

**THE UNIFORM DOMAIN NAME DISPUTE RESOLUTION PROCESS AND
THE APPEARANCE OF IMPARTIALITY:
PANELISTS IMPALED ON THE HORNS OF A DILEMMA**

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The Uniform Domain Name Dispute Resolution Process (the "UDRP") is in many ways unique. Adopted by the Internet Corporation for Assigned Names and Numbers ("ICANN") on October 29, 1999, the UDRP provides for an administrative procedure for the resolution of disputes involving allegations that a domain name has been registered **and** is being used in bad faith to the detriment of a trademark or service mark held by the complaining party. The procedure is remarkable in at least three aspects: 1) absent exceptional circumstances, there is no in-person hearing (including by teleconference, videoconference and web conference), 2) the filings, communications, and a good portion of the panelists' deliberations take place largely online, and 3) the panel decisions are posted on the Internet and are publicly available. The UDRP is incorporated by reference into every registration agreement of a generic Top Level Domain ("gTLD").¹ Every registrant agrees to submit to the administrative procedure should a trademark holder manifest its agreement by filing a claim under the UDRP.

As in international arbitration, the individuals who determine the disputes (the UDRP panelists) are privately employed, rather than employees of the state. Like international arbitrators, the panelists derive only a portion of their income from acting as arbitrators. Indeed, the compensation that even the most active panelists receive from their work as a panelist is only a small fraction of their income. This system carries with it certain advantages, as the individuals who act as panelists come from varied backgrounds with different talents to contribute to the dispute resolution process. Many

¹ gTLDs are the generalized domain names that follow the "dot." Originally, there were seven gTLDs established: *.com*, *.net*, *.org*, *.gov*, *.edu*, *.int*, and *.mil*. Recently seven others have been approved: *.biz*, *.info*, *.name*, *.coop*, *.museum*, *.aero*, and *.pro*. These are to be distinguished from the country code Top Level Domains (ccTLDs) such as *.fr* (France) and *.ca* (Canada).

of the panelists are retired judges, who bring experience in approaching matters from a judicial perspective, experience in evaluating documentary evidence, in weighing credibility, and in interpreting and applying the law and rules to a given set of facts. Others are professors of law who bring with them an overall knowledge of trademark law, many with familiarity with international trademark law, many with experience in more than one legal system, and all with an eye to the development of the law and to the improvement of the overall body of trademark law, especially in light of the new technologies. Finally, there are private legal practitioners, often specialists in trademark law and members of private law firms, who bring an active knowledge of the law based on daily counseling and representation of clients, and an intimate awareness of their clients' concerns and aspirations. Practitioners bring a practical, commercial perspective to the dispute resolution task at hand.

But the UDRP process is different from international arbitration in significant ways. Unlike in international arbitration, but as in national court systems, the decision is publicly available, and is often the source of public comment and criticism.² There is a public interest in the UDRP that is not present in international arbitration, which is viewed as a privately agreed process, generally between two commercial entities, in which the parties agree on the rules and procedures by which their particular dispute will be resolved. The parties' dispute is heard privately and the arbitration award is issued only to the parties involved. The method by which a private, non-profit corporation was established to preside over the assignment of names and numbers for the Internet and to

² UDRP Policy, ¶ 4.j (available at <http://www.icann.org/udrp/udrp-policy-24oct.99.htm>).

establish a private dispute resolution system for dealing with the problem of cybersquatting is the subject of international attention and incessant public scrutiny.³

An international arbitration practitioner may frequently act as an arbitrator and as counsel in arbitrations. The positions the international advocate takes in private arbitrations rarely become known beyond the small circle involved in those proceedings, and such advocacy is readily accepted in the arbitration community and causes no perception problem for the advocate/arbitrator. However, the UDRP panelist is more like a national judge, than the panelist is like an arbitrator. There is a good deal of the public interest invested in the process. The panelist is a participant in a grand experiment in which a private dispute resolution system has been established to deal with a publicly recognized problem, one on which total international consensus has not been reached. The rules and procedures are set, and once a complainant elects to file a complaint, the complainant and respondent cannot vary the rules and procedures by agreement,⁴ as they are able to do in arbitration. The panelist's decision is posted on the Internet and is freely available to the public at large.⁵ When the UDRP panelist acts as an advocate, it is frequently in the national court system where the panelist is admitted to practice, and his activities are public and easily discoverable. Unlike in international arbitration, where the circle of interested parties consists largely of sophisticated international lawyers and

³ Web sites established to evaluate and critique ICANN and the UDRP include (1) <http://www.icannwatch.org>; (2) <http://www.udrplaw.net>; (3) <http://www.udrpinfo.com>; (4) <http://www.lextext.com/icann/index.html>; (5) <http://www.tbtf.com/roving-reporter/index.htm>; (6) <http://www.domainhandbook.com/icann3.html#news>; (7) <http://www.cpsr.org/internetdemocracy>; (8) <http://www.internetdemocracyproject.org>; (9) <http://www.domainbattles.com>; and (10) <http://www.dnlnr.com>.

