

UDRP REFORM POLICY PLATFORM 2018

Version: 1.1



Accountability, Uniformity, Predictability, Balance.



BACKGROUND TO THE UDRP

The Internet Corporation for Assigned Names and Numbers ("ICANN") is a California-based, not-for-profit corporation, whose purpose is to provide operational stability on the Internet. ICANN is charged with managing the development and architecture of domain names, and coordinates the Internet Assigned Numbers Authority functions, which are key technical services critical to the continued operations of the Internet's underlying address book, the Domain Name System or "DNS".

On August 26, 1999, ICANN adopted a Uniform Dispute Resolution Policy ("UDRP") and related Rules (the "UDRP Rules") for the resolution of certain limited kinds of domain name disputes between registrants and third parties, i.e. abusive registration of domain names, otherwise known as "cybersquatting", which is the practice of registering a domain name in bad faith.

All ICANN accredited registrars of ".com" and other domain names have adopted the UDRP and all registrants are therefore subject to the provisions of the UDRP by virtue of their obligations under their respective registration agreement with their particular registrar. Registrars reserve the right to cancel or transfer domain name registrations in certain circumstances, including: (a) receipt of an order from a court or arbitral tribunal, in each case of competent jurisdiction, requiring such action; and/or (b) receipt of a decision of an administrative panel requiring such action in any administrative proceeding to which the registrant was a party and which was conducted under the UDRP.

Under the UDRP, a party may file a complaint against a registrant over a particular domain name. In order to initiate the UDRP process, a complainant must file the complaint with an ICANN-accredited Dispute Resolution Provider ("DRP"). The only remedial action available to a DRP is the ability to order a registrar to either cancel or transfer the disputed domain name.

In order for the UDRP to apply to a dispute, and in order to succeed in a UDRP complaint, a complainant must prove that;

- a) the disputed domain name is identical or confusingly similar to a trademark in which the complainant has rights;
- b) the domain name registrant has no rights or legitimate interests in respect of the domain name; and
- c) the domain name was registered in bad faith and that it was also used in bad faith subsequent to its registration in bad faith.

The UDRP is based upon three primary documents: first, the "Policy" which sets out the scope, relief, and basis for mandatory administrative proceedings which may be brought within its ambit;

BACKGROUND TO THE UDRP

and secondly the “Rules” that set out the procedural requirements that must be followed in such a proceeding. Thirdly, there are “Supplementary Rules” which DRP’s have enacted and which provide for additional procedural requirements observed by the particular DRP’s.

The UDRP is intended to provide a streamlined, inexpensive administrative dispute-resolution procedure applicable only for the relatively narrow class of cases of "abusive registrations". Where a UDRP administrative tribunal considers the dispute to be a "legitimate" dispute involving longstanding domain name ownership rights (rather than a case of a registrant merely registering a domain name to target a known trademark owner), the policy of the UDRP is to refer the dispute to the courts and to not transfer the disputed domain name.

Since its inception in 1999, the UDRP has not undergone any reforms to the Policy itself, but without consultation with stakeholders, has undergone certain changes to the UDRP Rules which govern proceedings. In addition ICANN-accredited UDRP Dispute Resolution Providers have unilaterally revised their Supplemental Rules, which also govern UDRP proceedings, again without any consultation.

On October 9, 2015, ICANN issued a Preliminary Issue Report to Review all RPM’s (Rights Protection Mechanisms) in all gTLD’s (General Top-Level Domain Names). This was followed up with an ICANN Working Group established to review and possibly reform and update rights protection mechanisms, including the UDRP.

Through extensive examination of cases decided under the UDRP, the ICA has determined that there are numerous areas where reform of the UDRP is required. This is evidenced by numerous poorly decided UDRP case decisions, an increase in Reverse Domain Name Hijacking decisions, feedback from ICA members and advisors regarding procedural irregularities and issues, and a comprehensive analysis of the UDRP Policy, Rules, and Supplemental Rules.

