

An empirical analysis of 15 years of Australian domain name disputes

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ABSTRACT

The *.au Dispute Resolution Policy* ('auDRP') creates an online mandatory administrative procedure for resolving disputes about .au domain names that contain another's trademark. This study is the first – and, to date, the only – detailed quantitative analysis of every one of the 470 determinations made in the procedure's first 15 years of operation. By identifying the characteristics of each case and its decision-maker, and by analysing which of those are associated with particular outcomes, we provide previously-unknown information about the factors that contribute to a case's success, and about the procedure's integrity. We find that the rate at which cases succeed has not changed over time, and does not differ between the two service providers or between the most prolific panelists. When there is a statistically significant difference in the success rate, it is associated with a difference in the characteristics of the individual case – namely, that the complaint is based solely on a trademark rather than on a name alone or together with a trademark, or on a registered rather than an unregistered trademark, or that the complaint is not defended by the respondent. Importantly, these findings support the conclusion that, contrary to some commonly expressed opinions, the auDRP produces outcomes that are consistent and fair.

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I. INTRODUCTION

A. Domain Name and Trademark Disputes

In the late 1990s, courts in common law countries were called upon to determine whether and, if so, when registration or use of a domain name containing a trademark constituted trademark infringement. While those courts showed a willingness to apply – and, indeed, to extend – existing principles of trademark infringement and passing off to capture activities involving domain names,¹ it was apparent to many stakeholders that reliance on national courts to resolve such disputes was problematic. The reasons for this include that the length and expense of litigation is both considerable and out of proportion to the prevalence and ease with which infringement occurs.² As was noted by the World Intellectual Property Organization (‘WIPO’):

a considerable disjunction exists between, on the one hand, the cost of obtaining domain name registration, which is relatively cheap, and, on the other hand, the economic value of the damage that can be done as a result of such a registration and the cost to the intellectual property owner of remedying the situation through litigation, which may be slow and very expensive in some countries.³

To overcome these problems, WIPO recommended the creation of an online mandatory administrative procedure to resolve disputes about abusive domain name registrations containing trademarks.⁴ Under this procedure, a neutral decision-maker would have the power to impose a binding decision on entitlement to a domain name, which would be

¹ See, e.g., *Panavision International, L.P. v. Toepfen* 141 F.3d 1316 (9th Cir. 1998) and *British Telecommunications Plc v. One in a Million Ltd* [1998] EWCA Civ 1272. In *Panavision*, the US Court of Appeals for the Ninth Circuit found that use as a website address of a domain name containing another’s famous trademark was a ‘commercial use in commerce’ that ‘causes dilution of the distinctive quality’ of the trademark, even though that use did come within either of the anti-dilution provision’s traditional concepts of ‘blurring’ or ‘tarnishment’. In *British Telecommunications*, the UK Court of Appeal found that a domain name that was confusingly similar to another’s well-known trademark was an ‘instrument of fraud’, since any use of it would constitute passing off, and that therefore mere registration of such a domain name would be subject to an injunction on a *quia timet* basis.

² The other main problem with the use of national courts is that a dispute will often be multi-jurisdictional, in the sense that it will relate to trademark infringement in multiple jurisdictions. This could require a trademark owner to bring separate court actions in multiple countries. It could also require those court actions to be brought against multiple parties, including, in particular, the domain name registrar, to ensure the availability of an effective remedy.

³ WIPO, *The Management of Internet Names and Addresses: Intellectual Property Issues* (April 30, 1999) (‘WIPO Domain Names Report’) <<http://www.wipo.int/amc/en/processes/process1/report/finalreport.html>>.

⁴ WIPO, above n 3, paragraphs 152-153.

given effect by the registrar of the domain name. Although the online procedure would not exclude the jurisdiction of national courts, it was expected that ‘with time and experience, confidence will be built up in the credibility and consistency of decisions made under the procedure, so that parties would resort less and less to litigation’.⁵ WIPO’s recommendation was soon adopted by the organisation responsible for co-ordinating the Internet’s naming system, the Internet Corporation for Assigned Names and Numbers (‘ICANN’), and was implemented in 1999 by way of the *Uniform Domain-Name Dispute-Resolution Policy* (‘UDRP’).⁶

The UDRP applies to domain names registered in generic Top-Level Domains (‘gTLDs’), such as ‘.com’, ‘.net’ and ‘.org’.⁷ There exists, in addition to gTLDs, country-code Top-Level Domains (‘ccTLDs’) – that is, two-letter Top-Level Domains that have been established for countries and some territories.⁸ The ccTLD for Australia is ‘.au’, which is administered on behalf of the Government of Australia by .au Domain Administration Ltd (‘auDA’).⁹

The success of the UDRP in resolving disputes about gTLD domain names led many countries to adopt an equivalent policy for their ccTLD. The version of the UDRP that applies to .au domain names is the *.au Dispute Resolution Policy* (‘auDRP’), which is complemented by the *Rules for .au Dispute Resolution Policy* (‘auDRP Rules’).¹⁰ The

⁵ WIPO, above n 3, paragraph 153.

⁶ ‘Uniform Domain-Name Dispute-Resolution Policy’ <<http://www.icann.org/en/help/dndr/udrp>>, and ‘Timeline for the Formulation and Implementation of the Uniform Domain-Name Dispute-Resolution Policy’ <<https://www.icann.org/resources/pages/schedule-2012-02-25-en>>.

⁷ There are, in fact, 1,255 delegated gTLDs – see IANA, ‘Root Zone Database’ <<https://www.iana.org/domains/root/db>>.

⁸ As of 22 May 2019, there were 312 ccTLDs – see IANA, above n 7.

⁹ auDA derives its authority to administer the .au ccTLD from two sources: ICANN and the Government of Australia. On 25 October 2001, ICANN and auDA entered into a ccTLD Sponsorship Agreement under which auDA is recognized as the manager for the .au ccTLD: <<https://www.icann.org/resources/unthemed-pages/au-2012-02-25-en>>. The agreement is based on an endorsement of auDA by the Government of Australia, contained in a letter to auDA from the Minister for Communications, Information Technology and the Arts dated 31 December 2000: <<https://www.auda.org.au/pdf/auda-govt-endorse.pdf>>. This endorsement was communicated to ICANN in a letter from the Minister dated 4 July 2001: <<https://www.iana.org/reports/2001/au-redelegation/alston-to-lynn-04jul01.html>>. For a discussion of the position prior to auDA assuming responsibility, see Roger Clarke, ‘Origins and Nature of the Internet in Australia’ <<http://www.rogerclarke.com/II/OzI04.html>>, sections 4 and 5.

¹⁰ The auDRP is Schedule A, and the auDRP Rules is Schedule B, to auDA Policy No. 2016-01 <<https://www.auda.org.au/policies/index-of-published-policies/2016/2016-01/>>.

auDRP and auDRP Rules were adopted by the auDA Board on 13 August 2001, and apply to all domain names registered or renewed in the open Second-Level Domains ('2LDs')¹¹ of the .au ccTLD from 1 August 2002.¹²

B. Main Provisions of the auDRP

The core of the auDRP is paragraph 4, which sets out details of the proceeding to which a domain name registrant must submit in the event of a complaint being filed by a trademark owner. Paragraph 4(a) of the auDRP informs a domain name registrant (the 'respondent') that:

You are required to submit to a mandatory administrative proceeding in the event that a third party (a 'complainant') asserts to the applicable Provider, in compliance with the Rules of Procedure, that:

- (i) your domain name is identical or confusingly similar to a name, trademark or service mark in which the complainant has rights; and
- (ii) you have no rights or legitimate interests in respect of the domain name; and
- (iii) your domain name has been registered or subsequently used in bad faith.

In the administrative proceeding, the complainant must prove that each of these three elements are present.

There are two explanatory notes to paragraph 4(a). The first, to paragraph 4(a)(i), explains that 'name' means a company, business or other legal or trading name, as registered with the relevant Australian government authority, or a personal name. The second note is to paragraph 4(a)(ii). It explains that 'rights or legitimate interests in respect of the domain name' are not established merely by a registrar's determination that the respondent satisfied the relevant eligibility criteria for the domain name at the time of registration.

Paragraphs 4(b) and 4(c) of the auDRP provide guidance on when the elements of paragraphs 4(a)(iii) and 4(a)(ii), respectively, are satisfied. Paragraph 4(c) sets out three situations which are 'taken to demonstrate' that the respondent has rights or legitimate

¹¹ As of December 2018, the .au ccTLD contains five 'open' 2LDs: asn.au, com.au, id.au, net.au, and org.au. It also contains eight 'community geographic' 2LDs (act.au, nsw.au, nt.au, qld.au, sa.au, tas.au, vic.au, and wa.au) and two 'closed' 2LDs (edu.au and gov.au). See auDA, 'Registry', <<https://www.auda.org.au/industry-information/registry/>>.

¹² auDA Policy 2016-01, above n 10, paragraph 2.1,

interests in the domain name – namely: (i) a ‘bona fide use of’ the domain name in connection with an offering of goods or services; (ii) being ‘commonly known by’ the domain name; and (iii) making a ‘legitimate non-commercial or fair use of’ the domain name. Paragraph 4(b) specifies four circumstances that ‘shall be evidence of’ the registration and use of the domain name in bad faith – being: (i) registration or acquisition of the domain name ‘primarily for the purpose of selling ... [it] to another person’ for a profit; (ii) registration of the domain name to prevent the owner of a name or trademark ‘from reflecting that name or mark in a corresponding domain name’; (iii) registration of the domain name ‘primarily for the purpose of disrupting the business or activities of another person’; and (iv) using the domain name to attract, for commercial gain, users to a website ‘by creating a likelihood of confusion with the complainant’s name or mark’.