⁴ UDRP Policy, ¶¶ 4 and 9 (available at <http://www.icann.org/udrp/udrp-policy-24oct.99.htm>). UDRP Rules, ¶¶ 3(a)(i) and 10(a) (available at <http://www.icann.org/udrp/udrp-rules-24oct.99.htm>).

⁵ Available at <http://www.icann.org/udrp/proceedings-list.htm> (organized by date), <http://www.icann.org/udrp/proceedings-list-number.htm> (organized by proceeding number), and <http://www.icann.org/udrp/proceedings-list-names.htm> (organized by domain name).

multinational corporations, the parties interested in the UDRP process are often private individuals with little experience with the litigation process or with trademark law. The audience of the UDRP process is far more likely to find an appearance of impropriety in a given situation than is the more legally sophisticated audience of international arbitration.

Thus, any analysis of the obligations of a UDRP panelist to be impartial and independent must be conducted in the light of both how those obligations apply to an arbitrator and how those obligations apply to a judge. The UDRP panelist is neither fish, nor fowl, but is caught somewhere in between. If the system is to gain the acceptance and the respect of the public, it must not only be fair, but must also appear to be fair. This may require some modification in the make-up of the panel, the nature of the process, or the way in which cases are assigned.

THE CONCEPTS OF "INDEPENDENCE" AND "IMPARTIALITY"

Almost ten years ago I was reflecting on this subject from the viewpoint of an international commercial arbitrator, and my reflections resulted in a published article.⁶ The distinction between "independence" and "impartiality" that I articulated there still seems appropriate. The term independence is one that measures the relationship between the arbitrator and the parties or their counsel - personal, social, and financial. The closer the relationship in any of these spheres, the less "independent" the arbitrator is from the party. The measurement is an **objective** one in that it is generally easy to determine whether the arbitrator and a party are in kinship, whether they have business or financial relations, and whether and to what degree they are involved socially. It looks for the appearance of bias, not its actual presence. Thus, although it is possible for someone who

⁶ Donahy, "The Independence and Neutrality of Arbitrators," Vol 9, No. 4 *Journal of International Arbitration* 31 (December 1992).

is closely related to a party, in a party's employ, or a close friend of a party, to be able to judge a case in which that party is involved without bias toward that party, the other party in the matter would likely doubt the impartiality of the arbitrator under the circumstances.

Impartiality is the absence of impermissible bias in the mind of the arbitrator toward a party or toward the subject matter in dispute. This is a subjective test, since it is impossible to directly measure. It is a test, not for the appearance of bias, but for its actual presence. The presence of bias is inferred from the facts and circumstances surrounding the arbitrator's exercise of the arbitral function. Only the arbitrator is capable of knowing for certain whether he or she is impartial. An arbitrator's lack of independence and the way that the arbitrator conducts the proceedings may give rise in the minds of others to an appearance of partiality.

A. As Applicable in International Arbitration

Arbitral codes of ethics speak of the duty of the arbitrator to avoid the appearance of partiality:

After accepting appointment and while serving as an arbitrator, a person should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias.⁷

The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises where an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.⁸

Facts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias. The same is true if an arbitrator has a material interest in the outcome of the

⁷ American Arbitration Association/American Bar Association Code of Ethics for Arbitrators in Commercial Disputes (1997), Canon I, (D).

⁸ International Bar Association Rules of Ethics for International Arbitrators, Art. 3.1.

dispute, or if he has already taken a position in relation to it. The appearance of bias is best overcome by full disclosure as described in Article 4 below.⁹

International arbitration rules require disclosure of the facts and circumstances that may cause a reasonable person to apprehend bias on the arbitrator's part. The United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules requires a potential arbitrator to disclose "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."¹⁰ The American Arbitration Association ("AAA") International Rules use virtually identical language.¹¹ The World Intellectual Property Organization ("WIPO") Arbitration Rules employ very similar language, requiring a prospective arbitrator to disclose "any circumstances that might give rise to justifiable doubt as to the arbitrator's impartiality or independence."¹²

All of these disclosure requirements are intended to avoid a "justifiable doubt" as to an arbitrator's impartiality. No guidance is offered as to when a doubt is justifiable and when it cannot be justified. Much, of course, depends on the sophistication of the party entertaining the doubt or that of the person charged with evaluating the doubt.

