

# Emerging Patterns in Arbitration Under the Uniform Domain-Name Dispute-Resolution Policy

By Patrick Kelley

The Uniform Domain-Name Dispute-Resolution Policy (“UDRP”)<sup>1</sup> provides a mechanism for resolving disputes between domain name owners and trademark holders who claim that a domain name infringes their trademark.<sup>2</sup> Designed to provide a relatively quick, efficient, low cost alternative to initiating infringement or dilution litigation, the UDRP allows a trademark holder to challenge any domain name deemed confusingly similar or identical to his mark.<sup>3</sup> Before the UDRP went into effect, most trademark-based domain name disputes could only be resolved by agreement, court action, or arbitration.<sup>4</sup> Disputes over allegations of infringement can now be resolved under the UDRP when the trademark owner files a complaint with an approved dispute resolution service provider.<sup>5</sup>

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<sup>1</sup> ICANN, *Uniform Domain Name Dispute Resolution Policy*, at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> (Jan. 3, 2000) [hereinafter *UDRP*].

<sup>2</sup> ICANN, *Uniform Domain-Name Dispute-Resolution Policy, General Information*, at <http://www.icann.org/udrp/> (last modified Aug. 26, 2001) [hereinafter *UDRP General Information*].

<sup>3</sup> Sally M. Abel, *eVolution or Revolution? Trademark Law on the Internet*, at [http://www.fenwick.com/pub/ip\\_pubs/Trademarks\\_&\\_Internet/Trademark\\_&\\_Internet.htm](http://www.fenwick.com/pub/ip_pubs/Trademarks_&_Internet/Trademark_&_Internet.htm) (Jun. 18, 2001).

<sup>4</sup> J. Kevin Gray, *UDRP - The First Nine Months*, at <http://www.jgsolutions.com/material/articles/udrphist.pdf> (last visited Jan. 28, 2002).

<sup>5</sup> *Id.* See also ICANN, *Approved Providers for Uniform Dispute Resolution Policy*, at <http://www.icann.org/udrp/approved-providers.htm> (last modified Nov. 30, 2001) [hereinafter *Approved Providers*]. (providing a list of ICANN-approved dispute resolution services providers. Approved providers include: the National Arbitration Foundation (“NAF”); CPR Institute for Dispute Resolution (“CPR”); and the World Intellectual Property Organization (“WIPO”)); *eResolution Leaves Worldwide Domain Name Dispute Resolution Behind*, at <http://www.mediate.com/adassociates/pg208.cfm> (Dec. 2001) [hereinafter *eResolution*] (discussing eResolution’s decision to end its participation as a dispute resolution service provider for the UDRP); ICANN, *ICANN Announces New Dispute Resolution Service Provider in the Asia Pacific Region*, at <http://www.icann.org/announcements/announcement-03dec01.htm> (Dec. 3, 2001) [hereinafter *New Provider*] (announcing that a new provider, the Asian Domain Name Dispute Resolution Centre (ADNRC) was recently approved and will begin accepting disputes on February 28, 2002); ICANN, *Information Concerning Approval Process for Dispute-Resolution Service Providers*, at <http://www.icann.org/udrp/udrp-provider-approval-process.htm> (last modified May 6, 2000) [hereinafter *Approval Process*] (detailing the application process to obtain provisional approval as a UDRP dispute resolution service provider. The application must show, among other things that: (1) the applicant has sufficient experience to competently deal with the clerical aspects of alternative dispute resolution proceedings; (2) the applicant has at least twenty well qualified individuals willing to serve as neutral panelists; and, (3) the provider’s supplemental rules and internal procedures reflect an understanding of the workings of the policy and its rules).

Implemented by the Internet Corporation for Assigned Names and Numbers (“ICANN”) on January 3, 2000, the UDRP appears to be a success based on results over the last two years.<sup>6</sup> Some commentators maintain that the UDRP has exceeded expectations, by providing a quick method for fairly resolving domain name disputes at a relatively low cost.<sup>7</sup> In spite of its apparent success, the UDRP has been the subject of significant criticism on a variety of issues.<sup>8</sup> The most common criticism of the UDRP is that the policy is biased in favor of trademark owners (“the Complainants”), giving them an unfair advantage over the domain name owners (“the Respondents”).<sup>9</sup> According to these critics, it is this bias that allows Complainants to win over eighty percent of all UDRP disputes.<sup>10</sup> Additional criticism has been directed at the UDRP’s processes and procedures.<sup>11</sup> Proponents of this line of criticism have called for the addition of an appellate process to provide an alternative to challenging UDRP decisions in court and deal with

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<sup>6</sup> ICANN, *Timeline for the Formulation and Implementation of the Uniform Domain-Name Dispute-Resolution Policy*, at <http://www.icann.org/udrp/udrp-schedule.htm> (last modified Oct. 17, 2000) [hereinafter *Timeline*]. See ICANN, *Statistical Summary of Proceedings Under Uniform Domain Name Dispute Resolution Policy*, at <http://www.icann.org/udrp/proceedings-stat.htm> (last modified Jan. 24, 2002) [hereinafter *Statistical Summary*] (providing a numerical breakdown of the results of all UDRP disputes filed in the last two years). As of December 21, 2001 approximately six and one-half percent of the 4,942 administrative proceedings initiated under the UDRP are still pending. Approximately eighty-two percent of all proceedings are disposed of by a decision, while just under eleven percent are either settled or dismissed. These proceedings have led to the resolution of disputes involving 7,863 domain names. Roughly seventy-nine percent of all decided cases resulted in at least one domain name being transferred to the Complainant. The Respondent prevailed in less than twenty percent of the decided cases. Although the UDRP allows either party to file a lawsuit at anytime during the proceeding and up to 10 days after the proceeding if a domain name is ordered to be transferred or canceled, this option has rarely been exercised. In the United States (“U.S.”) only 36 lawsuits challenging UDRP decisions have been filed). *Id.* See also Patrick L. Jones, *Complete List of UDRP Challenges in Court*, at <http://www.udrplaw.net/UDRPAppeals.htm> (last modified Jan. 29, 2002) (providing a database of 41 UDRP decisions that are being challenged or were challenged in U.S. courts, news articles on the outcomes of these cases, and a link to the UDRP decision that resulted in the lawsuit).

<sup>7</sup> Gray, *supra* note 4. See also, M. Scott Donahey, *The UDRP – Fundamentally Fair, but Far from Perfect*, 6 Electronic Com. & L. Rep. 937 (Aug. 29, 2001), available at <http://pubs.bna.com/ip/BNA/EIP.NSF/23d9e82d7d25950885256743006e3012/8c885f12f946fe8285256ab5007e1b1f?OpenDocument> (noting that the UDRP is a fundamentally fair system, despite its flaws).