The ICA is participating in the ICANN Working Group and developed four (4) key principles that should be espoused in any update to the UDRP, namely Accountability, Uniformity, Predictability, and Balance.

I. Accountability

The ICA believes that Accountability is needed in the UDRP. This means that Dispute Resolution Providers should be accountable to ICANN and that ICA should be accountable to UDRP participants and to the ICANN community.

DRP'S UNDER CONTRACT OR SIMILAR

The Problem: Currently DRP's are simply "accredited" by ICANN but once accredited, are unaccountable to ICANN.

The Solution: Put DRP's under contract or similar with ICANN.

The ICA Proposes that all current and future ICANN-accredited UDRP Dispute Resolution Providers be under contract or otherwise bound to an established set of requirements and performance parameters.

Currently, the five (5) ICANN-accredited Dispute Resolution Providers are not bound to any contract or comparable framework and have simply been initially "accredited" without any mechanism for ICANN de-accreditation or oversight whatsoever. ICANN has permitted these DRP's to operate entirely independently on an indefinite basis – with no accountability to anyone – unlike any other sphere of business relations and unlike any other credible system for the administration of justice. The ICA further proposes that any further accreditation of DRP's be frozen until such a mechanism is in place.

DRP COMPLIANCE FRAMEWORK

The Problem: Currently DRP's are not accountable for their conduct or performance.

The Solution: Establish a framework for oversight, standards, performance, and monitoring of all DRP's.

The ICA Proposes that in order to be a credible system for dispute resolution, DRP's be continually monitored for compliance with an established framework which establishes the DRP's mandate, role, restrictions, limitations, and performance levels.

Currently, there is no such framework in place whatsoever, and accordingly the ICA proposes that ICANN establish such a framework by contract or otherwise with each DRP, and make it enforceable by way of performance reviews, a de-accreditation process for breaches, and a complaints procedure.

DRP COMPLIANCE FRAMEWORK

Without an established framework, there is simply no accountability for DRP's, and DRP's will continue to operate in any manner that they see fit, regardless of the needs of UDRP participants. In the absence of a mandatory framework for DRP's, DRP's can continue to enact their own rules, employ whomever they choose to decide cases despite lack of qualifications or bias, take however long they want to release decisions, raise prices, add additional fees, maintain panelists on their roster despite conflicts of interest, issue decisions tantamount to amending the UDRP in substance. Both complainants and respondents have an interest in creating accountability, as without it, DRP's can continue in a totally unregulated fashion, making unsupportable decisions transferring valuable domain names away from innocent domain name investors or allowing respondents to hold on to domain names which they are clearly not entitled to under the UDRP.

DRP COMPLAINT PROCEDURE

The Problem: There is no mechanism for making complaints about DRP conduct or performance.

The Solution: Establish a procedure for receiving and investigating complaints about DRP conduct or performance

The ICA Proposes that as part of any framework established to regulate DRP's, that there be a public complaints process.

ICANN itself has carried on with the UDRP for 18 years despite having fully delegated its administration to DRP's with no oversight whatsoever. This amounts to ICANN unconscionably absolving itself of any responsibility for DRP conduct or performance.

There is no established mechanism for UDRP participants and the ICANN community to express concerns or make complaints regarding DRP conduct and performance. The absence of any such complaints procedure hurts dispute resolution participants, as they are the ones most familiar with issues, concerns, and inadequacies in DRP conduct and performance, and there is currently no mechanism for providing these valuable insights from the community to ICANN for possible remedial or enforcement actions. If a UDRP participant becomes aware of a breach of the proposed framework for DRP regulation, there needs to be a clear mechanism for conveying this concern or complaint to ICANN, and for ICANN to promptly investigate it and take remedial or enforcement action where necessary.

REGULAR REVIEW OF THE UDRP

The Problem: Until now, the UDRP has not undergone any substantive review since its inception 18 years ago.