Nowhere in the various codes and rules is a potential arbitrator precluded from acting as an advocate in another matter or from taking legal positions in such representations on the same types of issues that may be before him in the arbitration. The arbitrator is a private party, selected in part for her expertise in the industry or in the particular area of the law. The arbitrator is not expected to forego other remunerative

⁹ Id., Art. 3.2

¹⁰ UNCITRAL Arbitration Rules, Article 9.

¹¹ AAA International Arbitration Rules, Art. 7.

¹² WIPO Arbitration Rules, Article 22(b).

engagements in her particular field, simply because she has agreed to act as an arbitrator in a given dispute.

B. As Applicable in National Court Proceedings

The Code of Conduct for United States Judges covers the ethical norms expected of federal judges in the United States.¹³ There are no disclosure requirements for federal judges. Rather a judge is mandated to avoid the appearance of impropriety and to disqualify himself in any proceeding in which the judge's impartiality might reasonably be questioned.¹⁴ The Commentary to Canon 2A is particularly instructive and seems equally applicable to UDRP panelists. "[a] judge must expect to be the subject of constant public scrutiny." "The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." What is a "reasonable mind" must be determined in the same way that one determines a "justifiable doubt."

Unlike a UDRP panelist, a judge derives virtually her entire income from her activities as a judge.¹⁵ A judge is prohibited from acting as an arbitrator or mediator and from the practice of law.¹⁶ This prohibition eliminates the possibility that she will be

¹³ Code of Conduct for United States Judges (1996-97), available at http://www2.law.cornell.edu/cgi-bin/fofiocgi.exe/judicial/query+*/doc/{t1}?.

¹⁴ Code of Conduct for United States Judges, Canons 2 and 3C.

¹⁵ A judge is permitted to receive compensation and reimbursement of expenses for law-related and extra-judicial activities, such as speaking, writing, and teaching, so long as the source and amount of the income are publicly reported. Code of Conduct for United States Judges, Canon 6. Such compensation constitutes only a very small percentage of a judge's income.

¹⁶ Code of Conduct for United States Judges, Canons 5E and 5F.

seen taking positions on matters similar to those before her as a judge, which might create in "reasonable minds" a perception that she was lacking impartiality.

C. As Applied to the UDRP Panel

The question of zealous representation of a client by a UDRP panelist was recently the subject of a *New York Times* article and of critical email commentary.¹⁷ A copy of letter that a UDRP panelist had written threatening legal action if certain domain names were registered was given to the newspaper and quoted from in the article. The UDRP panelist in question who authored the article explained that he was merely engaged in the diligent representation of his client, as lawyers in the United States are ethically bound to do.¹⁸ Nevertheless, much criticism was directed at the panelist and his ability to act impartially was questioned.

Having served with the UDRP panelist in question on more than one three-person panel, the author can testify to the individual's impeccable integrity and absolute impartiality. However, this incident illustrates that as public scrutiny increases, the tests for avoiding even the appearance of impartiality become more stringent. It may be argued that the process would be better served if no panelist (or panelist's law firm?) could act on behalf of a party in a trademark or domain name dispute. Since no UDRP panelist derives any significant percentage of her income from her work as a panelist, this would effectively eliminate the services of all practitioner panelists. This would, of

¹⁷ *New York Times*, August 29, 2001, Business, p.2. In addition to emails directed to providers and panelists, comments were posted at www.icannwatch.org/article.php?sid=322.

¹⁸ "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." American Bar Association, Model Rules of Professional Conduct, Comment to Rule 1.3.

course, deprive the UDRP of the expertise that practitioner panelists bring to the process. Perhaps an appellate panel could be established, financed by an additional fee charged to parties to all UDRP proceedings, which would be staffed exclusively by neutrals who derive all of their income either from acting as UDRP appellate panelists or as mediators or arbitrators and who agree not to represent parties as an advocate in a trademark or domain name matter. The fact that this appellate body would be free of any apprehended impartiality resulting from advocating a client's position might serve to lessen the scrutiny given to the practitioner panelists, allowing them to continue to contribute to the process.

Or perhaps an educational campaign could be mounted, whereby the public could understand the conflicting duties and obligations that are placed on practicing lawyers and of the substantial contribution that they make, virtually volunteering their time to create and develop a private dispute resolution system which is efficient and inexpensive, and which precludes a wealthy complainant from spending an individual respondent into submission, a situation that occurs every day in United States courts.

The UDRP as adopted does not lend itself to the resolution of this ethical dilemma. The mixed nature of the public and private nature of the process, the inadequate funding to enable interested and qualified individuals from dedicating their full time efforts to the process, the controversy which surrounds the creation and functioning of the Internet Corporation for Assigned Names and Numbers, all serve to create an environment in which the public expects to find "fundamental unfairness" in the process. The individual UDRP panelist is caught on the horns of this ethical dilemma.