<sup>8</sup> See e.g., Michael Geist, *Fair.Com?: An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP*, at <http://aix1.uottawa.ca/~geist/geistudrp.pdf> (Aug. 2001); A. Michael Froomkin, *ICANN’s “Uniform Dispute Resolution Policy”—Causes and (Partial) Cures*, at <http://www.law.miami.edu/~froomkin/articles/udrp.pdf> (Nov. 19, 2001).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* See also *Statistical Summary*, *supra* note 6.

<sup>11</sup> See Justin Kelly, *ICANN Panelist Floats Appeals Process For Domain Arbitrations*, Jan. 12, 2001, at <http://www.adrworld.com/opendocument.asp> (subscription required); see generally Froomkin, *supra* note 8.

split precedents that have resulted in inconsistent decisions in cases with similar underlying facts.<sup>12</sup>

This Note seeks to examine the validity of these criticisms in light of the decisions produced under the UDRP and propose potential solutions to these problems. Foremost among these proposals is the implementation of a UDRP based appellate process to provide a mechanism for challenging UDRP decisions without resorting to the court system.<sup>13</sup> This Note discusses how several UDRP based dispute resolution policies have handled the implementation of an appellate process, and outlines the parameters of a model appellate process under the UDRP. In addition, this Note details proposed revisions to UDRP procedures which would require the majority of all UDRP disputes to be heard by three-member panels. The Note will ultimately propose a model for fixing problems with the current policy in order to ensure that the UDRP remains a viable and effective medium for resolving domain name ownership disputes in the future.

## **I. UDRP Policies and Procedures**

The UDRP provides expedited administrative proceedings for the resolution of domain name disputes purportedly arising from abusive registrations of domain names.<sup>14</sup> A UDRP proceeding is initiated when a trademark owner files a complaint with an ICANN-approved dispute resolution services provider.<sup>15</sup> There are currently three<sup>16</sup> ICANN-approved dispute resolution services providers—the National Arbitration Foundation (“NAF”), CPR Institute for Dispute Resolution (“CPR”), and the World Intellectual Property Organization (“WIPO”).<sup>17</sup> The dispute

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<sup>12</sup> *Id.*

<sup>13</sup> Froomkin, *supra* note 8, at 49-56, 66-68 (discussing the difficulties of challenging UDRP decisions in court).

<sup>14</sup> *UDRP*, *supra* note 1, at § 4(a).

<sup>15</sup> *Id.*

<sup>16</sup> Until November 30, 2001 there were four ICANN approved service providers, but eResolution has recently decided to end its participation as a dispute resolution service provider for the UDRP. *eResolution*, *supra* note 5. ICANN recently authorized a new dispute resolution service provider, The Asian Domain Name Dispute Resolution Centre (ADNRC). The ADNRC will begin accepting disputes on February 28, 2002. *New Provider*, *supra* note 5.

<sup>17</sup> *Approved Providers*, *supra* note 5.

resolution service provider is usually selected by the Complainant, who also typically pays the service provider's fees.<sup>18</sup> The only remedies available to the Complainant are the cancellation or transfer of the domain name registration.<sup>19</sup>

If a complaint is filed against a domain name owner, the owner is required to submit to these proceedings under the terms of their domain name registration agreement.<sup>20</sup> Complainants and Respondents may alternatively choose to settle their dispute by mutual agreement, arbitration, or through court proceedings.<sup>21</sup> The UDRP requires that most trademark-based domain name disputes be resolved by one of these methods before a registrar<sup>22</sup> will cancel, suspend, or transfer a domain name.<sup>23</sup> The UDRP is followed by all registrars in the .biz, .com, .info, .name, .net, and .org top-level domains.<sup>24</sup>

Under the UDRP, domain name owners are required to submit to mandatory administrative proceedings if a third party claims that the: (1) domain name is confusingly similar or identical to its trademark or service mark; (2) owner has no rights or legitimate interests in the domain name; and, (3) domain name was registered and is being used in bad faith.<sup>25</sup> The Complainant is required to prove that each of these elements is present in order to prevail.<sup>26</sup> Accused domain name owners can demonstrate their rights and legitimate interests by providing evidence of any of the following: (1) use or demonstrable preparations for use of the domain or a name corre-

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<sup>18</sup> *UDRP supra* note 1, at § 4(d), 4(g).

<sup>19</sup> *Id.* at § 4(i).

<sup>20</sup> *Id.* at § 4.

<sup>21</sup> *UDRP General Information, supra* note 2.

<sup>22</sup> A registrar is the organization with which the domain name has been registered. ICANN, *Rules for Uniform Domain Name Dispute Resolution Policy*, at <http://www.icann.org/udrp/udrp-rules-24oct99.htm> (Oct. 24, 1999) [hereinafter *Rules*].

<sup>23</sup> *UDRP General Information, supra* note 2. Trademark-based domain name disputes involving domain names registered with registrars that do not follow the UDRP are not subject to these terms. Disputes involving these registrars' domain names are instead subject to whatever terms the registrar chooses to impose.

<sup>24</sup> *Id.*

<sup>25</sup> *UDRP, supra* note 1, at § 4(a). *See also id.* at § 4(b) (discussing circumstances indicative of bad faith registration and use of a domain name).

<sup>26</sup> *Id.* at § 4(a).

sponding to the domain name in connection with a legitimate offering of goods and services before the domain owner was notified of the dispute; (2) common knowledge of the owner being known under the domain name, even absent trademark or service mark rights; or, (3) a legitimate noncommercial or fair use of the domain name, with no intent for commercial gain to misleadingly divert consumers or tarnish the Complainant's trademark or service mark.<sup>27</sup>

The institution of a UDRP proceeding does not prevent either party from filing a lawsuit to resolve the dispute in a court of mutual jurisdiction before, during, or after the administrative proceeding.<sup>28</sup> The UDRP defines a court of mutual jurisdiction as a court in either the jurisdiction in which the main office of the Registrar is located,<sup>29</sup> or the jurisdiction in which the domain name owner resides according to the registration of the domain name in the Registrar's Whois database<sup>30</sup> at the time the complaint is filed.<sup>31</sup>

If a UDRP administrative panel ("Panel") orders a domain name to be transferred or canceled, the owner is given ten business days to provide official documentation indicating that he has filed a lawsuit.<sup>32</sup> If he does not file within ten days, the decision will be implemented.<sup>33</sup> If documentation of the lawsuit is received within the ten day period, no further action will be taken until: (1) satisfactory evidence of a resolution is presented; (2) the lawsuit is dismissed or withdrawn; or, (3) the court dismisses the lawsuit or orders the owner to cease using the domain name.<sup>34</sup>

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<sup>27</sup> *Id.* at § 4(c).

<sup>28</sup> *Id.* at § 4(k).

<sup>29</sup> Provided the domain-name owner agreed to submit to that jurisdiction for disputes over domain name use at the time the domain name was registered. *Rules, supra* note 22.

<sup>30</sup> The Registrar's Whois Database contains records of the names and addresses of the owners of each domain name registered with that particular registrar. *See* Verisign, *WHOIS Command Overview*, at [http://www.netsol.com/en\\_US/faq/whois/whois-learnmore.jhtml](http://www.netsol.com/en_US/faq/whois/whois-learnmore.jhtml) (Feb. 5, 2002).