Various other provisions of the auDRP deal with matters of procedure, including: the organisation that is to administer the proceeding (the ‘service provider’);¹³ the orders that are available in the event the proceeding succeeds (the ‘remedy’);¹⁴ and the notification and publication of the outcome of the proceeding (the ‘decision’).¹⁵ The auDRP Rules specify in greater detail the procedural aspects of the system, including: the required form and content of the filing that initiates a proceeding (the ‘complaint’);¹⁶ the timing of, and the matters to be addressed in, any reply to the complaint (the ‘response’);¹⁷ the type of body that determines the dispute (the ‘panel’) and the appointment of members to that body (the ‘panelists’);¹⁸ and the consequences of a party’s failure to comply with a provision or requirement of the auDRP Rules or of a request from the panel.¹⁹

¹³ The complainant must select the service provider from among those approved by auDA, by submitting the complaint to that service provider: auDRP, paragraph 4(d).

¹⁴ The remedy is either cancellation of the domain name or transfer of the domain name to the complainant: auDRP, paragraph 4(i).

¹⁵ The service provider is required to notify the registrar with which the domain name is registered of any decision made in relation to the domain name: auDRP, paragraph 4(j). All decisions made under the auDRP are to be published in full over the Internet, except when the administrative panel determines in exceptional cases to redact portions of its decision: auDRP, paragraph 4(j).

¹⁶ auDRP Rules, paragraph 3.

¹⁷ auDRP Rules, paragraph 5.

¹⁸ auDRP Rules, paragraph 6.

¹⁹ auDRP Rules, paragraph 14.

The provisions of the auDRP are, in most respects, identical to those of the UDRP – even to the point of adopting the American spellings of ‘trademark’ and ‘panelist’ (being the spellings we use in this article). There are, however, three important differences. First, whereas the UDRP applies only in respect of a trademark or service mark in which the complainant has rights, under paragraph 4(a)(i) the auDRP applies in addition in respect of any name in which the complainant has rights. Secondly, under paragraph 4(a)(iii) of the auDRP it is sufficient for the complainant to prove that either registration or use of the domain name is in bad faith, whereas the UDRP requires the complainant to prove both. Thirdly, under the auDRP it is sufficient for the purposes of paragraph 4(b)(ii) to show the prevention of the name, trademark or service mark owner from reflecting the mark in a corresponding domain name, while the UDRP requires in addition that the respondent has engaged in a pattern of such conduct.

C. Key Features of the auDRP

Although the administrative proceeding under the auDRP is sometimes referred to as an ‘arbitration’,²⁰ its features are very different from those of a typical arbitration procedure. In a typical arbitration, the parties have voluntarily agreed to its adoption, they can select the arbitrator(s), and they choose the applicable law, language and venue of the arbitration. In addition, the existence and the outcome of the arbitration are confidential.²¹ None of those features are present in the auDRP procedure. Furthermore, the auDRP, like the UDRP, has two key features not found in traditional arbitration, which make it particularly powerful: its mandatory application and its automatic execution of a remedy.²²

Like a typical arbitration, involvement in an auDRP proceeding arises as a result of a contractual agreement to use this dispute resolution procedure. Unlike a typical

²⁰ See, e.g., Epiphany Law, ‘Courts vs Arbitration for Domain Name Disputes’ <<https://epiphany.law/articles/domain-names/courts-vs-arbitration-for-domain-name-disputes>>; Nick Gammon, ‘New Internet Domain Name dispute resolution process for Australia’ <https://www.gammon.com.au/arbitration/domain_name_disputes.htm>.

²¹ See, e.g., WIPO, ‘What is Arbitration?’ <<https://www.wipo.int/amc/en/arbitration/what-is-arb.html>>.

²² For an explanation of how these key features are structurally implemented in the UDRP, see Andrew F. Christie, ‘Online Dispute Resolution – the Phenomenon of the UDRP’, Chapter 16 in Torremans P. (ed.), *Research Handbook on Cross-Border Enforcement of Intellectual Property*, (2014, Edward Elgar, Cheltenham, UK and Northampton, MA, USA), 642, 650-654.

arbitration, that commitment is not made voluntarily. Rather, it is ‘incorporated by reference’ into the Registrant Agreement,²³ this being the contract that all registrants of an open 2LD .au domain name are required to enter when initially registering and when subsequently renewing a domain name. By virtue of being incorporated by reference, it is not possible for a registrant to register or renew a domain name without agreeing to the commitment.²⁴

Furthermore, the commitment is obligatory. As the word ‘required’ in the opening clause of paragraph 4(a) makes clear, a domain name registrant *must* submit to the administrative proceeding under the auDRP in the event that a name, trademark or service mark owner (the ‘complainant’) commences an action with an accredited service provider. The effect of the respondent’s agreement to ‘submit’ is not to oblige the respondent to participate in the proceedings; the respondent is free to choose whether or not to file a response, although a failure to do so may have adverse evidentiary consequences.²⁵ Rather, the effect is to make the respondent – or, more accurately, the respondent’s domain name – subject to the power of the panel to order one of the remedies provided by the auDRP.

Unlike a traditional arbitration, the auDRP process provides for *automatic* execution of an effective remedy. There are two, mutually exclusive, remedies available to a successful complainant: cancellation of the domain name, and transfer of the domain name to the complainant.²⁶ The complainant is required to state in the complaint which of these remedies it seeks.²⁷ If the complaint succeeds, execution of the requested remedy is automatic, in the sense that it does not require the co-operation of the respondent. This is because the order for the remedy is directed not to the registrant, but to the *registrar*, of the domain name. Being the entity that creates and maintains the details of the domain

²³ auDRP, paragraph 1.

²⁴ auDA effects this ‘incorporation by reference’ by specifying in its *pro forma* Registrar Agreement (<<https://www.auda.org.au/pdf/auda-registrar-agreementv4.pdf>>) the provisions that must be contained in the Registrant Agreement. These mandatory provisions, which are set out in Schedule B to the Registrar Agreement, include clause 2.2 which states: ‘Registrant must comply with all auDA Published Policies, as if they were incorporated into, and form part, of this agreement.’ Because the auDRP is an auDA Published Policy, every domain name registrant is required to submit to its provisions.

²⁵ See the discussion of the consequences of a respondent’s ‘default’ in the text associated with n 101 below.

²⁶ auDRP, paragraph 4(i).

²⁷ auDRP Rules, paragraph 3(b)(x).

name's registration, the registrar is able to give effect to an order of cancellation or transfer of the domain name without action from the respondent/registrant. Where a remedy is ordered by the panel, the relevant registrar must, upon notification of this remedy, 'immediately communicate' to each party the date for implementation of the decision.²⁸

D. Criticisms and Assessments of the auDRP

The UDRP has been the subject of criticisms since inception. Since it largely replicates the UDRP, those criticisms apply to the auDRP by implication.²⁹ The substance of those criticisms is that the administrative proceeding is unfair – and, in particular, is biased against respondents. The primary source of this bias, it is claimed, is the mandatory nature of the proceeding together with the fact that the complainant gets to choose the service provider with which to file the complaint. According to Geist:

The right of complainants to pick which arbitration provider handles their dispute has been the target of particularly vociferous criticism. Although ICANN initially accredited three arbitration providers in order to foster a competitive environment, many commentators anticipated that complainants would engage in forum shopping by rationally selecting arbitration providers who tended to rule in their favour. Those fears were immediately realised.³⁰

Geist, and others, assert that service providers have a financial incentive to attract filings of complaints, and that they seek to do so by appointing panelists who tend to rule in favour of complainants.³¹ While these assertions can be rebutted as a matter of theory,³²

²⁸ auDRP Rules, paragraph 16(a). The obligation on the Registrar to comply with this requirement derives from clause 7.2.1 of the Registrar Agreement, which states that 'the Registrar must comply with all Published Policies, as if they were incorporated into, and form part of, this document'. Because the auDRP is an auDA Published Policy, the Registrar is required to submit to its provisions.

²⁹ Some of those criticisms have also been applied to the auDRP expressly: Alpana Roy, 'Navigating the landscape of the .au Dispute Resolution Policy as it enters its second decade', (2014) 19 *Media and Arts Law Review* 1, 25-29.

³⁰ Michael Geist, 'Fair.com?: An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP' (2002) 27(3) *Brooklyn Journal of International Law* 903, 905 (internal citations omitted).

³¹ *Ibid.*, 911-912.