The Solution: Mandate that the UDRP be reviewed at regular intervals.

The ICA Proposes that as part of the current review of the UDRP, that it be resolved to conduct subsequent reviews at regular intervals.

The UDRP is such an important feature of the domain name system administered by ICANN, that it should not be permitted to languish for another 18 years without opportunities for further discussion, re-evaluation, improvements.

Such reviews should take account of UDRP performance, and DRP performance stakeholder concerns and complaints of the UDRP and DRP's. ICANN staff should prepare for such reviews by reporting on UDRP statistics, performance, DRP compliance, and stakeholder concerns and complaints.

II. Transparency

The ICA believes that for the UDRP to be and to be perceived to be, a credible dispute resolution system which presides over valuable trademarks and domain names, Transparency should be a guiding principle in its administration. Transparency is fundamental to credible UDRP administration.

DISCLOSURE OF DRP OWNERSHIP

The Problem: Unlike in virtually any other facet of ICANN governance, DRP'S are not required to be Transparent and disclose their ownership interests, affiliations, and management.

The Solution: Require all existing and future DRP's to disclose their ownership, affiliations, and management.

The ICA Proposes that as part of the accreditation process and as a condition of continued accreditation, all DRP's be required to disclose all material aspects of their identity, including but not limited to ownership details, management details, affiliations, and interests.

DRP's are entrusted with administering the adjudication of disputes which are of paramount importance to trademark owners and domain name registrants alike. Countless millions of dollars have been spent on UDRP disputes involving domain names and trademarks which are of immense value. Despite that, DRP's have continued to operate opaquely, with no mandated disclosure of who owns them, who runs them, who they are affiliated with, or what outside interests they have.

In order to be a credible dispute resolution process and to avoid actual or even perceived conflicts of interest or other grave issues, ICANN and UDRP participants in particular, need to know who owns and operates DRP's and be prevented from changing their ownership and management without consent of ICANN. Otherwise, without any regulations or restrictions at all, serious issues can arise such as, for example, a DRP being owned or purchased by a party that has a vested interest in UDRP outcomes or who has a history of unlawful conduct. Furthermore, without restrictions on ownership and management, a DRP could "sublicense" or "franchise" its DRP operation to a third party, without any knowledge or consent of ICANN.

DRP PANELIST ACCREDITATION

The Problem: There is no Transparency of Panelist accreditation and de-accreditation standards and procedures.

The Solution: Establish standards and procedures for all Panelist accreditations and de-accreditations.

The ICA Proposes that ICANN establish standards and procedures for all DRP Panelist accreditation and de-accreditation. Currently, DRP's accredit and de-accredit Panelists without any established standards or procedures, and do so without any transparency whatsoever. Participants in UDRP procedures are not provided with any information whatsoever as to what standards particular DRP's employ with regards to who gets to be a Panelist. It is left entirely to the unknown discretion of DRP's.

UDRP Panelists play an integral role in the UDRP, and a transparent accreditation procedure is integral to a fair process, and one that is also perceived to be fair. Without transparency over accreditation of Panelists, UDRP participants cannot be certain that DRP's rosters are exclusively comprised of respected, experienced, credible, and knowledgeable adjudicators. Moreover, individuals who aspire to become an accredited Panelist are left without being provided with any transparent procedures and standards establishing a mechanism for qualification.

Moreover, without a transparent accreditation procedure, there can be no transparent de-accreditation procedure. De-accreditation should occur when an accredited Panelist fails to continue to meet accreditation standards.

There should be public notice of all Panelist accreditation and de-accreditation so that UDRP participants can knowledgeably monitor compliance with ICANN accreditation and de-accreditation standards and procedures, thereby enabling them to identify any accreditation related concerns and enabling them to make complaints to ICANN where a DRP has failed to abide by the standards and procedures.

UDRP DATA DISCLOSURE

The Problem: ICANN does not provide Transparent UDRP data disclosure.

The Solution: Regularly and consistently provide UDRP data across all DRP's.