<sup>31</sup> *Rules, supra* note 22.

<sup>32</sup> *UDRP, supra* note 1, at § 4(k).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

## II. Criticisms of the UDRP

With 4,039 domain name dispute resolutions to its credit,<sup>35</sup> the UDRP appears, at least on the surface, to be a rousing success.<sup>36</sup> In spite of these numbers, the UDRP has been the subject of significant criticism on a number of fronts.<sup>37</sup> Perhaps the most vocal critics of the UDRP are those who feel the current policy gives trademark holders an unfair advantage over domain name owners.<sup>38</sup> Much of this criticism has been directed at the structure and processes of the UDRP.<sup>39</sup> These commentators argue that there is a need for an appellate process to help ensure the fairness of Panel decisions and aid in the creation of a body of consistent precedent.<sup>40</sup>

### A. Claims that the UDRP is Biased in Favor of Trademark Holders

A number of critics have claimed that the UDRP is biased in favor of trademark holders, who are typically the Complainants in domain name disputes.<sup>41</sup> Proponents of this line of criticism point to ICANN's own figures, which show that Complainants emerge victorious in over eighty percent of all UDRP disputes.<sup>42</sup> Some argue that this trend is temporary.<sup>43</sup> It merely reflects a weeding out of obviously infringing domain names, and should level off once most of the blatant cybersquatting cases have been decided.<sup>44</sup> Those critical of the UDRP, however, maintain that this trend is not merely a result of Complainants having stronger cases, but is rather caused by a system which gives Complainants a significant advantage by allowing them to

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<sup>35</sup> *Statistical Summary*, *supra* note 6.

<sup>36</sup> *See, e.g.*, Gray, *supra* note 4 (arguing that the UDRP has proven to be an extremely productive system that produces fair results quickly and at a low cost); Donahey, *supra* note 7.

<sup>37</sup> *See e.g.*, Rod Dixon, *The Arbitral Forum: Why ICANN'S Uniform Dispute Resolution Process Must Undergo Reform*, Oct. 9, 2000, at [http://www.domainnotes.com/news/article/0,,3371\\_480291,00.html](http://www.domainnotes.com/news/article/0,,3371_480291,00.html); Geist, *supra* note 8; Froomkin, *supra* note 8.

<sup>38</sup> *E.g.*, Geist, *supra* note 8; Froomkin, *supra* note 8.

<sup>39</sup> *Id.*

<sup>40</sup> *See, e.g.*, Kelly, *supra* note 11.

<sup>41</sup> *See* Justin Kelly, *ICANN Board Member Calls for End to Domain Dispute Policy*, Oct. 23, 2000, at <http://www.adrworld.com/opendocument.asp?Doc=RLAb9bVdD0&code=TvqDOdFE> (subscription required); Geist, *supra* note 8.

<sup>42</sup> *Statistical Summary*, *supra* note 6.

choose the dispute resolution service provider which will ultimately decide their case.<sup>45</sup> They assert that this system creates a competitive environment in which Complainants pick the arbitration service provider which appears most likely to rule in their favor.<sup>46</sup>

*1. The Distribution of Complaints Between Service Providers*

WIPO and NAF have handled the majority of the disputes, with fifty-eight and thirty-four percent of all cases respectively.<sup>47</sup> Based on raw statistical evidence, WIPO and NAF are also much more likely to rule in favor of Complainants than the other two providers, eResolution and CPR.<sup>48</sup> Complainants are successful in approximately eighty-two percent of WIPO proceedings and in eighty-three percent of NAF proceedings, but are only successful in approximately sixty-three percent of the time with eResolution and fifty-nine percent of the time with CPR.<sup>49</sup> eResolution, which generally produced the least favorable outcomes for Complainants, handled just seven percent of all cases while CPR handles less than one percent.<sup>50</sup> Critics of the UDRP maintain that Complainants do not choose service providers based on cost, noting that WIPO, which is the most popular provider, is the second most expensive (\$US 1500 for a single complaint).<sup>51</sup>

Based on the apparent correlation between successful outcomes for Complainants and selection of dispute resolution services, those who believe the UDRP is biased in favor of trade-

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<sup>43</sup> Gray, *supra* note 4.

<sup>44</sup> *Id.*

<sup>45</sup> Geist, *supra* note 8, at 3-8.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 6. Until eResolution's November 30, 2001 decision to end its participation as a UDRP service provider, there were four active ICANN certified dispute resolution service providers. This data was collected while eResolution was still an active service provider.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 3-4. See also World Intellectual Property Organization, *Schedule of Fees under the ICANN Policy*, at <http://arbiter.wipo.int/domains/fees/index.html> (Aug. 15, 2001) (detailing WIPO fees for UDRP proceedings); National Arbitration Forum, *Uniform Domain Name Dispute Resolution Policy "UDRP" Fees*, at <http://www.arb-forum.com/domains/UDRP/fees.asp> (Feb. 1, 2001) (detailing NAF fees for UDRP proceedings); CPR Institute for Dispute Resolution, *CPR'S Supplemental Rules and Fee Schedule*, at

mark holders argue that the likelihood of success plays a major role in which provider is ultimately chosen.<sup>52</sup> This “forum shopping” was cited as one of the main factors in eResolution’s decision to cease its participation as a dispute resolution service provider.<sup>53</sup> In a press release, the company maintained that its perception as the provider least likely to rule in favor of Complainants had led to a significant reduction in its market share.<sup>54</sup> Concerns over potential “forum shopping” have prompted some commentators to make allegations of potential bias on the part of service providers.<sup>55</sup> These critics have expressed concern that service providers might deliberately assign panelists they believe are likely to rule in favor of Complainants.<sup>56</sup>

## 2. Respondent Default

Respondent default occurs when a Respondent fails to respond to the complaint before the time limit expires.<sup>57</sup> When a default occurs, the UDRP proceeding continues towards a decision, and the Panel is allowed to consider the Respondent’s default in reaching its decision.<sup>58</sup> Given that respondents default in fifty to sixty percent of all proceedings,<sup>59</sup> the fact that Complainants emerge victorious in over eighty percent of these disputes<sup>60</sup> seems somewhat less shocking than when Complainant victories are considered on their own. It has been argued that

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[http://www.cpradr.org/ICANN\\_RulesAndFees.htm](http://www.cpradr.org/ICANN_RulesAndFees.htm) (last visited Jan. 28, 2002) (detailing CPR fees for UDRP proceedings).

<sup>52</sup> Geist, *supra* note 8, at 7. See also, Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 Wm and Mary L. Rev. 141, 211-13 (2001) (discussing problems created by the actions of some dispute resolution service providers that have created a public perception that “some dispute settlement providers are more complainant friendly than others”).