³² See Christie, above n 22, 662-669, who identifies a number of reasons why service provider bias is unlikely to occur in practice. One is that the majority of UDRP service providers are not-for-profit entities, meaning there is little or no incentive for them to attract the filing of cases simply for the sake of revenue. Also, not-for-profits entities can be expected to be especially concerned about their reputation, and in particular about having a reputation for fairness. Another reason is that it is the panelist, not the service provider, who decides the outcome of a case. The vast majority of panelists are highly

more important is what empirical evidence establishes. Based on an early analysis of a small number of UDRP cases, Mueller concluded that ‘[a]fter only 1 year of operation, there is a statistically significant correlation between market share and the tendency to take away domain names from respondents’.³³ Geist undertook a basic analysis of UDRP cases from the first two years of operation, and observed that service providers allocated a large number of cases to a small number of the panelists, who appeared to be more likely to find in favour of the complainant than other panelists.³⁴ Later commentators have pointed out the flaws in each of these analyses, including that it ‘completely fails to adequately review or account for the merits of the UDRP cases covered’.³⁵

Since the auDRP began in 2002, more than 600 proceedings have been commenced, and more than 500 have been determined. While there has been some good detailed *qualitative* analyses of auDRP proceedings,³⁶ including in comparison to proceedings under the UDRP,³⁷ the only *quantitative* analysis undertaken to date has been limited to a tabulation of the number of proceedings commenced (by year, and by service provider), the outcome of proceedings (by year, by service provider, and by single-member panels), and the geographical location of the parties (by Australian State and Territory, and by overseas region).³⁸ That study expressly identified a number of important questions for

experienced, legally qualified, professionals whose main sources of income are unrelated to the activities of the service provider. Furthermore, the fee paid to a panelist is sufficiently modest (typically USD 1,000) to make it highly unlikely he or she would be motivated in their decision-making by financial considerations. Rather, the dominant factor motivating the decision-making performance of a panelist is the desire to develop and maintain a reputation for quality and integrity.

³³ Milton Mueller, ‘Rough Justice – An analysis of ICANN’s Uniform Dispute Resolution Policy’ (2001) *The Information Society* 151, 161.

³⁴ Geist, above n 30, 928-930.

³⁵ Ned Branthover, ‘UDRP – A Success Story: A Rebuttal to the Analysis and Conclusions of Professor Milton Mueller in “Rough Justice”’ (May 6, 2002) <<https://www.inta.org/Advocacy/Documents/INTAUDRPSuccesscontraMueller.pdf>>, 1. While this is a rebuttal of Mueller’s analysis, it is equally applicable to the analysis by Geist. See also Juan Pablo Cortés Diéguez, ‘An Analysis of the UDRP Experience: Is it Time for Reform?’ (2008) 24(4) *Computer Law and Security Report* 349.

³⁶ See Alpana Roy, *Australian Domain Name Law* (2016, Thomson Reuters, Sydney). See also *auDA Overview of Panel Views on Selected auDRP Questions First Edition* (‘*auDA auDRP Overview 1.0*’) <<https://www.auda.org.au/policies/audrp/audrp-overview/>>, which distils the reasoning of panels contained in the approximately 330 decisions published from commencement of the auDRP until July 2014.

³⁷ Alpana Roy and Althaf Marsoof, ‘A Critical and Comparative Review of auDRP and UDRP Domain Name Decisions’ (2016) 19(5-6) *Journal of World Intellectual Property* 203.

³⁸ Roy, above n 29.

subsequent investigation – including the reason for the apparent ‘disparity’ between the volume of proceedings under the auDRP compared with the UDRP, why ‘complainants have a more challenging time under the auDRP’ compared with under the UDRP, and why there is an apparently ‘quite high’ rate of respondent default.³⁹ Missing from the literature is a quantitative analysis that can respond to such questions, by taking into account the range of factors which contribute to the ‘merits of the case’ such as the nature of the parties, the legal right on which the case is based, and whether the respondent participated in the proceeding. Also missing from the literature is a quantitative analysis of the features of the decision-maker – namely the type of panel by which, and the particular panelist by whom, the proceeding was determined.

Our study fills this gap. It undertakes a detailed and rigorous evaluation of *every* proceeding determined in the first 15 years of operation of the auDRP – and, hence is a study of a population, not just of a sample. It identifies for each proceeding the various characteristics of the case and the decision-maker, and it analyses the extent to which those are factors associated with a particular outcome. By doing so we are able to draw conclusions about which features of a case are associated with its success or failure. Importantly, we are also able to draw conclusions about the consistency, integrity and fairness of the system as a whole.

II. METHOD

A. Data

Our dataset comprises every proceeding that was commenced with a service provider under the auDRP, from its inception on 1 August 2002 until 31 July 2017. We identified all commenced proceedings by reference to a set of webpages published on the auDA website called the ‘auDRP Archived Proceedings’ (hereafter ‘auDA Archive’).⁴⁰ The information in the auDA Archive is provided to auDA by the service providers.

The population of commenced proceedings is a sub-set of the population of ‘filed’ proceedings. Not every filed proceeding commences; some filed proceedings are deemed

³⁹ Ibid., 15, 17, 24.

⁴⁰ ‘auDA Archived Proceedings’ <<https://www.auda.org.au/policies/audrp/archived-proceedings/>>.

to be withdrawn because the complainant fails to correct an administrative deficiency in the complaint identified by the service provider.⁴¹ The population of commenced proceedings contains a sub-population of ‘determined’ proceedings – that is, proceedings that progress to a determination by a panel. Not every commenced proceeding progresses to a determination; some proceedings are terminated by the complainant prior to a determination being made.⁴² A typical situation in which this occurs is when the complainant and the respondent reach a mutually satisfactory agreement about the domain name – that is, when the complaint ‘settles’. Where a proceeding is terminated, only basic information about it is published in the auDA Archive.

For proceedings that progressed to a determination, we obtained the panel’s published decision via the hyperlink to it on the auDA Archive.⁴³ Each decision was closely read by a legally trained researcher with knowledge of the auDRP. A range of information was extracted from each decision and entered into a relational database.

⁴¹ When a proceeding is filed, the service provider with which it is filed must first review the complaint for administrative compliance with the auDRP and the auDRP Rules. If the complaint is found to be compliant, the service provider shall forward it to the respondent within three days of receipt of the fees to be paid by the complainant: auDRP Rules, paragraph 4(a). If the service provider finds the complaint to be administratively deficient, it shall notify the complainant and the respondent of the deficiencies. The complainant has five days in which to remedy the deficiencies, after which the complaint is deemed withdrawn: auDRP Rules, paragraph 4(b). Where the complaint is deemed withdrawn due to administrative deficiency, the complaint does not commence.

⁴² Based on communications from the service providers, we have ascertained that there is a difference in how a terminated proceeding is recorded by the service providers and by auDA. Where a complaint is terminated, WIPO lists the proceeding on its ‘Decisions (ccTLD)’ page (<<https://www.wipo.int/amc/en/domains/decisionsx/index-ctld.html>>) as ‘terminated’, while RI lists it on its ‘Decision archive’ page (<<https://www.resolution.institute/dispute-resolution/decision-archive>>) as ‘withdrawn’. In both cases, the filing of the complaint is notified to auDA, and the proceeding is listed on auDA Archive – either as ‘terminated’, in the case of a WIPO proceeding, or ‘withdrawn’ (or occasionally ‘terminated’), in the case of a RI proceeding. There is also a difference in how a withdrawn complaint is recorded by the service providers and by auDA. Where a complaint is deemed withdrawn because of an uncorrected administrative deficiency (see above n 41), WIPO lists it as ‘terminated’, while RI lists it as ‘withdrawn’. Neither WIPO nor RI notifies auDA of the withdrawn filing. However, it appears that auDA extracts the entry of the withdrawn proceeding from the WIPO website, but not from the RI website, and lists the proceeding as ‘terminated’ on the auDA Archive. For the purposes of this study, the proceedings listed on the auDA Archive as either ‘terminated’ or ‘withdrawn’ have been conflated, and we refer herein to the conflation as ‘terminated’ proceedings.

⁴³ One decision (LEADR-auDRP07/06) was inaccessible due to a non-functioning link, which was reported to auDA. auDA sought to obtain a copy of the decision from the service provider, but was unsuccessful. Accordingly, that case does not form part of our dataset. Additionally, there were a small number of decisions published by LEADR-Association of Dispute Resolvers in which the proceedings number did not match the proceedings number listed on auDA’s Archive. For these cases, we deferred to auDA’s numbering and reported the inconsistencies to auDA.

B. Analyses

We undertook two sets of analyses of the data in our database. First, we identified the fundamental characteristics of the determined proceedings – namely, when and how many proceedings were commenced and were determined, the identity of the service providers with which the proceedings were filed, the nature of the parties to the proceedings, the number of domain names in issue in the proceedings, the types of legal rights on which the proceedings were based, the panels and panelists by whom the proceedings were determined, and the outcomes of the proceedings. The results of those analyses are reported in section III.A below, by way of descriptive statistics. Where appropriate and relevant, we applied a statistical test (in this case, Pearson’s χ^2 test⁴⁴) to determine whether observed differences between sub-populations are significant ($p < .05$). Application of a statistical test is important, as without testing for statistical significance it is not possible to know whether observed differences are meaningful.

Our second set of analyses explored the factors that were associated with the outcome of proceedings. In particular, we analysed the data to establish which of the characteristics identified in our first set of analyses were associated with a greater or lesser likelihood of a complaint succeeding. In section III.B we report those analyses in terms of proportions, and we again apply an appropriate statistical test (the χ^2 test) to determine whether observed differences are statistically significant ($p < .05$) and hence meaningful.

