 in Seattle after traveling to the U.S. for a job interview. However, the computer security company offering them jobs, Invita, was an undercover entity the FBI created to obtain evidence against the 2 Russians, prosecutors said. Ivanov also is charged with intrusions into systems in Conn., N.J. and Wash., prosecutors said. Under the Cal. indictment, Ivanov could face a 5-year penalty and a fine of \$250,000 on each of 13 charges.

The Space & Naval Warfare Systems Center is seeking project proposals from the private sector on optoelectronics and photonics research and development. It's interested in papers in areas such as the integration of laser and digital circuit technologies. The goal is to "establish battle space information channels with greatest bandwidth possible and provide degrees of connectivity not possible with present technologies," it said Aug. 17 in Commerce Business Daily's CBDNet. 619-553-4333.

The Navy Marine Corp Intranet (NMCI) initiative is the focus of a technology expo Nov. 16 at the Naval Submarine Base in Kings Bay, Ga. The NMCI, which is expected to be operational by year-end, will give the Navy and the Marines universal access to integrated voice, video and data communications. The projects also will link 360,000 desktops in the U.S., P.R., Cuba, Iceland. Meanwhile, the National Institute of Standards & Technology is seeking exhibitors for its Nov. 6 technology expo in Gaithersburg, Md. NIST Acquisition Group said the event would enable companies to compete to provide \$120 million in goods and services needed annually by NIST, NTIA and other Dept. of Commerce agencies. (sales@fbcdb.com).

Security

The White House reported no unusual traffic on its Web site Mon., barely 12 hours after the Code Red Worm was scheduled to launch a denial-of-service attack against White House sites. The attack was scheduled to begin



(ISSN 1530-0501)

PUBLISHED BY WARREN COMMUNICATIONS NEWS, INC.

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at 8 p.m. Sun., but an FBI National Infrastructure Protection Center (NIPC) spokeswoman told us there were no reports of intrusions or aggressive attacks. Tinabeth Burton, spokeswoman for the Information Technology Assn. of America (ITAA), said the absence of attacks showed that the massive public awareness campaign was useful in curtailing the spread and effectiveness of the worm. But Wayne Madsen of the Electronic Privacy Information Center said NIPC had hyped the worm the way “Microsoft hypes its new software.” He said he believed the worm was overhyped to help gain attention to a new Executive Order set to be released Oct. 1 that would create a 30-member security council to manage the threat caused by Internet intrusions. — *TL*

International

Australia’s domain-name authority said Mon. it would consider adding new 2nd-level domains (2LDs) to the country’s namespace next year. At its meeting last week, the .au Domain Administration (auDA) board approved a report from its Name Policy Advisory Panel calling for the addition of new 2LDs to the current batch (such as com.au and gov.au). However, it said, it won’t consider new 2LDs until auDA makes much-needed changes in the existing domain-name system. Those reforms could include: (1) Revamping existing rules to allow people to register domains directly in id.au instead of in subdomains such as dropbear.id.au. (2) Holding an auction later this year to allocate generic domain names in.au following auDA’s decision to lift restrictions on owning such names. The board also gave the nod to a .au Dispute Resolution Policy that will become effective when competition is introduced in the namespace, auDA said.

Domain Names

The ICANN board should suspend the status of the Domain Name Supporting Organization’s (DNSO) Business Constituency (BC) because it’s violating its charter and ICANN bylaws, DNSO General Assembly Chmn. Danny Younger said in a posting late. Fri. The BC’s charter permits only one representative to the Names Council (NC) to belong to “an identifiable business sector,” Younger said, but 2 current NC members — AT&T’s Marilyn Cade and Clear Communications Ltd.’s Grant Forsythe — both represent the telecom industry. Moreover, he said, ICANN bylaws require that NC representatives be elected by their respective constituencies. Both Cade — who replaced Theresa Swinehart when she went to work for ICANN — and Forsythe, who took the place of Masanobu Katoh when he was elected to the board, were appointed, not elected. The BC also has breached its decision-making procedures and has failed to conduct business in an open manner, Younger said. “At this time, the BC is no more than a cartel representing primarily telecoms and intellectual property interests which seem to have no difficulty being in violation of their own rules while seeking to impose additional restrictions on others,” he wrote. “There is no hesitancy on the part of the BC to deny individuals a voice in the ICANN process,” Younger said, referring to the constituency’s proposal that there be 5 at-large directors on the ICANN board instead of the 9 originally promised. As long as the BC feels that way, “I feel no personal remorse in challenging” its fitness as a constituency or in asking ICANN to suspend it, Younger said. Two of Younger’s 3 complaints are on target, law prof. Jonathan Weinberg told us. Having 2 NC representatives from the telecom sector does violate the group’s charter, he said, and the BC has pulled its charter from the Web site, ostensibly to revise it. Moreover, he said, Younger’s claim that the constituency’s charter requires it to develop policy through research committees and do its best to permit input from small business entities is correct: “They plainly haven’t complied with it.” However, Weinberg said, it’s unlikely that either the NC or ICANN would interpret ICANN’s bylaws to bar appointment of NC representatives. The analysis “disregards the main point,” he said, “which is that nothing will happen” to the BC except an amendment of its charter to remove the troublesome requirements. Despite the fact that 2/3 of the BC’s representatives to the NC weren’t elected, we’re told, they do almost all the work. Papers rarely are circulated on the BC’s list before publication, and there’s no consultation, one source said, yet the documents are submitted to ICANN as though they have the approval and input of scores of companies. — *DS*