<sup>53</sup> *eResolution*, *supra* note 5 (detailing eResolution’s decision to end its participation as a dispute resolution service provider). Karim Benyekhlef, eResolution’s president argued that “forum shopping” is a common occurrence, noting that Complainants chose WIPO, the provider statistically most likely to rule in their favor far more often than eResolution, which produced less favorable results for Complainants. Benyekhlef claims this is one of the main reasons that eResolution’s market share shrunk to the point where the proceeds no longer covered the cost of maintaining the service. *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Geist, *supra* note 8, at 7-9.

<sup>56</sup> *Id.*

<sup>57</sup> John G. White, *ICANN’s Uniform Dispute Resolution Policy In Action*, 16 BERKELEY TECH. L.J. 229, 235-36 (2000).

<sup>58</sup> *Id.* See also *Rules supra* note 31.

<sup>59</sup> Donahey, *supra* note 7, at 2; White, *supra* note 57, at 236-37.

Complainants win the majority of these cases on the merits, and that a significant percentage of UDRP cases, especially in the early days, dealt with blatant cases of cybersquatting where the Respondents were clearly in the wrong.<sup>61</sup> Unfortunately, since Respondents default in approximately half of these disputes,<sup>62</sup> it is all but impossible to form concrete conclusions based on these numbers alone.

### 3. *Differing Results from One and Three-Member Panels*

Three-member Panels are responsible for only ten percent of all decisions, with Respondent's defaulting in twenty-four percent of those disputes.<sup>63</sup> While the overall Complainant win percentage rests at just over eighty percent, that number decreases to sixty percent for cases decided by a three-member panel.<sup>64</sup> As expected, Complainants emerged victorious in all but one of the three-member panel cases in which the Respondent defaulted.<sup>65</sup> When default cases are excluded, however, Complainants win only forty-five percent of three-member panel cases.<sup>66</sup>

Interestingly, Complainants appearing before three-member panels receive favorable outcomes at roughly the same rate regardless of which provider they use.<sup>67</sup> This is in stark contrast to the overall figures encompassing results from both one and three-member panels, which indicate that WIPO and NAF find in favor of Complainants at a much higher rate than eResolution and CPR.<sup>68</sup> Despite the fact that Complainants have a better success rate with one-person panels

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<sup>60</sup> *Statistical Summary*, *supra* note 6

<sup>61</sup> Gray, *supra* note 4.

<sup>62</sup> Donahey, *supra* note 7, at 2; White, *supra* note 57, at 236-37.

<sup>63</sup> Geist, *supra* note 8, at 18-20.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 18-22.

<sup>68</sup> *Id.*

than with three-member panels, Complainants request three-member panels more frequently than Respondents.<sup>69</sup>

One critic argues that this occurs because having three panelists limits the possibility of a single panelist misinterpreting the policy and prevents incorrect decisions.<sup>70</sup> In the end, while the UDRP as a whole might give an unfair advantage to Complainants, three-member panels statistically appear to produce more even results, with Complainants winning only sixty percent of disputes before three panelists in contrast to just over eighty percent when the dispute is heard by one panelist.<sup>71</sup> While it is all but impossible to conclude that three-member panels are inherently more fair than one-member panels,<sup>72</sup> these statistics have created a perception of increased fairness in three-member panels.<sup>73</sup>

#### 4. *Additional Criticisms Alleging UDRP Bias Towards Trademark Holders*

Allegations of bias in favor of trademark holders have not been limited to the process for selecting a dispute resolution provider.<sup>74</sup> Among the most common criticisms of the UDRP is that it fails to ensure that domain owners actually receive notice that a complaint has been filed against them.<sup>75</sup> It has also been argued that in providing the option of challenging UDRP decisions in court the policy actually limits the availability of the judicial system to those who lose

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<sup>69</sup> *Id.* at 20 (indicating that Complainants requested the three-member panels sixty-two percent of the time).

<sup>70</sup> *Id.* at 18-22 (explaining these figures by noting that Respondents may see the entire system as biased and unfair, and choose the three-member panel in hopes of receiving a more equitable decision; while Complainants with strong cases may be concerned that a single panelist will misinterpret the policy and decide a case they feel they should win in favor of the Respondent).

<sup>71</sup> *Id.*

<sup>72</sup> Concluding that three-member panels are more fair than one-person panels would require a detailed analysis of each case handled by both types of panels, which is impossible because complete records are not available for UDRP decisions.

<sup>73</sup> *See id.* at 18-29 (providing a detailed statistical analysis of the results produced by both three and one person panels, and arguing that using only three-member Panels would limit the potential for bias in favor of trademark holders).

<sup>74</sup> Froomkin, *supra* note 8, (providing an in-depth discussion and analysis of each of these criticisms as well as an additional look at issues surrounding the selection and composition of the UDRP's administrative Panels.).

<sup>75</sup> *Id.* at 64-65.

UDRP disputes.<sup>76</sup> In addition, it has been alleged that the UDRP gives service providers too much freedom to add supplemental rules that may bias the dispute resolution process.<sup>77</sup> Some commentators also maintain that the UDRP allotted twenty day response period fails to provide sufficient time for domain owners to respond to complaints.<sup>78</sup>

## **B. Claimed Problems with the UDRP's processes and procedures**

### *1. Using the Legal System to Overturn Panel Decisions*

Critics of current UDRP procedures have called for the addition of an appellate process to ensure the quality and fairness of Panel decisions.<sup>79</sup> Under current UDRP procedures, the only alternative available to the losing party in a UDRP proceeding is to file a lawsuit to overturn the Panel's decision.<sup>80</sup> Once the Panel reaches a decision, the losing party has only ten business days to file suit in a court of mutual jurisdiction, otherwise the Panel's decision will be implemented.<sup>81</sup> Although this is the only way a UDRP decision can be overturned, relatively few UDRP decisions have been challenged in court.<sup>82</sup> Those decisions which have been challenged have produced mixed results.<sup>83</sup> Critics of the UDRP argue that jurisdictional obstacles, the limited amount of time a losing party has to file a lawsuit, and the uncertainty on the part of courts as to how these cases should be handled appears to have limited the usefulness of courts as a medium for appealing UDRP decisions.<sup>84</sup> Critics of the current policy maintain that creating a

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<sup>76</sup> *Id.* at 66-67.

<sup>77</sup> *Id.* at 45.

<sup>78</sup> *Id.* at 64.

<sup>79</sup> Kelly, *supra* note 11.

<sup>80</sup> UDRP *supra* note 1, at § 4(k).

<sup>81</sup> *Id.*

<sup>82</sup> Jones, *supra*, note 6 (summarizing 41 UDRP decisions that are being challenged or were challenged in U.S. courts).