III. RESULTS

A. Characteristics of Determined Proceedings

A.1 Commenced, determined and terminated proceedings

Between 1 August 2002 and 31 July 2017, 559 proceedings were commenced, and 470 of those progressed to a determination – meaning that in approximately one-sixth (16%) of commenced proceedings the complaint was terminated. **Figure 1** is a plot of the numbers of proceedings commenced and determined, by year of commencement of

⁴⁴ For a general discussion of the χ^2 test, see Cochran WG, ‘The χ^2 test of goodness of fit’, (1952) 25 *Annals of Mathematical Statistics* 315-345.

proceeding, for each full calendar that the auDRP was in operation during the timeframe of the data.⁴⁵

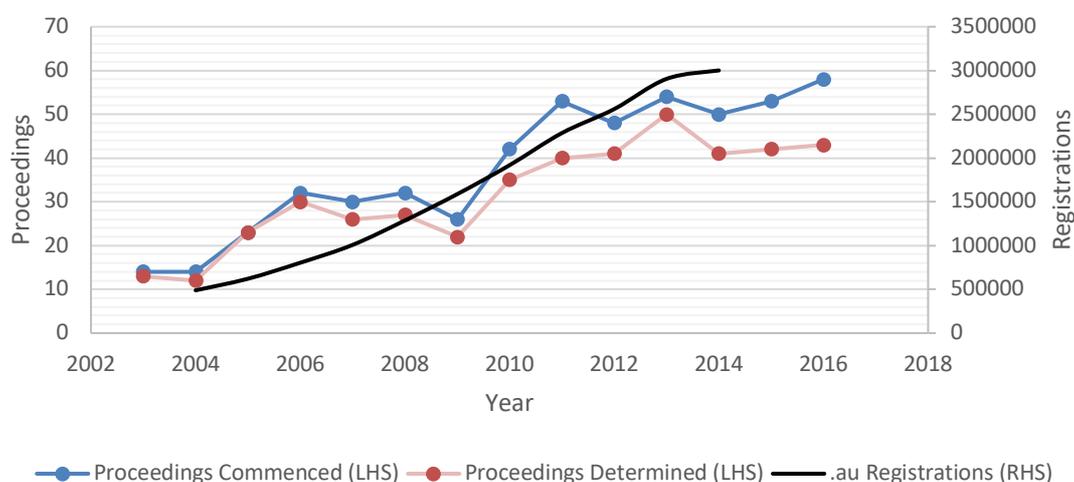


Figure 1: Number of proceedings commenced and determined, and cumulative number of .au domain name registrations, by calendar year of filing

Figure 1 also plots the total number of .au domain name registrations at the end of each calendar year for which the data is available.⁴⁶ Over time, the number of proceedings commenced and determined are largely in proportion to the number of domain name registrations in the .au ccTLD. There is an average of 2.5 (median of 2.3) auDRP proceedings commenced for every 100,000 .au domain name registrations.

A.2 Service providers

As illustrated in **Figure 2**, approximately two-thirds (65%) of all commenced proceedings were filed with WIPO. With only a few exceptions,⁴⁷ the remainder of the determined

⁴⁵ Only *full* calendar years are shown in Figure 1, so as to illustrate the increase over time in the numbers of proceedings commenced and proceedings determined. The partial calendar years of 2002 (1 proceeding commenced, 1 proceeding determined) and 2017 (29 proceedings commenced, 25 proceedings determined) have been omitted.

⁴⁶ The sources of the .au domain name registration numbers are the *.au Registry Reports* <<https://www.auda.org.au/industry-information/registry/registry-reports/>>.

⁴⁷ The exceptions were the six proceedings that were filed with the Chartered Institute of Arbitrators Australia (‘CI Arb’), prior to it discontinuing being a service provider from March 2008.

proceedings were filed with Resolution Institute or its predecessor organisations⁴⁸ – which, together, we refer to herein as ‘RI’. The difference in the proportion of commenced proceedings that progressed to a determination for the two main service providers – 83% for WIPO, and 86% for RI – is not statistically significant.⁴⁹

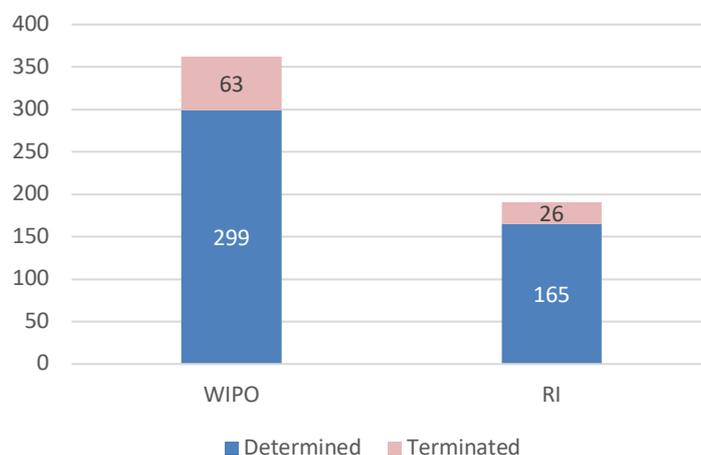


Figure 2: Number of proceedings determined and terminated, by main service providers

A.3 Complainants and respondents

We ascertained the number and the identity of the complainant and the respondent in each proceeding.⁵⁰ The vast majority (90%) of complaints were brought in the name of a single complainant. Of the 46 determined proceedings brought by multiple complainants, all but two were in the name of two complainants; of the exceptions, one was in the name of three complainants and the other in the name of nine complainants. We found that 50 unique complainants appeared as a complainant in more than one determined proceeding.

A very large majority (86%) of determined proceedings were brought against a single respondent. Of the 64 determined proceedings brought against multiple respondents, most (53) were against two respondents with the remaining 11 against three respondents.

⁴⁸ On 1 January 2015, Resolution Institute was formed by amalgamation of LEADR-Association of Dispute Resolvers (‘LEADR’) and the Institute of Arbitrators and Mediators Australia (‘IAMA’). Prior to amalgamation, 137 proceedings had been filed with LEADR and 28 proceedings had been filed with IAMA.

⁴⁹ χ^2 statistic = 1.330, p-value = .249.

⁵⁰ In some cases, a complaint was filed by multiple complainants, was filed against multiple respondents, or was filed by multiple complainants against multiple respondents. Unless otherwise stated, the terms ‘complainant’ and ‘respondent’ are used herein to refer to both the singular and the plural.

We found that 28 unique respondents appeared as a respondent in more than one determined proceeding.

We also ascertained the nature of the complainant and the respondent in the determined proceedings. As shown in **Figures 3 and 4**, the most common type of party to a determined proceeding is an organisation (*i.e.*, a company or an incorporated association) – being almost all (93%) of the complainants, and more than one-half (57%) of the respondents.

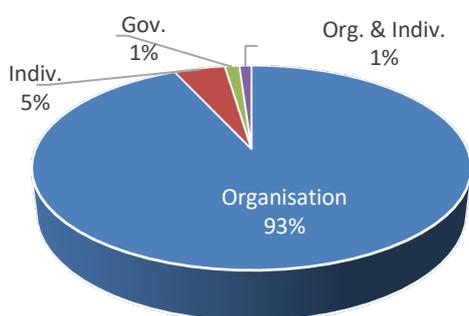


Figure 3: Nature of complainant in determined proceedings

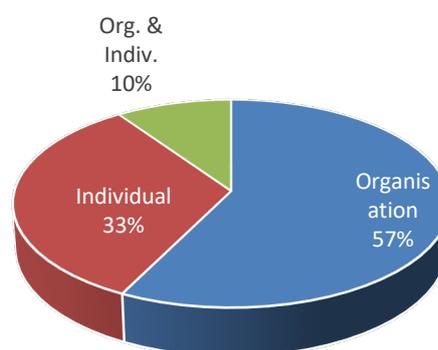


Figure 4: Nature of respondent in determined proceedings

A4. Domain names

Four-fifths (81%) of determined proceedings were in respect of a single domain name. Of the remainder of the cases, 13% concerned two domain names and 2% concerned three domain names. The greatest number of domain names that were the subject of a determined proceeding was 175;⁵¹ the second-greatest number of domain names in a single proceeding was 66.⁵²

⁵¹ WIPO DAU2016-0033.

⁵² WIPO DAU2008-0021.

A.5 Legal rights

We ascertained the legal right forming the basis of the complaint. For this purpose, we treated a trademark and a service mark as being of the same legal type, and we refer to each as a ‘trademark’.

We established whether the complaint was based solely on a trademark, solely on a name, or jointly on a trademark and a name.⁵³ As shown in **Figure 5**, two-thirds (66%) of the determined proceedings were based solely on a trademark (registered or unregistered), with approximately one-tenth (12%) based solely on a name and one-fifth (21%) based jointly on a trademark and a name.

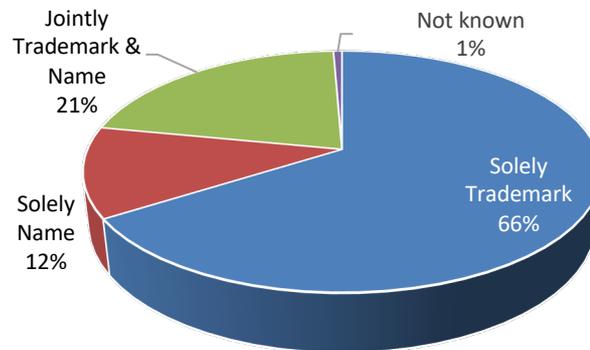


Figure 5: Legal right on which complaint based in determined proceedings

We also established the type of trademark and the type of name on which the complaint was based. As shown in **Figure 6**, for complaints that are based solely on trademarks, the trademark is registered in almost all (91%) cases. **Figure 7** shows that, for those complaints based solely on names, the names are typically either a business name (40%), a company name (32%), or both (12%).