Industry Notes

The U.S. Appeals Court, Federal Circuit, said Covad wasn’t infringing Verizon’s DSL patent. The decision issued Fri. (00-1475) affirmed an earlier ruling by the U.S. Dist. Court, Alexandria, Va. The Verizon patent added capabilities to DSL technology by providing an ADSL system with “adjustable variable rate” functionality, the court held. However, the courts decided Covad’s DSL systems didn’t contain key aspects of Verizon’s technology.

The Congressional Internet Caucus Advisory Committee will host panels highlighting progress in e-learning technologies Sept. 11. The event will feature panels on grades K-12, higher education and work force training and will include a fair showcasing new technology. The event will be in 2-5 p.m., Rm. 902, Hart Senate Office Building — Megan Kinnaird or Catherine Parsons at 202 638-4370 or <http://www.netcaucus.org>.

“Brick-and-mortar” retailers are using the wrong metric to evaluate the effectiveness of Web sites, Jupiter Media Metrix said. At least 69% of retailers are underestimating the return on investment (ROI) of Web sites, Jupiter said. ROI would be 65% higher for brick-and-mortar companies that consider the nontransactional benefits of their sites — including online-influenced sales and improved payroll productivity, it said. Brick-and-mortar retailers need to maximize their sites’ ability to drive online sales and to pull informed customers into stores, Jupiter said. A retailer with a fairly successful transactional Web site is likely to extract nearly 2/3 of its total Web benefit from the non-transactional capabilities of the site, Jupiter said.

Eagle Broadband of League City, Tex., said it had joined the Fiber-to-the-Home Council and would participate in the group’s first meeting in Rochester, N.Y., Thurs. The council, which is designed to promote the acceleration of fiber broadband access throughout N. America, will elect a board, approve bylaws and appoint legal counsel at the meeting.

Excite@Home Corp. said in its annual report to the SEC that its own auditors were raising “substantial doubt about our ability to continue as a going concern.” Ernst & Young said the broadband services provider had had operating losses and negative cash flows since its inception. The company said the buildout of its network, combined with weakened demand for Internet advertising, had hurt its media operations. Excite has cut 300 jobs and doesn’t rule out further restructuring, including the possibility of selling its media operations. The company reported a loss of \$346 million in July after raising \$100 million in bonds plus \$85 million from AT&T. Excite’s stock closed down 46% to 47 cents Mon.

Toys ‘R’ Us said “sales almost quadrupled to \$35 million” for its Toysrus.com division from \$9 million a year ago, but the division continued to lose money. Toysrus.com ended the quarter with an operating loss of \$18 million — only a slight improvement from its \$20 million loss a year ago. The company said “the fixed costs associated” with its Amazon.com alliance “have a much higher impact on operating expenses in the lower revenue-generating first 3 quarters of the year,” adding: “The company expects to see this trend decrease dramatically beginning in the 3rd quarter of this year as it cycles the alliance with Amazon and as its revenue stream increases.”

Internet Calendar

- Sept. 5-7 NAB Radio Show, New Orleans, www.nab.org.
- Sept. 9-12 CTIA Wireless I.T. 2001, San Diego Convention Center, San Diego, 202-785-CTIA.
- Sept. 11 Congressional Internet Caucus conference on E-Learning, 2-6 p.m., Rm. 902, Hart Bldg., 202-638-4370.
- Sept. 14 Columbia Institute for Tele-information conference, “Broadband Economy: Emerging Market System in Bandwidth,” Columbia U., Shapiro Hall. — 212-854-4222.
- Oct. 2-3 MCommerce 2001 conference, including executives of Verizon, BT and Cingular, San Diego, www.wbresearch.com/mcommerce01ca.
- Oct. 9-12 Electronic Commerce World Conference 2001 Fall, McCormick Center Chicago — www.ecmediagroup.com or 877-440-7125.
- Oct. 29-31 Wireless Computing, presented by Meta Group and DCI, Marriott Copley Place, Boston, www.summitonwireless.com.

Internet People

Barbara Douglas, ex-America’s Promise, named FCC Consumer Information Bureau assoc. chief for program coordination & management... **Michael Berg**, ex-AT&T, appointed Equant gen. counsel-corp. secy... **Sarah Anderson**, ex-Egreetings, named Acclaim Entertainment senior vp-brand.