<sup>83</sup> *Id.*

<sup>84</sup> Froomkin, *supra* note 8, at 49-56, 66-68 (detailing how jurisdictional problems and other obstacles have limited the availability of court proceedings to losing parties in UDRP disputes). *See also*, Helfer & Dinwoodie, *supra* note 52, at 203-04 (discussing potential obstacles to challenging UDRP decisions in court caused by the "extremely short ten-day window" respondents have to file suit once the Panel has reached a decision).

means to appeal UDRP Panel decisions without filing a lawsuit would make it easier to challenge Panel decisions and ultimately improve the quality of these decisions.<sup>85</sup>

To date, relatively few United States (“U.S.”) courts have considered what role UDRP Panel decisions should play in the American legal system.<sup>86</sup> The most publicized court case involving a UDRP decision was *Weber-Stephen Products Co. v. Armitage Hardware and Building Supply, Inc.*,<sup>87</sup> in which the U.S. District Court for the Northern District of Illinois held that neither the UDRP nor its governing rules dictate what weight courts should give to a Panel's decision.<sup>88</sup> The court declined, however, to determine the exact standard by which it might ultimately review the result of a UDRP proceeding, and what, if any, deference a Panel decision would be entitled to.<sup>89</sup> Overall, the results of UDRP-based cases before U.S. courts have varied widely, with no consistent body of precedent emerging.<sup>90</sup> The absence of legal precedent relating to domain name disputes in general, and UDRP decisions in particular, is not unique to the United States.<sup>91</sup> Domain name disputes remain a relatively novel concept for the court systems of most countries.<sup>92</sup> In fact, most countries have yet to hear any domain name disputes in their courts.<sup>93</sup>

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<sup>85</sup> Kelly, *supra* note 11.

<sup>86</sup> Jones, *supra*, note 6.

<sup>87</sup> 54 U.S.P.Q.2d (BNA) 1766 (N.D. Ill. 2000).

<sup>88</sup> *Id.* at 1768; *see also* Abel, *supra* note 3.

<sup>89</sup> *Weber*, 54 U.S.P.Q.2d (BNA) at 1768.

<sup>90</sup> *See, e.g., Weber*, 54 U.S.P.Q.2d (BNA) 1766; Patrick Jones, *Federal Court Overturns UDRP Decision For NCAA*; *NCAA Also Wins ACPA Case Against Internet Gambling Operator*, Sept. 2, 2001, at <http://www.udrplaw.net/ExclusiveNews.htm> (discussing the *NCAA* case where the district court gave plaintiff *NCAA* rights to twelve domain names *WIPO* had granted to defendant *NCAAbasketballodds.com*); *Virtuality L.L.C. v. Bata Ltd.*, Civil No. H-00-3054 (D. Md. Apr. 2, 2001), available at <http://www.mdd.uscourts.gov/Opinions152/Opinions/bata.pdf> (denying *Bata*'s motion to dismiss *Virtuality*'s federal trademark claim, finding that it had jurisdiction over this claim); *Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745 (E.D. Va. 2001) (holding that the Federal Arbitration Act, which limits the review of arbitration awards, does not apply to UDRP decisions); *Sallen. v. Corinthians Licenciamentos LTDA*, No. 01-1197 (1st Cir. Dec. 5, 2000), available at <http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=01-1197.01A> (reversing the district court's dismissal, for lack of jurisdiction, of a Respondent's challenge to a UDRP decision to transfer his domain name).

<sup>91</sup> Diane Cabell, *Foreign Domain Name Disputes 2000*, 17 *COMPUTER & INTERNET LAW*. 5 (2000), available at <http://www.mama-tech.com/foreign.html>.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

Unlike other problems with the UDRP, making changes to the current policy is not likely to solve problems relating to the interaction of UDRP decisions with the court systems. Aside from extending the ten business day limit for filing a lawsuit after a Panel decision has been rendered, there is relatively little ICANN or the dispute resolution service providers can do to bring about a direct solution to this problem. The UDRP allows either party to file suit in any court of mutual jurisdiction.<sup>94</sup> Absent a complete harmonization of international trademark laws, the end result of this policy will be decisions which widely vary depending on where the lawsuit is filed.

## 2. *The Role of Precedent in UDRP Proceedings*

Under the UDRP, Panels are allowed to use prior decisions to guide them in resolving disputes, but these decisions do not serve as binding precedent.<sup>95</sup> Thus Panels are not bound by previous decisions, regardless of similarity.<sup>96</sup> Critics of the UDRP maintain that this policy has resulted in numerous situations in which incorrect decisions are used as precedent in deciding cases of a similar nature, resulting in a continuous stream of erroneous decisions.<sup>97</sup> The only option currently available to parties who feel their case has been incorrectly decided is to file a lawsuit challenging the Panel decision.<sup>98</sup> The absence of any internal mechanism for reviewing Panel decisions has led critics of the current policy to call for the institution of an appellate process to help correct erroneous decisions and prevent them from being used as precedent in future proceedings.<sup>99</sup>

An examination of Panel decisions also reveals an increasing number of split precedents in which divergent lines of case law are followed by different Panels, resulting in vastly disparate

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<sup>94</sup> *Rules supra* note 31.

<sup>95</sup> Helfer & Dinwoodie, *supra* note 52, at 235-36; Froomkin, *supra* note 8, at 69.

<sup>96</sup> *Id.*

<sup>97</sup> Froomkin, *supra* note 8, at 56.

<sup>98</sup> *Rules supra* note 31.

<sup>99</sup> *Id.*

holdings in cases with similar underlying facts.<sup>100</sup> UDRP critics argue that a method for sorting out inconsistent precedents is needed to provide UDRP Panels with a uniform body of precedent to aid in the resolution of disputes.<sup>101</sup> One notable example of split precedent can be found in cases where the Respondent defaults.<sup>102</sup> When a default occurs, the UDRP proceeding continues, and the Panel is allowed to consider the Respondent's default in reaching its decision.<sup>103</sup> Some Panels use a literal interpretation of the policy and rules to shift the burden of proof on all issues to Complainants.<sup>104</sup> Other Panels take a broader approach, placing the burden of proof on the Respondent.<sup>105</sup> Because respondents default in fifty-sixty percent of all proceedings,<sup>106</sup> the use of these two different methods is cause for concern.

### **III. Proposed Solutions and Improvements for the UDRP's Problems**

Despite the criticisms levied against it, the UDRP remains the best mechanism for resolving disputes over domain name ownership. There are however a number of flaws with the current policy, which limit both its effectiveness and its ability to produce consistently fair, high quality decisions.<sup>107</sup> To that end, critics of the current policy have made a number of recommendations aimed at improving the UDRP.<sup>108</sup> Based on these criticisms, it seems clear that a mechanism for appealing Panel decisions under the UDRP could reduce problems with dueling lines of precedent and erroneous decisions. A requirement that all UDRP disputes, except those in which the Respondent defaults be heard by three-member panels, would also help to correct some of the weaknesses of the current policy.

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<sup>100</sup> Kelly, *supra* note 11.

<sup>101</sup> *Id.*

<sup>102</sup> White, *supra* note 57, at 239-40.

<sup>103</sup> *Id.* See also Rules *supra* note 31.

<sup>104</sup> White, *supra* note 57, at 239-40.

<sup>105</sup> *Id.*

<sup>106</sup> See *supra* note 59 and accompanying text.