⁵³ In some cases, a complaint was based on multiple trademarks, on multiples names, or on both multiple trademarks and multiple names. Unless otherwise stated, the terms ‘trademark’ and ‘name’ are used herein to refer to both the singular and the plural.

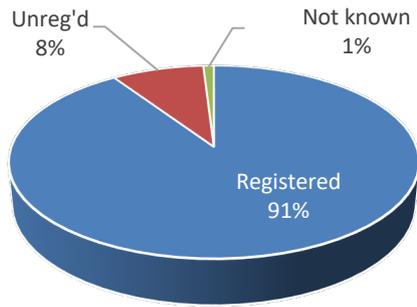


Figure 6: Type of trademark (complaint based solely on a trademark)

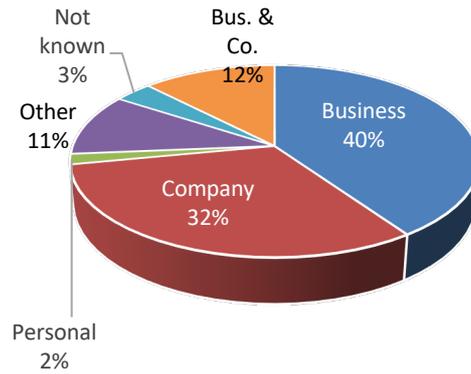


Figure 7: Type of name (complaint based solely on a name)

A6. Respondent default

In nearly two-fifths (38%) of determined proceedings the respondent ‘defaulted’ – that is, the respondent did not file a response to the complaint. There was a statistically significant higher proportion of respondent default where the complaint: (i) concerned only one domain name (41%) rather than multiple domain names (27%);⁵⁴ (ii) concerned only a registered trademark (44%) rather than only an unregistered trademark (17%);⁵⁵ and (iii) was determined by a single-member panel (40%) rather than by a three-member panel (19%).⁵⁶

A.7 Panels and panelists

The vast majority (90%) of proceedings were determined by a panel with a single member (‘single-member panel’); in the remainder of cases the panel was comprised of three members (‘three-member panel’). The 423 single-member panels were decided by 66 unique panelists, and the 47 three-member panels were decided by 38 unique panelists.

In **Table 1** we list the most prolific panelists (ten or more proceedings), and state the number of cases in which they served. There is a fairly clear concentration of the most prolific panelists: the top six decided more than 30 cases each, while the remainder

⁵⁴ $\chi^2 = 5.966$, $p = 0.015$.

⁵⁵ $\chi^2 = 7.713$, $p = 0.005$.

⁵⁶ $\chi^2 = 8.103$, $p = 0.004$.

decided 20 or fewer cases. In aggregate, the six most prolific panelists decided two-fifths (39%) of all single-member panel cases. More than one-half (55%) of all single-member panel cases were decided by one of the 13 panelists listed in Table 1.

Table 1: Most prolific panelists

Panelist	Total all cases	Single panelist	Presiding panelist	Complainant panelist	Respondent panelist	Total 3-mem. cases
John Swinson	44	35	1	4	4	9
Alan L. Limbury	38	27	7	2	2	11
Andrew F. Christie	36	30	1	2	3	6
Warwick A. Rothnie	35	20	8	6	1	15
James A. Barker	34	30	1	1	2	4
Philip N. Argy	32	23	3	3	3	9
Alistair Payne	20	15	4	0	1	5
Desmond J. Ryan	18	13	4	0	1	5
Neil A. Brown QC	17	9	2	5	1	8
William P. Knight	14	8	1	3	2	6
Anthony P. Alder	13	10	2	1	0	3
Michael J. Spence	12	9	2	0	1	3
Dan Hunter	10	2	1	2	5	8

For the three-member panel cases we were able to ascertain the basis of the appointment of panelists – that is, whether they were appointed as the panelist who presided (‘presiding panelist’) from a list provided to the parties by the service provider, as a non-presiding panelist from a list provided to the service provider by the complainant (‘complainant panelist’), or as a non-presiding panelist from a list provided to the service provider by the respondent (‘respondent panelist’).⁵⁷ We identified the panelists whose appointment was on one of these three bases, and ascertained the number of such proceedings in which they were appointed on those bases.

In more than four-fifths (83%) of all three-member panel cases, at least one of the six most prolific panelists was a member. In nearly one-quarter (23%) of three-member panel

⁵⁷ The procedure for appointing a three-member panel is set out in Rule 6(e) of the auDRP Rules. It states that each party will give the service provider a list of three preferred panelists, and the service provider will appoint one panelist from each list. The service provider will supply the parties with a list of five other panelists for potential appointment as the presiding panelist. Each party ranks the five panelists in their preferred order, and the service provider appoints the panelist who ranks highest when both parties’ preferences are combined. We could ascertain the identity of the presiding panelist in the three-member panel cases, because the published decision in those cases specified who was the ‘Presiding Panelist’ or the ‘Chair’. We could ascertain the identity of the complainant panelist and the respondent panelist in the three-member panel cases because the published decisions in those cases, by convention, lists the complainant panelist as the second-named panelist and the respondent panelist as the third-named panelist (with the presiding panelist being first-named).

cases, two of the panel members were from the group of the six most prolific panelists, and in a small number (4%) of cases the whole panel was from this group. In only one-sixth (17%) of the three-member panel cases did the panel not contain any of the six most prolific panelists.

A.8 Outcomes and remedies

We allocated the outcomes of determined proceedings into two mutually exclusive categories: ‘complaint succeeded’ (where the panel made an order either for transfer of the domain name to the complainant or for cancellation of domain name), and ‘complaint failed’ (where no such order was made – that is, the complaint was denied). As shown in **Figure 8**, the complaint succeeded in nearly three-quarters (74%) of determined proceedings.

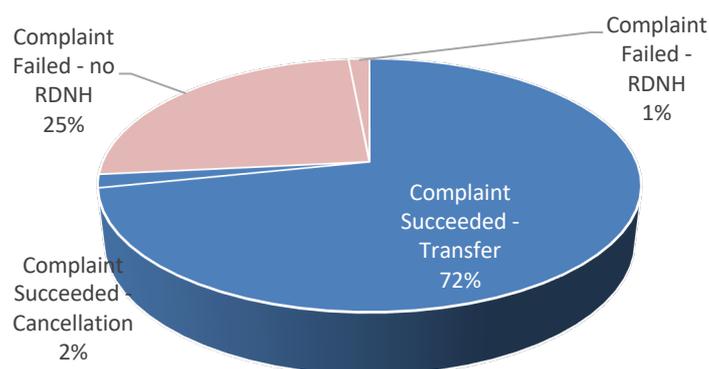


Figure 8: Outcomes of determined proceedings

In almost all (98%) of the cases in which the complaint succeeded, the remedy ordered was transfer of the domain name. In just six cases, the remedy ordered was cancellation of the domain name. All six of these proceedings were single-member panel cases.

In a very small number (5%) of the proceedings where the complaint failed, the panel made a finding of reverse domain name hijacking (‘RDNH’).⁵⁸ These cases represent

⁵⁸ Paragraph 15(e) of the auDRP Rules states: ‘If after considering the submissions the Panel finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or was brought primarily to harass the domain name holder, the Panel shall declare in its decision that the complaint was brought in bad faith and constitutes an abuse of the administrative proceeding.’ Paragraph 1 of the auDRP Rules defines ‘reverse domain name hijacking’ to mean ‘using the Policy in bad faith to attempt to deprive a registered domain name holder of a domain name’.

one-sixth (17%) of the proceedings where RDNH was alleged. In no case was RDNH found where it was not alleged.

B. Factors Associated with Outcomes

B.1 Year of commencement

We ascertained the proportion of determined proceedings that resulted in a finding that the complaint succeeded (*i.e.*, the ‘success rate’). As shown in **Figure 9**, those proportions fluctuate over time.⁵⁹ When considered in terms of three periods of five consecutive years, we found that the complaint succeeded two-thirds (66%) of the time in the period 2003-2007, nearly three-quarters (72%) of the time in the period 2008-2012, and four-fifths (79%) of the time in the period 2013-2017 – but the differences are not statistically significant.⁶⁰

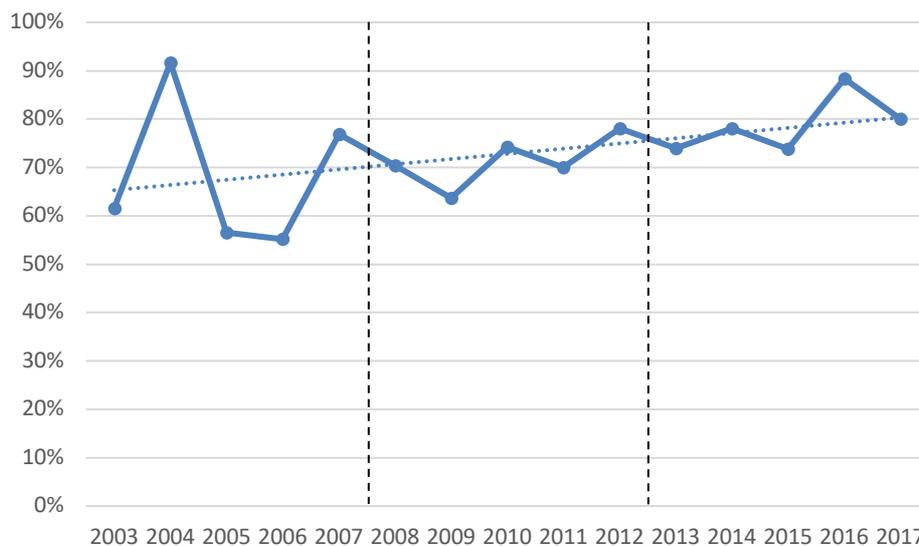


Figure 9: Proportion of determinations where complaint succeeded, by year

⁵⁹ Figure 7 shows the proportions for each year except the first year (2002). That was a year in which there was only one case (being one in which the complaint failed).