The ICA Proposes that ICANN take responsibility for compiling and publishing UDRP data derived from all DRP's.

Currently, ICANN publishes no UDRP data whatsoever. ICANN does not publish a database of pending UDRP disputes nor does it publish UDRP decisions. It is left entirely to DRP's to decide how to publish details of pending disputes and completed UDRP cases, if at all. Furthermore, ICANN compiles no statistics regarding UDRP's, and again it is left entirely to DRP's if they choose to compile and publish such statistics, which statistics are compiled, and how they are published.

As a result, ICANN and UDRP participants are deprived of access to crucial data that would assist in evaluating the performance of the UDRP and UDRP participants in particular, are also hindered in making decisions in the conduct of UDRP's which are a factor of UDRP data.

ICANN should establish an agreed upon framework for data collection which all DRP's are required to contribute to, in a standardized format that ICANN can compile in a searchable format. ICANN should also determine which data sets are important and should be acquired.

It is unsatisfactory for DRP's to be permitted to fail to adequately compile and publish data, or fail altogether to compile and publish such data. Data such as party names, locations, trademarks, issues, outcomes, procedural orders, case law references, reverse domain name hijacking instances, and many other data sets, are all important and should be readily available and searchable across all UDRP disputes, regardless of the particular DRP involved.

There is substantial evidence of certain DRP's failing to publish decisions, failing to publish searchable decisions, and failing to fairly and comprehensively extract data for issues that are of concern to many UDRP participants. Left to compile and publish data on their own, DRP's will continue to either fail entirely to compile and publish, or compile and publish only selective data for their own DRP, making effective searching of data difficult or impossible.

PANELIST APPOINTMENT

The Problem: Panelists are appointed by DRP's in secret, without any Transparent methodology.

The Solution: Require DRP's to follow an established and fair procedure for appointing Panelists to UDRP cases.

The ICA Proposes that DRP's be required to appoint Panelists pursuant to an established and fair mechanism that prevents DRP's from unduly influencing the outcome of DRP's by unilaterally determining or impacting the appointment of Panelists.

The appointment of a Panelist to hear a UDRP dispute can have a crucial impact on the outcome of the dispute, and in some instances even arguably pre-determine its outcome based upon a particular Panelist's recorded inclinations on particular UDRP issues.

In single-Panelist cases, DRP's unilaterally appoint a Panelist from their roster. The roster is public, however which Panelist from the roster is selected by the DRP is unknown by the UDRP participants, and thereby lacks any transparency. If a DRP appoints the same Panelist over and over again, it may unduly impact the course of UDRP case law. Furthermore, by appointing certain panelists whose views on particular issues are known to the DRP, or whose records indicate to the DRP a certain predisposition to side with respondents or complainants, the DRP may be unfairly prejudicing UDRP outcomes and case law.

In three-Panelist cases, although parties are able to submit names for their own nominees to the Panel, the chair position is chosen from amongst candidates unilaterally selected by the DRP. Accordingly, the DRP is in a position to include Panelists whose views are known to the DRP on particular issues or are otherwise predisposed to side with a complainant or respondent.

Accordingly, the methodology for DRP's selection of Panelists from its roster is a crucial element in ensuring fairness and the perception of fairness in UDRP disputes.

DRP's should be required to use a 'round robin' system for appointment of Panelists, whereby the DRP is compelled to appoint (or nominate in the case of three-member Panels), the 'next Panelist on the roster list' and to certify same to the Parties, so that there is no room for unduly influencing Panel selection, and by extension, possibly unduly influencing UDRP outcomes. In the case of three-person Panels where greater experience may be desired for the chair position, an additional select list should be adopted by the DRP's, with transparent, public disclosure.

III. Uniformity

The ICA believes that the UDRP be truly “Uniform” regardless of which Dispute Resolution Provider administers the dispute and that no DRP be permitted to unilaterally create rules or procedures which have the effect of altering the uniformity of the UDRP.