<sup>107</sup> See generally Geist, *supra* note 8; Froomkin, *supra* note 8.

<sup>108</sup> See, e.g., Kelly, *supra* note 11; Geist, *supra* note 8; Froomkin, *supra* note 8.

## A. Making Three-Member Panels the Standard for UDRP Dispute Resolution

Based on the more equitable results produced by three-member UDRP panels, limiting the availability of single-person panels to cases in which the Respondent defaults, and requiring that all other disputes be decided by three-member panels would lend an increased perception of fairness to UDRP proceedings.<sup>109</sup> Under this proposed policy, the Complainant and Respondent would each participate in selecting one panelist.<sup>110</sup> The dispute resolution service provider would select the third panelist from a list of panelists, taking into consideration the preferences of both parties in making that selection.<sup>111</sup> Complainants would continue to bear the cost of the proceeding.<sup>112</sup> Additional fees received from using only three-member panels could potentially allow service providers to hire more panelists, thereby eliminating any potential concerns regarding a lack of panelists to staff the three-member panels. As with the current policy, decisions would require a majority vote from the Panel.<sup>113</sup> This would significantly reduce the perception that providers are assigning panelists they believe are more likely to find in favor of Complainants, providing a solution to one of the most common criticisms of the UDRP.<sup>114</sup>

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<sup>109</sup> Geist, *supra* note 8, at 26-29 (arguing for mandatory three-member Panels). *See also*, Helfer & Dinwoodie, *supra* note 52, at 194 (stating that “[i]n international commercial arbitration, use of a three-member panel is the accepted norm, and often a default rule if the parties fail to specify a different selection method.” and that “[t]hree-member panels also promote confidence in the arbitral process and thus generate fewer challenges to the panel’s final decision.”).

<sup>110</sup> Geist, *supra* note 8, at 26-29 (proposing rules identical to those currently used by ICANN for selecting the members of a three-member Panel); *see also Rules supra* note 31.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (arguing that the Complainant should be required to bear the full cost of the mandatory three-member Panel, in contrast to the current policy, where the Complainant only pays the entire cost for the three-member Panel if he elects to use it).

<sup>113</sup> *Rules, supra* note 22, at § 15(c).

<sup>114</sup> Geist, *supra* note 8, at 7-9.

## B. Implementing a UDRP Based Appellate Process

The need for an appellate process finds support in a variety of factors. Foremost among these are the divergent lines of precedent for some key issues<sup>115</sup> which serve as the basis for vastly different decisions by UDRP Panels on cases with essentially the same facts.<sup>116</sup> It is unclear what, if any, role the UDRP intends previous Panel rulings to play in a Panel's decision making process.<sup>117</sup> Panelists are not bound by prior decisions, but they may consider them in resolving disputes.<sup>118</sup> UDRP Panels have varied in their interpretation of this rule, with some Panels treating prior decisions as binding precedent, and others choosing to completely ignore them.<sup>119</sup> Most analysts see the development of a body of precedent as a positive tool which will ultimately improve the efficiency and quality of decisions, as many disputes involve similar issues and facts.<sup>120</sup>

The addition of an appellate process to supplement current UDRP procedures would create an entity to resolve different bodies of precedent, and allow panelists to rely on appellate decisions as the model for resolving a particular class of disputes. A UDRP-based appellate system would also play an important role in correcting rulings in which incorrect rules were applied or incorrect decisions were made. Although modifying the UDRP is unlikely to produce a solution to the jurisdictional wrangling and inconsistent decisions plaguing the court system, the addition of an internal appeals process may lessen the impact of these problems by improving the quality of UDRP decisions and providing an alternative avenue for disputing the results of UDRP proceedings. Since challenging UDRP decisions in court has proven to be a difficult and uncertain

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<sup>115</sup> For example, the two different approaches used by administrative panels in deciding how to deal with cases in which the Respondent is in default. *See supra* notes 102-06 and accompanying text; *see also* White, *supra* note 57, at 239-240.

<sup>116</sup> Kelly, *supra* note 11.

<sup>117</sup> Helfer & Dinwoodie, *supra* note 52, at 235-36; Fromkin, *supra* note 8, at 69.

<sup>118</sup> *Id.*

proposition,<sup>121</sup> a UDRP appellate process would present a more accessible forum for parties who feel their cases were decided incorrectly. If parties feel their dispute was correctly and fairly decided, which is what a UDRP appellate process would strive to promote, they may be less likely to challenge the decision in court. Clear and concise Panel decisions based on consistent applications of the UDRP will make things easier for courts reviewing Panel decisions.

### *1. Competing Models for a UDRP Appellate Process*

#### (i) The U.S. Supreme Court Model

The key obstacle for the creation of a UDRP appeals process is finding a way to implement a fair and effective appellate process without defeating the efficiency and cost effective benefits of the UDRP.<sup>122</sup> One approach is the creation of a system similar to the U.S. Supreme Court.<sup>123</sup> Here, an appellate body consisting of nine panelists would typically hear appeals from Panel decisions in groups of three, with the possibility of an *en banc* hearing before the entire Panel in certain special cases.<sup>124</sup> In this model, arbitrators would be appointed either by the service providers or directly by ICANN.<sup>125</sup> Members of the appeals board would have discretionary review over all Panel decisions, with the bulk of their caseload coming from cases with similar facts that are decided differently.<sup>126</sup> Under this proposal, appeals would be financed either by charging the appealing party, adding a small fee to domain name registrations, or attaching a new fee to any complaint filed under the UDRP.<sup>127</sup>

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<sup>119</sup> Helfer & Dinwoodie, *supra* note 52, at 235-36; Kelly, *supra* note 11.

<sup>120</sup> See Kelly, *supra* note 11.

<sup>121</sup> Froomkin, *supra* note 8, at 49-56, 66-68.

<sup>122</sup> Kelly, *supra* note 11.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

While this proposal presents a potentially workable appellate process based on a well-tested model, it is likely to face many of the same problems found in the appellate systems of American courts. Overcrowded dockets, a significant increase in costs to the parties involved, and significant delays between Panel decisions and appellate decisions would significantly limit the usefulness of this system.<sup>128</sup> Although this model would adequately settle many of the problems with inconsistent bodies of precedent, the delays and higher costs that would likely result would run counter to the UDRP's goal of providing an inexpensive and efficient means for dispute resolution.

(ii) The Keyword Dispute Resolution Policy Model

A second model stems from the Keyword Dispute Resolution Policy ("KDRP") enacted by RealNames to settle ownership disputes over its Internet Keywords System.<sup>129</sup> The provisions of the KDRP are virtually identical to the UDRP with the exception of several modifications in the KDRP addressing many of the UDRP's most criticized problems.<sup>130</sup> One of the key differences between the two policies is that the KDRP provides for a limited appellate process in which a losing party can apply for "reconsideration" of their case.<sup>131</sup> The KDRP allows either party to move for reconsideration of the ruling, so long as they do so within two months of the Panel's decision.<sup>132</sup> If the moving party can demonstrate "manifest injustice," then the motion will be granted.<sup>133</sup> Every effort will be made to have the motion heard by the same panelists who

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<sup>128</sup> *Id.* (summarizing Michael Froomkin's criticisms of this proposal).