⁶⁰ $\chi^2 = 5.819$, $p = .054$.

B.2 Service providers

The complaint succeeded in just over three-quarters (77%) of the determined proceedings that were filed with WIPO, compared with just over two-thirds (68%) of the determined proceedings that were filed with RI⁶¹ – but the difference is not statistically significant.⁶²

B.3 Complainants and respondents

As shown in **Figure 10**, the success rate of complaints brought by a single complainant (74%) was higher than that of complainants brought by multiple complainants (70%), but the difference is not statistically significant.⁶³ There was, however, a statistically significant difference⁶⁴ in the success rate of complaints by number of respondents to the proceeding. As shown in **Figure 11**, complaints brought against multiple respondents succeeded more than four-fifths (84%) of the time, whereas complaints brought against a single respondent succeeded less than three-quarters (72%) of the time.

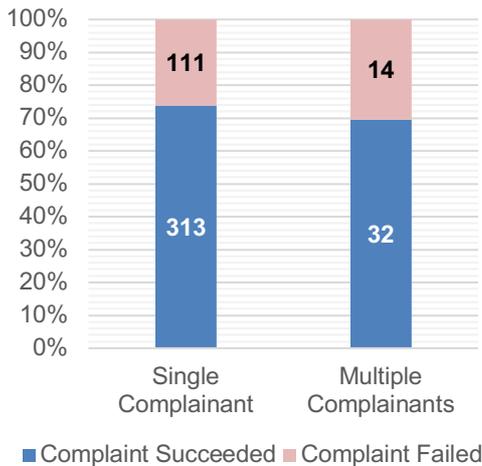


Figure 10: Outcome, by number of complainants

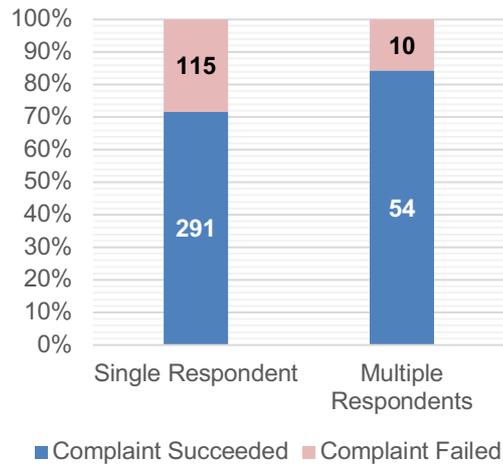


Figure 11: Outcome, by number of respondents

⁶¹ As discussed in the text associated with n 48 above, the proceedings that were filed with LEADR and IAMA prior to amalgamation have been conflated with the proceedings filed with Resolution Institute after amalgamation, and we call those RI's determined proceedings. Independent of WIPO and RI, CIArb had a 50% success rate for the six proceedings filed with it prior to its cessation as a service provider in March 2008.

⁶² $\chi^2 = 3.603$, $p = .058$.

⁶³ $\chi^2 = 0.0385$, $p = .535$.

⁶⁴ $\chi^2 = 4.568$, $p = .033$.

The success rate of complaints brought by an organisation (75%) is higher than the success rate of complaints brought by an individual (52%), by a government (67%) or by an organisation and an individual jointly (70%) – but the differences are not statistically significant.⁶⁵ Complaints brought against an individual had a rate of success (76%) that is higher than for complaints brought against an organisation (70%), but lower than for complaints brought against an organisation and individual jointly (85%) – but, again, these differences are not statistically significant.⁶⁶

B.4 Domain names

Complaints concerning only one domain name had a higher success rate (75%) than complaints concerning multiple domain names (69%),⁶⁷ but the difference is not statistically significant.⁶⁸

B.5 Legal rights

We ascertained the outcome of determined proceedings by the legal right upon which the complaint was based. As can be seen in **Figure 12**, complaints based solely on a trademark had a higher success rate (79%) than complaints based solely on a name (60%), with complaints based jointly on a trademark and a name having a success rate in between the two (65%). These differences are statistically significant.⁶⁹

⁶⁵ $\chi^2 = 5.801$, $p = .122$.

⁶⁶ $\chi^2 = 5.876$, $p = .053$.

⁶⁷ We treated a complaint based on multiple domain names as succeeding if an order of transfer or cancellation was made in respect of *at least one* of the domain names.

⁶⁸ $\chi^2 = 1.331$, $p = .249$.

⁶⁹ $\chi^2 = 13.291$, $p = .001$.

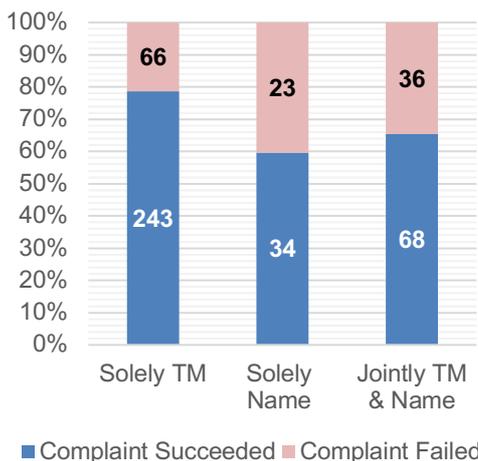


Figure 12: Outcome, by type of right on which complaint based

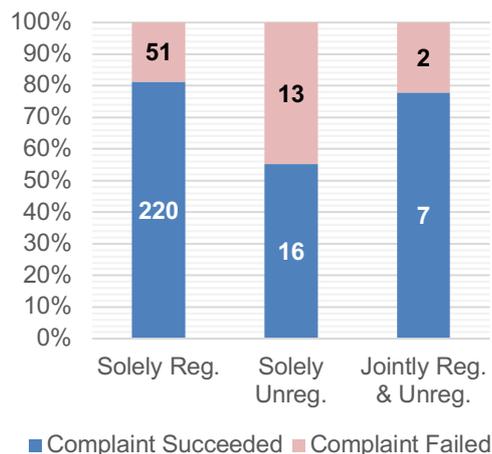


Figure 13: Outcome, by type of trademark on which complaint based

Figure 13 shows the success rates of complaints that were based solely on a trademark, by the type of trademark on which they were based. Complaints based solely on a registered trademark had a success rate (81%) that was higher than complaints based either solely on an unregistered trademark (55%) or jointly on a registered trademark and unregistered trademark (77%) – differences that are statistically significant.⁷⁰

Complaints based solely on a company name had a success rate (72%) that was higher than complaints based solely on a business name (57%), based jointly on a company and a business name (56%), or based on some other type of name (43%) – but those differences are not statistically significant.⁷¹

B.6 Respondent default

As shown in **Figure 15**, the complaint succeeds in almost all (95%) of proceedings where no response is filed, but in only three-fifths (60%) of proceedings where a response is filed. This difference in success rates is statistically significant.⁷²

⁷⁰ $\chi^2 = 10.554, p = .005$.

⁷¹ $\chi^2 = 2.158, p = .540$.

⁷² $\chi^2 = 69.691, p < 0.00001$.

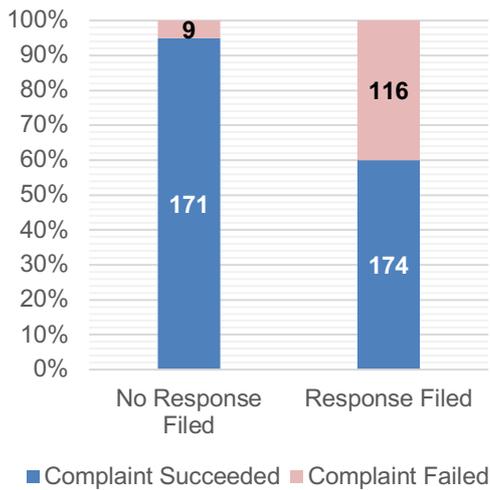


Figure 15: Outcome, by whether a response filed

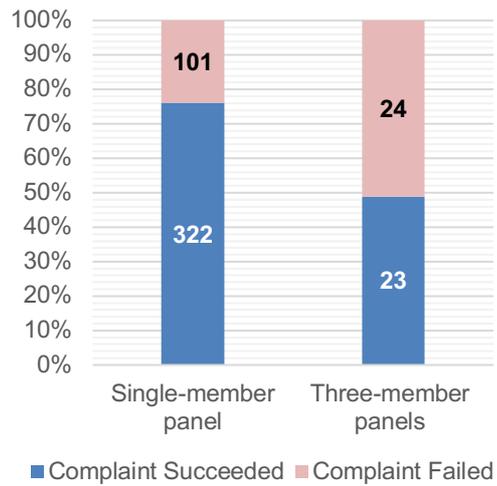


Figure 16: Outcome, by panel type

B.7 Panels and panelists

We compared the success rate of proceedings determined by single-member panels with that of proceedings determined by three-member panels. As shown in **Figure 16**, three-quarters (76%) of all single-member panel cases succeeded, whereas only one-half (49%) of three-member panel cases did – a statistically significant difference in outcomes.⁷³

For each of the six most prolific panelists, we determined the success rate of the single-member panel proceedings which they determined. The success rates of their determinations ranged from 70% to 83%, with an average of 75% (median of 74%). The differences in their success rates are not statistically significant.⁷⁴

We plotted each prolific panelist’s success rate against the ‘rate of default’ in their cases – that is, the proportion of their single-member panel cases in which the respondent failed to file a response. As shown in **Figure 17**, a prolific panelist’s success rate is closely related to the rate of default in their cases.

