

Simon on Fair Use under the UDRP

David A. Simon (Harvard Law School and Harvard College) has posted An Empirical Analysis of Fair Use Decisions Under the Uniform Domain-Name Dispute-Resolution Policy on SSRN. Here is the abstract:

For over ten years, the Uniform Domain-Name Dispute-Resolution Policy (UDRP) has resolved nearly 20,000 domain-name disputes brought before the World Intellectual Property Organization (WIPO), a United Nations organization that arbitrates UDRP disputes. The UDRP allows the holder of a legally protectable trademark to initiate proceedings to cancel the domain name or have it transferred to the trademark owner. Domain-name holders, though, have a number of defenses, including using their domain names in a noncommercial, fair manner. Although several empirical studies have analyzed various aspects of the UDRP, none has specifically examined this fair use defense.

This study does what others have not. It analyzes the fair use defense in decisions before WIPO. Using WIPO's online decision database, this study found that arbitrator and respondent nationality influence the success of a respondent's fair use claim to a statistically significant degree. Specifically, respondents from the United States are more likely than those from other countries to succeed on a fair use defense. Additionally, arbitrators from the United States are more likely than those from other countries to find that a respondent's use of a domain name was fair. This means that, under the UDRP, respondents from the United States enjoy greater speech protections than those from other countries, and that arbitrators from the United States are more sympathetic to speech interests than arbitrators from other countries. To improve the UDRP, I propose two revisions. First, ICANN should adopt a choice of law provision stating that the law of the respondent's home country governs fair use disputes. Second, ICANN should implement a panel assignment provision in fair use cases that requires arbitrators to share the nationalities of the litigants.