FORUM SHOPPING

The Problem: DRP’s have been free to write their own supplementary rules which make the UDRP a hodgepodge of various rule sets which make UDRP procedure unnecessarily inconsistent and encourages forum shopping.

The Solution: Establish a Uniform set of Supplementary Rules common to all DRP’s.

The ICA Proposes that a single set of procedural rules govern all UDRP proceedings. Currently, each DRP has its own set of supplementary rules ostensibly as enabled by the ICANN Rules. Pursuant to the ICANN Rules, DRP’s can adopt Supplementary Rules which cover topics such as fees, word and page limits, and file size, forms of cover sheets, etc. But there is no good reason for a DRP to adopt its own version of Supplemental Rules when such topics should not vary between DRP’s. Fees should be established by ICANN pursuant to contracts or similar arrangements. Word length should be uniform so as not to enable one DRP to allow substantially longer or shorter pleadings than another DRP, as this substantially affects the nature and efficacy of the proceeding. File sizes should be uniform as each DRP is equipped to handle standard file sizes. Cover pages should be uniform as there is no reason to vary from a standardized approach. Uniform Supplementary Rules would enable UDRP practitioners, parties, and panelists to take the same procedural steps in each case, regardless of the DRP involved, thereby increasing the ease of use of the UDRP.

It would also avoid the risk of ad hoc procedural regulations impacting outcome. It would prevent DRP’s from raising filing fees or adding new additional filing fees, which they are entirely free to do now, and in fact have done. If DRP’s were to all decide to raise filing fees dramatically, there is no current recourse under the Policy, and they would indeed be permitted to do so under the current Rules.

Furthermore, the absence of a Uniform set of Supplement Rules encourages DRP’s to compete with each other by providing more favorable procedures to Complainants, who are ultimately the primary client of DRP’s.

INCONSISTENT SUPPLEMENTAL RULES

The Problem: Even though the ICANN Rules expressly forbid DRP's from adopting Supplemental Rules which are "inconsistent" with the Policy or which "conflict" with the Rules, at least one DRP has unilaterally adopted such prohibited Supplementary Rules, without any recourse available to UDRP participants.

The Solution: Prohibit any DRP from unilaterally adopting any Supplemental Rules whatsoever without consultation and ICANN oversight, and require ICANN approval prior to adoption of any Supplemental Rules or procedures.

The ICA Proposes that all existing DRP Supplemental Rules be extinguished in favor of a single uniform rule set common among all DRP's. To the extent that any DRP purports to require its own set of Supplemental Rules or procedures, it should be required to consult with ICANN stakeholders and obtain ICANN approval prior to the adoption of same.

A prime example of DRP's unilaterally establishing Supplemental Rules is where a DRP's Supplemental Rules expressly permit the filing of "additional written statements and documents", beyond the Complaint and the Response. This is clearly in conflict with UDRP Rule 12 which by implication states that the UDRP process involves only a Complaint and a Response, with only the possibility of the Panel itself requesting further statements or documents from either of the parties. By departing from the Rules, the DRP has effectively added another costly layer to the UDRP procedure which is inconsistent with the Policy, without any consultation, authorization, or oversight.

DRP PANELIST ROSTERS

The Problem: The Rules permit parties to nominate Panelists for three-member Panel disputes and even permit a Complainant under Rule 6(d) to nominate a Panelist from any DRP's roster, but the language is unclear as to whether this also applies to Respondents. Furthermore, DRP's tend not to appoint Panelists drawn from other DRP rosters, despite the Rules. As a result, the Uniformity as between particular DRP's that would otherwise be afforded to Parties as a result of an effectively 'shared' roster, is substantially diminished.

The Solution: Revise Rule 6(d) to make it clear that both Complainants and Respondents can nominate Panelists from any DRP roster, and also require DRP's to report to ICANN on a regular basis on the number of Panelists appointed from another DRP.