⁷³ $\chi^2 = 16.015, p < 0.0001$.

⁷⁴ $\chi^2 = 1.538, p = .909$.

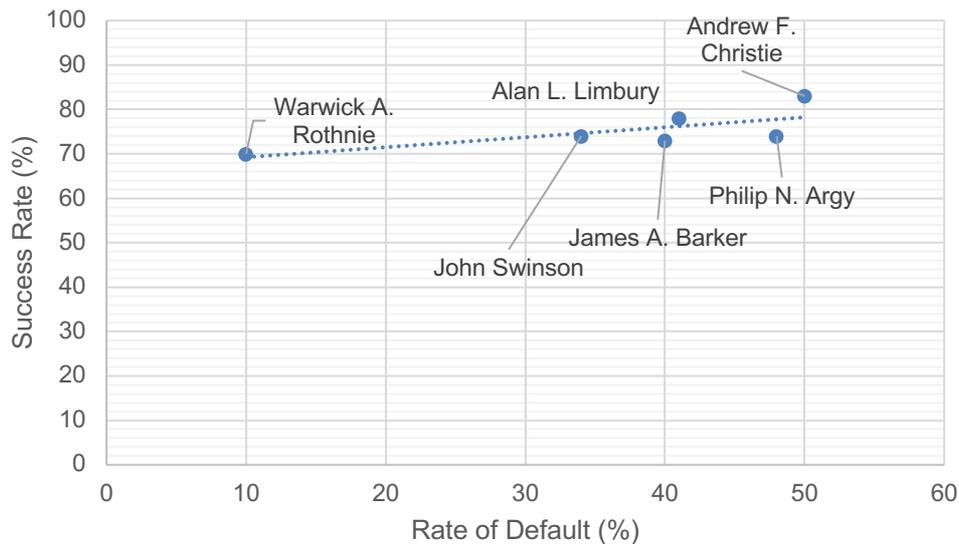


Figure 17: Success rate against rate of default for six most prolific panelists

IV. DISCUSSION

A. Characteristics of the Proceeding

Roy has observed that ‘there is an enormous difference’ in the number of auDRP proceedings compared with UDRP proceedings.⁷⁵ That is, of course, true in absolute terms. We estimate that, in the period under consideration, more than 55,000 UDRP cases were decided⁷⁶ – substantially more than the auDRP’s 470 cases. What matters, however, is not absolute numbers, but relative numbers – that is, the number of disputes as a proportion of domain name registrations. In the calendar year 2014 (the last year of the data for .au registrations shown in Figure 1), there were approximately 4,000 UDRP decisions at a time when the number of gTLD registrations was approximately 154

⁷⁵ Roy, above n 29, 15.

⁷⁶ This estimate is calculated by using counts of the number of UDRP decisions extracted from the WIPO ‘Domain Name Dispute Resolution Statistics’ database (<<https://www.wipo.int/amc/en/domains/statistics/cases.jsp>>) and from the National Arbitration Forum (NAF) ‘Domain Name Dispute Proceedings and Decisions’ database (<<https://www.adrforum.com/domain-dispute/search-decisions>>). The count of WIPO and NAF cases is an underestimate of all UDRP decisions, as it does not include decisions by the other, smaller (in terms of cases handled) UDRP service providers (Arab Center for Domain Name Dispute Resolution; Asian Domain Name Dispute Resolution Centre; Czech Arbitration Court Arbitration Center for Internet Disputes) or the even smaller former UDRP service providers (CPR: International Institute for Conflict Prevention and Resolution; eResolution).

million.⁷⁷ This means that there were approximately 2.6 UDRP decisions for every 100,000 gTLD domain name registrations – essentially the same proportion of disputes to registrations as applies to auDRP proceedings (2.5⁷⁸). Thus, a .au ccTLD registration is as likely to be challenged under the auDRP as is a gTLD registration under the UDRP.

While the number of proceedings brought under the auDRP has risen steadily over the 15 years it has been in operation, the rate of increase is in line with the rate of increase in the total number of .au domain name registrations.⁷⁹ Thus, the likelihood of a .au domain name registration being disputed by a trademark owner is no greater now than it was when the proceeding was first introduced.

The rate at which a proceeding under the auDRP succeeds has not changed significantly over time. That success rate (74%⁸⁰) is lower than the success rate for proceedings under the UDRP that are filed with WIPO (89%⁸¹) – a difference which is statistically significant.⁸² The primary reason for the auDRP’s lower success rate seems clear: it has a lower rate of respondent default. For the reason explained below, default by the respondent is associated with a significantly higher likelihood of the complaint succeeding under both procedures – a success rate of 95% compared with 60% in auDRP proceedings,⁸³ and 94% compared with 66% in UDRP proceedings.⁸⁴ However, the respondent defaults substantially less often in proceedings under the auDRP than under the UDRP⁸⁵ – in only 38% of proceedings under the auDRP,⁸⁶ but in 72% of proceedings

⁷⁷ This estimate is obtained by subtracting from the total number of registrations across all TLDs (288 million) the total number of ccTLD registrations (134 million), as contained in Verisign’s *The Domain Name Industry Brief* (Volume 12, Issue 1, March 2015) <<https://www.verisign.com/assets/domain-name-report-march2015.pdf>>.

⁷⁸ See text at section III.A.1 above.

⁷⁹ See Figure 1 above.

⁸⁰ See Figure 9 above, and associated text.

⁸¹ WIPO, ‘Case Outcome (Consolidated): All Years’ <https://www.wipo.int/amc/en/domains/statistics/decision_rate.jsp?year=>>.

⁸² $\chi^2 = 112.488$, $p < .00001$.

⁸³ See Figure 15 above.

⁸⁴ See Christie, above n 22, 658.

⁸⁵ This finding is contrary to Roy’s supposition that the default rate in auDRP proceedings ‘seems to be quite a high figure’: Roy, above n 29, 24.

⁸⁶ See text at section III.A.6 above.

under the UDRP.⁸⁷ This fact alone is sufficient to explain most, if not all, of the difference in success rates between the two procedures.

However, this then raises the question of why there is such a large difference in the respondent default rates between the two procedures. A plausible explanation is the procedures' different restrictions on what domain names can be registered and by whom. Under the auDA 'Domain Name Eligibility and Allocation Policy Rules for Open 2LDs', a registrant may only register a domain name in an open .au 2LD that is either an exact match, abbreviation or acronym of the registrant's name or trademark, or otherwise closely and substantially connected to the registrant.⁸⁸ There is no equivalent restriction on registration of domain names in an open gTLD. It seems likely that the .au domain name eligibility and allocation rules limit the number of registrations by registrants who have no rights or legitimate interests in the domain name. If that is so, then one would expect the respondent default rate under the auDRP to be lower than under the UDRP, as there will be more proceedings in which the respondent can plausibly claim to have rights or legitimate interests in the domain name and thus a 'defence' to the complaint. It is logical that a respondent who has a plausible defence is more likely to file a response than one who does not.

Complainants have a clear preference for WIPO over RI as the service provider with which to file a complaint, in the ratio of 2:1.⁸⁹ Very importantly, given the allegations of systemic bias due to the complainant's entitlement to select the service provider, our findings show that there is no statistically significant difference in the rates at which WIPO-filed and RI-filed proceedings result in determinations in favour of complainants. Thus, the preference of auDRP complainants to file proceedings with WIPO must be based on some factor other than an expectation of allocation to a relatively more complainant-friendly panel. Since the filing fees of the two service providers are the same,⁹⁰ that other factor is not cost.

⁸⁷ See Christie, above n 22, 658.

⁸⁸ auDA Policy 2012-04 <<https://www.auda.org.au/policies/index-of-published-policies/2012/2012-04/>>.

⁸⁹ See Figure 2 above.

⁹⁰ See above n 102 for the amount of the filing fees.

Our data do not suggest an explanation for the preference. We note, however, that an early study in relation to service provider bias under the UDRP found that:

The alleged bias of the providers towards the complainants is not the main variable complainants are looking at in order to decide the most suitable provider. Instead, complainants seem to regard provider performance as the main concern in choosing a provider.⁹¹

Anecdotal evidence familiar to the first-named author is consistent with that finding. We believe it to be plausible that a perception of difference in service quality is the primary reason complainants under the auDRP prefer WIPO to RI as the service provider with which to file their complaint. However, further research is required to determine if this is in fact correct.