<sup>129</sup> See Keywords, at [http://www.realnames.com/Eng/Eng\\_Corporate\\_RealNamesHomepage.asp](http://www.realnames.com/Eng/Eng_Corporate_RealNamesHomepage.asp) (last visited Jan. 28, 2002) (describing the RealNames Keyword System, designed to provide an alternative to traditional domain names, by allowing the user to find a web page simply by typing the name of a company, product, or website in the Internet Explorer address bar). See also RealNames, *Keyword Dispute Resolution Policy*, at [http://www.realnames.com/Virtual.asp?page=Eng\\_Policy\\_DisputeResolution](http://www.realnames.com/Virtual.asp?page=Eng_Policy_DisputeResolution) (last visited Jan. 28, 2002) [hereinafter *RealNames KDRP*].

<sup>130</sup> *RealNames KDRP*, *supra* note 129.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

adjudicated the original complaint, unless the motion alleges that one of the panelists was not impartial.<sup>134</sup> Absent a showing of manifest injustice, the Complainant is forbidden from initiating an administrative proceeding involving the same Respondent and Keyword Registration within two years of a previous Panel decision.<sup>135</sup>

The key feature of the KDRP appellate process is that appellants must provide considerable justification as to why their case deserves appellate consideration.<sup>136</sup> This makes it unlikely that the appellate board would be forced to consider unwarranted appeals. Applying this mechanism to the UDRP would enable it to retain its efficiency while providing a mechanism for appealing wrongly decided cases and harmonizing inconsistent precedent. Requiring that parties show “manifest injustice” if their appeal is to be heard would likely prevent unwarranted appeals from overwhelming the system and hindering the efficiency of the appellate process. However, an unfortunate side effect of such a potentially stringent justification requirement<sup>137</sup> is that some cases which warrant appellate review may not meet the eligibility requirements. While review would likely be granted in cases of blatant error under the manifest injustice standard, it is unclear whether this standard would allow review of cases involving split precedent.

(iii) Nominet’s United Kingdom Model

A third model for an appellate system comes from the recently implemented Dispute Resolution Service for the .uk top level domain (“TLD”). While most nations have elected to use

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> To date no Keyword disputes have been filed, thus the KDRP and its appellate mechanism remain untested. It remains unclear what the term “manifest injustice” means, as RealNames has not taken any steps to define this term.

the UDRP to resolve domain name disputes for their TLDs, Nominet, the body managing the .uk TLD, has chosen to create its own dispute resolution policy loosely based on the UDRP.<sup>138</sup>

The Nominet policy contains two features not present in the UDRP.<sup>139</sup> First, it requires the parties to engage in an informal mediation, within three days of the complaint being filed.<sup>140</sup> It also adds an appeals process, through which either party to a dispute can challenge the ruling in the case.<sup>141</sup> Under this policy, parties must submit an appeal within five days after the decision has been rendered.<sup>142</sup> Once an appeal has been submitted, it will be ruled on as soon as possible by a Panel of three of Nominet's experts.<sup>143</sup> The appeals Panel considers appeals on two grounds: (1) that a matter needs to be re-examined on the facts, and/or (2) that procedure has not been followed correctly.<sup>144</sup> Appellate Panel decisions will be published, but they do not serve as binding precedent for future decisions, and do not affect any decisions previously made under the Dispute Resolution Service.<sup>145</sup> Experts are, however, allowed to consider the persuasive value of appellate rulings in making future decisions.<sup>146</sup> During the appellate process, both parties remain free to submit their dispute to a court of competent jurisdiction.<sup>147</sup>

The primary advantage of this model appears to be its focus on correcting errant decisions, misinterpretations of policy, and other situations where the facts of the case do not seem to

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<sup>138</sup> UDRPLaw.Net, *Nominet Releases New Dispute Resolution Service For .UK Domain Names*, Sept. 27, 2001, at <http://www.udrplaw.net/cctldDisputes.htm>.

<sup>139</sup> Nominet UK, *Dispute Resolution Service Procedure*, at <http://www.nic.uk/ref/drs-procedure.html> (last visited Jan. 28, 2002) [hereinafter *Nominet Procedure*].

<sup>140</sup> *Nominet Procedure*, *supra* note 139, at § 7 (detailing the mediation process: Nominet reserves complete discretion over how the mediation proceeds, negotiations are kept secret so as not to affect either party's position if the mediation fails, details of the negotiations can only be released by court order, and if the dispute is not resolved within ten days, the mediation period comes to a close and an expert is appointed to hear the case).

<sup>141</sup> *Nominet Procedure*, *supra* note 139, at § 18.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*; see also Nominet UK, *Dispute Resolution Service Policy*, at <http://www.nic.uk/ref/drs-policy.html> (last visited Jan. 28, 2002) [hereinafter *Nominet Policy*] (defining an "expert" as a person Nominet appoints to hear disputes and serve essentially the same role as UDRP panelists).

<sup>144</sup> *Nominet Policy*, *supra* note 144, at § 9.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

support the outcome. Unfortunately, the Nominet model does not seem to offer a solution to the problem of divergent precedent for similar cases. The Nominet policy states that appellate decisions do not serve as binding precedent for future decisions.<sup>148</sup> The UDRP uses essentially the same approach for Panel decisions, which can be considered by future Panels in deciding disputes, but do not act as binding precedent.<sup>149</sup> Under the Nominet model, even with the potential for appellate review, the absence of binding precedent would still allow Panels to resolve similar cases in different ways. While the losing party in these split precedent cases could likely appeal, it seems somewhat inefficient that the appellate body would potentially resolve the same issue numerous times. Further, there is no guarantee that the appellate body would even reach the same decision each time it heard an appeal on that issue.

## 2. *Suggested Model for a UDRP Based Appellate Process*

Based on an analysis of these three models, it seems clear that no single model fully addresses all of the major problems UDRP critics have identified.<sup>150</sup> An optimal UDRP-based appeals process must provide a system for challenging incorrectly decided cases and harmonizing inconsistent bodies of precedent, while adding to the perceived fairness of the overall UDRP

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Helfer & Dinwoodie, *supra* note 52, at 235-36; Froomkin, *supra* note 8, at 69.