The ICA Proposes that Rule 6(d) to make it crystal clear that all

DRP PANELIST ROSTERS

candidates nominated by parties to a three-member Panel dispute may be drawn from any DRP, and that DRP's be monitored for compliance.

Rule 6(d) on its face sets out that when a Complainant nominates its candidates, the Complainant may draw from any DRP roster, but there is no comparable language provided for Respondents. The understanding has nevertheless been that this provision applies to Respondents as well, but greater clarity is required. Moreover, anecdotal evidence suggests that despite being permitted to nominate candidates from a DRP other than the one that is administering the particular dispute, DRP's tend to favor their own in-house Panelists rather than willingly appoint a Panelist from another DRP. DRP's have an interest in sending files to their own Panelists so as to satisfy their own contractors.

In order to overcome this natural bias of DRP's, monitoring and oversight is required. By requiring DRP's to report to ICANN on the number of outside Panelists nominated by a party during a reporting period, and the number of outside Panelists actually appointed by the DRP, it will become clear whether a DRP is abiding by the Rules or whether it is abrogating its responsibilities and thereby breaching its contract or similar arrangement with ICANN.

IV. Predictability

The ICA believes that steps be taken to enshrine the principle of ‘Predictability’ in UDRP decision making by Panelists so that parties can be reasonably reliant on Panels following established precedent and consensus views on common UDRP interpretation issues. Consistent interpretation of the Policy by Panelists will more often produce predictable outcomes.

ROGUE INTERPRETATIONS

The Problem: Currently, Panelists who disregard well-established interpretations of the Policy continue to be assigned to numerous UDRP cases, which no recourse, no oversight and no de-accreditation mechanism in place to remove these “rogue” Panelists who threaten the Predictability of the UDRP.

The Solution: Require all DRP’s and Panelists to subscribe to a single ‘Consensus View’ and be subject to discipline and/or de-accreditation for failure to apply the interpretations established by the Consensus View.

The ICA Proposes that through consultation and consensus amongst UDRP participants and ICANN stakeholders, a single “Consensus View” of UDRP interpretation be established to increase predictability of Panel decisions. Without such an interpretative tool being required for all Panelists, Panelists will continue to issue outlying decisions which harm the credibility and efficacy of the UDRP at tremendous costs to UDRP participants.

While one DRP has created its own “Consensus View”, this alone is inadequate for a number of reasons. First of all, this interpretative tool was unilaterally created without wide consultation and input from UDRP participants. Second of all, it is not common nor is it adhered to by all DRP’s. Third of all, there is no requirement that Panelists adhere to it. Accordingly, although the concept behind this existing Consensus View is helpful, Predictability requires that one unitary and universally accepted interpretative tool be developed for all Panelists across all DRP’s, and that there be a mechanism for identifying, disciplining, and/or de-accrediting DRP’s and Panelists who do not adhere to it.

The weakening of the Policy by certain Panelists who have negligently or purposefully departed from well-established precedent and interpretation has encouraged dozens of frivolous complaints and is directly responsible for the recent surge in abusive complaints and RDNH findings.

Without high levels of predictability, parties are encouraged to file frivolous pleadings employing outlandish or discredited UDRP theories in the hopes that they will draw a rogue Panelist or Panelists who easily depart from well-established precedent and principles.

V. Balance

The ICA believes that Balance be enshrined as a guiding principle in the administration of the UDRP procedure. In the UDRP, it is not the case that only one party has rights and that only one party is subject to harm. While the UDRP was created to address the harm of cybersquatting suffered by trademark owners, The UDRP should find the proper balance between protecting trademark rights and respecting the ownership rights of domain registrants.

STAGGERED FEES

The Problem: Certain DRP's accept cases with fees being paid by Complainants on a 'staggered basis', with the balance of fees only being payable after a Response is filed. This can lead to Complainants deciding to not pay the second installment once they receive a Response, after the Respondent has already incurred substantial expense and the domain name has already been locked. There is no remedy in the Policy or the Rules for this eventuality.