B. Characteristics of the Case

The typical complaint – in the sense of this being the most common form of a complaint – is one brought by a single organisation against another single organisation,⁹² is in relation to one domain name,⁹³ and is based solely on a trademark that is registered.⁹⁴ In the typical complaint, the respondent files a response,⁹⁵ the proceeding is determined by a single-member panel comprised of one of the 11 most prolific panelists,⁹⁶ and the outcome of the proceeding is an order of transfer of the domain name to the Complainant.⁹⁷

In the less common situation where the complaint is not based solely on a trademark, but is based either on a name alone or together with a trademark, the likelihood of the complaint succeeding is significantly lower. This finding is of importance, as it suggests

⁹¹ Jay P. Kesan and Andres A. Gallo, 'The Market for Private Dispute Resolution Services – An Empirical Re-Assessment of ICANN-UDRP Performance', (2005) 11 *Michigan Telecommunications and Technology Law Review* 285, 370.

⁹² See Figure 3 above, and the associated text.

⁹³ See text at section III.A.4 above.

⁹⁴ See Figures 5 and 6 above.

⁹⁵ See text at section III.A.6 above.

⁹⁶ See Table 1 above, and the associated text.

⁹⁷ See Figure 8 above.

that a complainant whose legal right is not solely a trademark has more difficulty proving all three of the elements that must be satisfied for a remedy to be ordered than does a complainant whose legal right is solely a trademark.⁹⁸ Since only the first of the three elements expressly refers to the legal right, it might be thought that it is this element which is harder to satisfy where the complaint is based on a name alone or together with a trademark. It must be recalled, however, that the first element is a ‘threshold requirement’,⁹⁹ and that the second and third elements usually would be considered by a panelist only if the first element is found to be satisfied.¹⁰⁰ This means that if the second or the third element is under consideration, invariably it has been established by the panel that the domain name is identical or confusingly similar to the legal right on which the complaint is based.

It is conceivable that it is more difficult for a complainant to demonstrate that the respondent has no rights or legitimate interests in the domain name, and/or that the respondent has registered or used the domain name in bad faith, in the situation where the legal right (in respect of which the domain name has been found to be identical or confusingly similar) is not solely a trademark. Thus, it is plausible that it is the second element or the third element, rather than the first element, that is more difficult to satisfy when the complaint is based on a name alone or together with a trademark. One reason that this might be so is that a name is inherently more likely to be descriptive than is a trademark. A trademark is, by definition, distinctive, and descriptiveness is the antithesis of distinctiveness. A name, by contrast, need not be distinctive; and thus may, and sometimes will, be descriptive. It seems plausible, in principle, that the more descriptive is the legal right on which the complaint is based, the more likely it is that the respondent can show rights or legitimate interests in a domain name that is identical or confusingly similar to that legal right. Further research is necessary to determine whether this is in fact the reason that complaints not based solely on a trademark succeed less often.

⁹⁸ The three elements that must be satisfied are contained in paragraph 4(a) of the auDRP, which is set out in section I.B above.

⁹⁹ See *auDA auDRP Overview 1.0*, n 36 above, paragraph 1.1.

¹⁰⁰ There is no appellate mechanism in the auDRP (or in the UDRP). That is to say, there is no ‘higher panel’ to which an unsuccessful party can appeal a determination. As a consequence, there is no requirement for a panel to – and, therefore, a panel typically does not – make a finding on one of the elements of the auDRP when the panel has already found that another of the elements of the auDRP is not satisfied and thus that the complaint does not succeed.

The likelihood of the complaint succeeding is also significantly lower in the less common situation where the complaint is based on a trademark but the trademark is not registered. Again, this is important, as it indicates that a complainant whose legal right is an unregistered trademark has more difficulty proving their case compared with a complainant whose legal right is a registered trademark. As with the previously discussed observation about complaints based on a name, and for the same reasons, it cannot be said definitively that it is the first element that is responsible for this difficulty. Further research is necessary to determine why complaints based on an unregistered trademark succeed less often.

The finding that the likelihood of a complaint succeeding is significantly greater when the respondent does not file a response is important, even if it is not surprising. According to the *auDA Overview of Panel Views on Selected auDRP Questions First Edition*: ‘panels may draw appropriate inferences from a respondent's default, including that the complainant’s factual allegations that are not inherently implausible are true, and that any evidence the respondent might have given would not have been in its favour’.¹⁰¹ Our finding suggests that panels do in fact draw those inferences, and do so to a large degree.

C. Characteristics of the Decision-Maker

Our finding that the likelihood of a complaint succeeding is significantly lower when it is determined by a three-member panel rather than a single-member panel is also important, but is less easy to explain. The outcome of a three-member panel case is determined by majority rather than by consensus. Thus, a complaint will succeed so long as two or more of the panelists in a three-member panel finds for the complainant. Statistically, the chances of two or three panelists finding for the complainant is the same as the chances of two or three panelists finding for the respondent, all things being equal. Therefore, the number of the panelists *per se* cannot be the reason for a lower success rate in three-member panel cases.

¹⁰¹ *auDA auDRP Overview 1.0*, above n 36, paragraph 4.6.

A proceeding is determined by a three-member panel only when either the complainant or the respondent elects for that. The data in the auDA Archive do not disclose which party makes the election where the determination is by a three-member panel. We do know, however, that the *additional* cost of a three-member panel – which is currently \$2,500¹⁰² – is borne fully by the complainant where the complainant makes the election, but is shared equally between the complainant and the respondent where the respondent makes the election.¹⁰³ Thus, all things being equal, we would expect it to be the respondent rather than the complainant who would elect for a three-member panel. While our finding that a three-member panel is more likely to determine that the complaint fails is consistent with that expectation, that expectation does not explain the finding.

If a respondent does not elect for a three-member panel then it will not incur any filing fee. Thus, we would expect that a respondent will only elect for a three-member panel if, all things being equal, it expects a three-member panel to be more likely to find in its favour. Again, our finding is consistent with the expectation, but it is not explained by it.

What, then, is the explanation for the lower rate of success of three-member panel determinations? Given our finding that the success rate is significantly higher where the respondent defaults, the most likely explanation is because the rate of respondent default is significantly lower in three-member panel cases. As explained above, logically it is the respondent who is most likely to elect for a three-member panel. A respondent cannot elect for a three-member panel when it fails to file a response. Conversely, therefore, a respondent can only elect for a three-member panel when it files a response. It follows that we would expect most three-member cases to be ones in which the respondent filed a response – and, therefore, are cases in which it is more likely that the complainant cannot prove the elements required for the complaint to succeed. Our findings do indeed show that the respondent files a response more often in three-member panel cases. Thus, we believe that the reason the success rate is lower in three-member panel cases is because the respondent is much more likely to have filed a response – which, in turn, means the

¹⁰² As of December 2018, the filing fees at both WIPO and RI for a complaint concerning one to five domain names are \$2,000 for determination by a single-member panel, and \$4,500 for determination by a three-member panel (both exclusive of GST)
<<https://www.wipo.int/amc/en/domains/fees/ctlds/au/index.html>> and
<<https://www.resolution.institute/dispute-resolution/fees-2>>

¹⁰³ auDRP Rules, rule 6(c).

complainant is required to make out its case on each of the three elements by providing evidence, rather than by relying on adverse inferences.

Our final finding of importance is that there is no statistically significant difference in the success rates of the single-member panel proceedings determined by the six most prolific panelists (who, between them, have decided two-fifths of all such proceedings). This finding shows that experience, developed through determining a large number of cases, produces consistency in outcomes of determinations. It also shows that the likelihood of any particular complainant succeeding is not dependent on the identity of the panelist appointed to decide the case, at least where that panelist is very experienced.

V. CONCLUSION

The mandatory nature of an auDRP proceeding means that close consideration should be given to whether or not it is a fair process. While the precise characteristics of a ‘fair’ process are debatable,¹⁰⁴ it is certain that they include, at a minimum, consistency in outcome – that is, that like cases will be judged alike. Our findings provide strong support for the conclusion that the auDRP produces consistent outcomes. Over the first one and one-half decades of the auDRP’s operation, the rate at which complaints succeed has not changed to a statistically significant degree. Furthermore, there is no statistically significant difference in the success rates between the two service providers or between the most prolific panelists. Where there is a statistically significant difference in success rates, it is associated with a difference in the characteristics of the individual case – namely, that the complaint is based solely on a trademark rather than on a name alone or together with a trademark, or on a registered rather than an unregistered trademark, or that the complaint is not defended by the respondent.

¹⁰⁴ Interestingly, despite the use of ‘fair’ and ‘unfairness’ in the title of his article, Geist does not expressly identify what he considers to be the characteristics of a ‘fair’ system. It is, however, implicit that he considers a fair system to be one in which there are few or no ‘inconsistent and clearly incorrect decisions’: Geist, above n 30, 930. Essentially the same view of fairness is taken by Mueller, who states ‘The best way to ensure fairness is to ensure that the dispute resolution service providers have the strongest possible incentive to apply the UDRP correctly.’: Mueller, above n 33, 161.

An ICANN review in 2011 concluded that the UDRP produced outcomes that were, in general, consistent and fair.¹⁰⁵ We consider that our analysis of 15 years of auDRP decisions provides empirical evidence establishing that the same conclusion can be drawn about the Australian domain name dispute resolution procedure.

¹⁰⁵ ICANN, 'Final GNSO Issue Report on the Current State of the Uniform Domain Name Dispute Resolution Policy' <gnso.icann.org/issues/udrp/udrp-final-issue-report-03oct11-en.pdf>.