The Solution: Where a Complainant fails to pay its second installment of fees, the DRP should be required to appoint a single Panelist who is directed to make a finding of bad faith against the Complainant, refund the Respondent's fee, and prohibit that Complainant from bringing another UDRP Complaint to any DRP.

The ICA Proposes that the Rules be amended to provide for the eventuality of a Complainant refusing to pay the second installment of a DRP fee after a Respondent files a Response and elects a three-member Panel.

There is a gap in the Rules that enables a Complainant to game the system. As currently drafted, the Rules and DRP Supplemental Rules are silent on what happens if a Complainant files a Complaint electing a single-member Panel, receives a Response electing a three-member Panel, and then fails, refuses, or neglects to pay the additional fee levied against the Complainant in respect of the three-member Panel. Some unscrupulous Complainants may see this as an opportunity to abscond from the proceeding when faced with a strong Response or an allegation of Reverse Domain Name Hijacking. DRP's are helpless in such circumstances, as the Rules do not address this contingency.

If a Complainant fails, refuses, or neglects to pay its second installment of fees within a five-day period without excuse, it is demonstrative of the Complainant's abuse of the UDRP process, and a single-member Panel should be appointed by the DRP and that Panelist should be directed to make a finding of RDNH against the defaulting Complainant. Only in that way is such a Complainant dissuaded from attempting to obstruct the proceeding by failing to pay for the three-member Panel.

ADDITIONAL SUBMISSIONS

The Problem: Currently Complainants will file an additional submission as a rebuttal to a Response, notwithstanding that it is not permitted by the Rules, and it will be put in front of the Panel by the DRP whether it is ultimately admitted by the Panel or not. This prejudices the Panel as they are provided with an additional submission even though it may be entirely improper and ultimately disallowed by the Panel.

The Solution: Additional submissions should continue to be prohibited but the Rules should make this even clearer. Where exceptional circumstances are claimed by a Complainant to justify an unsolicited additional submission, the Rules should require a Complainant to submit its claim for an additional submission and await a favorable ruling before submitting the additional submission itself.

The ICA Proposes that the Rules governing additional submissions need to be more fairly Balanced in favor of Respondents. Currently, and despite the Rules, Policy, and case law providing otherwise, Complainants will with exceeding frequency, unilaterally submit a “rebuttal” in response to a Response. This puts Respondents in an untenable position. First of all, the Complainant will file the rebuttal at a time of its own choosing unless a particular DRP’s Supplemental Rules provide otherwise, making it possible to file a rebuttal weeks or even months after the Response is filed and while deliberations are already underway. Secondly, by putting its rebuttal before the Panel regardless of whether it is admissible, as DRP’s invariably will do, Respondents are prejudiced since they have not yet had an opportunity to object to the submission of the filing and the purported grounds for same, if any. Thirdly, when faced with a rebuttal filed without authorization from the Panel, often while the Panel deliberations are already underway, a Respondent will often be compelled to respond with a lengthy and costly additional filing of its own, only to find out later that the Panel has disallowed the Complainant’s rebuttal. The best procedure would be to require the Complainant to submit its request to file an additional submission with supporting reasons and await a ruling, prior to filing any additional submission.

ISSUE CONFLICTED PANELISTS

The Problem: Many UDRP panelists also represent UDRP complainants and are not only “rule-makers” but also “rule users”. This dual role enables such panelists to directly or indirectly, consciously or unconsciously, make rules which can later be used to benefit their clients. This is referred to as “Issue Conflict”. Moreover, there is an appearance of bias when panelists are drawn from amongst complainant advocates, since their professional interests can unduly inform their judgment and cast doubt upon their impartiality.

The Solution: Prohibit panelists and their firms from representing parties in UDRP disputes. Permitting issue-conflicted panelists taints UDRP decisions and unnecessarily causes the UDRP to be brought into disrepute.