<sup>150</sup> In addition to the three models discussed *infra*, the JAMS Optional Arbitration Appeal Procedure was considered in constructing the model UDRP appellate system. JAMS is an organization that provides a full range of alternative dispute resolution (“ADR”) services throughout the U.S. and abroad. With a staff of full time ADR practitioners, JAMS has experience resolving disputes in a wide variety of practice areas. JAMS, *About JAMS*, at [http://www.jamsadr.com/who\\_we\\_are.asp](http://www.jamsadr.com/who_we_are.asp) (Feb. 3, 2002). *See also*, Jams, *ADR Tools & Processes*, at [http://www.jamsadr.com/adr\\_tools\\_index.asp](http://www.jamsadr.com/adr_tools_index.asp) (Feb. 3, 2002) (for an overview of different types of ADR and the ADR services offered by JAMS); JAMS, *JAMS Optional Arbitration Appeal Procedure*, at <http://www.jamsadr.com/optionalArbAppeal.asp> (Feb. 3, 2002) [hereinafter *JAMS Appellate Procedure*] (detailing the optional appeals procedure available under certain circumstances to parties using JAMS dispute resolution services).

process. It is equally important that this appellate system not lose sight of the UDRP's original purpose of providing quick, efficient resolutions to disputes over domain-name ownership.<sup>151</sup>

One model for an optimal appellate system would require that the party seeking an appeal show: (1) that the Panel's decision was clearly erroneous; or, (2) that the decision involved a situation or issue for which competing bodies of precedent exist. This standard would allow the UDRP appeals process to correct erroneously decided cases, while providing a mechanism for harmonizing divergent lines of precedent.<sup>152</sup> Appellate review of clearly erroneous decisions allows for a case-specific review of instances where the wrong rule was applied to the facts of the case or, the policy guideline used in reaching its decision was misinterpreted.<sup>153</sup> The appellate panel would determine the correct method of resolving the issue, ensuring that cases involving similar facts and issues would not be decided differently.

The appellant would bear the burden of showing that his case warrants an appeal, and would submit a petition for review to a preliminary appellate review board that would determine whether the case meets either of the requirements for appellate review.<sup>154</sup> If the Respondent defaults, the case would not be eligible for appellate review. If the requirements for an appeal are met, the appeal would be heard by a panel of five arbitrators. Appellate review of proceedings which meet the appeal requirements would be mandatory. If the appellant fails to meet these re-

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<sup>151</sup> Kelly, *supra* note 11 (quoting Michael Froomkin who criticizes the U.S. Supreme Court model as hindering the efficiency and cost effectiveness the UDRP was designed to promote).

<sup>152</sup> This standard would appear to be somewhat more flexible than the KDRP standard in that it guarantees review for cases involving issues of split precedent. Until the KDRP process is tested however, it remains unclear how its "manifest injustice" standard for appeals will be interpreted and what types of cases will warrant appeal under the manifest injustice standard. *See* Froomkin, *supra* note 8, at 56 (discussing problems created by incorrectly decided cases that have been continually cited as precedent); Kelly, *supra* note 11 (arguing that incorrect decisions and inconsistent treatment of cases with similar underlying facts have created a need for a UDRP appellate process).

<sup>153</sup> Froomkin, *supra* note 8; Kelly, *supra* note 11.

<sup>154</sup> The purpose behind the preliminary review board is to weed out cases that do not warrant appellate review. This feature of the model appellate process is designed to prevent the system from becoming bogged down with unwarranted appeals and help maintain the efficient dispute resolution the UDRP was created to provide. *See* Kelly, *supra* note 11.

quirements, then his petition would be denied and the appealing party would have ten days to file suit in a court of competent jurisdiction before the original Panel decision goes into effect.

The appealing party would be required to file an intent to appeal notice within five days of the issuance of the Panel's decision and would then have an additional fourteen days to file the actual appeal.<sup>155</sup> Upon receipt of the intent to appeal notice, implementation of the Panel decision would be delayed until twenty-five days after the date the intent to appeal was mailed. If the appealing party fails to file the appeal within the allotted time period, the Panel decision would be implemented immediately. Once the appeal is received, the Panel decision would not be implemented while the preliminary appellate review board is considering the appeal.<sup>156</sup> Upon receipt of the appeal, the appellee will be notified that an appeal has been filed. If the appellee fails to respond he is in default and the appeals process continues with the preliminary review board and the appeals board allowed to consider the appellee's default in making their decisions.<sup>157</sup> If the preliminary review board decided a case warranted an appellate hearing, the domain name would not be transferred until ten days after the appellate decision has been issued.<sup>158</sup>

The appeals board would be controlled entirely by ICANN, instead of allowing the service providers to handle the appeals which would help promote the institutional validity of the appellate process. This method should prevent complaints that service providers are assigning

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<sup>155</sup> Like the JAMS Optional Arbitration Appeal Procedure, the model UDRP appellate system gives the appellant fourteen days to file the appeal. The model system differs from the JAMS approach however, in that JAMS does not require the appellant to file an intent to appeal notice. *See* JAMS Appellate Procedure, *supra* note 150, at § (B)(i).

<sup>156</sup> *See* JAMS Appellate Procedure, *supra* note 150, at § (C) (noting that under the JAMS policy, "once an appeal has been timely filed, the Arbitration Award is no longer considered final for purposes of judicial enforcement, modification or vacating pursuant to the applicable JAMS Arbitration Rules.").

<sup>157</sup> *See Rules*, *supra* note 22, at § 14. *See also*, JAMS Appellate Procedure, *supra* note 150, at § (E) (detailing the consequences if one of the parties refuses to participate in the appeal procedure).

<sup>158</sup> The time periods allotted for filing appeals were selected to provide adequate time for filing the appeal without excessively slowing down the overall UDRP process. Requiring an intent to appeal notice allows service providers to go forward with implementing Panel decisions in cases where an appeal is not going to be filed without having to wait twenty-five days. At the end of the appellate process the losing party has only ten days to file suit before the decision is implemented. At this point both parties have had adequate time to prepare to file a lawsuit should they

panelists likely to rule in favor of trademark holders.<sup>159</sup> ICANN would field a board of ten panelists that would be divided into two groups of five to hear appeals.<sup>160</sup> ICANN would attempt to reach an agreement with both parties to the appeal regarding which five members of the appeals board would hear the appeal.<sup>161</sup> If the parties are unable to come to an agreement on the makeup of the appellate board within seven days, ICANN would decide which five board members would preside.<sup>162</sup> The preliminary appellate review process would be handled by a separate group of nine arbitrators selected by ICANN working in groups of three. The nineteen arbitrators participating in the appellate process would primarily be retired judges, academics, and practitioners, creating a staff of arbitrators at the appellate level with similar qualifications to those serving on the Panels.<sup>163</sup>

Appeals would be reviewed by a mini-board of three panelists who would determine if the appeal meets the requirements for an appellate hearing. Funding for the appellate process would come primarily from fees for filing the appeal coupled with a nominal increase in the cost of domain registration. Like UDRP proceedings, the appellate process would be entirely paper based, with no in-person arguments from either party. The appeals board would essentially perform a de novo review of each case. Neither party would be permitted to submit additional facts

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choose to do so. *See* Froomkin, *supra* note 8, at 64-65 (arguing that the UDRP does not allow Respondents sufficient time to prepare an adequate response to the complaint). *See also*, UDRP, *supra* note 1, at § 4(k).

<sup>159</sup> *See* Geist, *supra* note 8, at 3-9 (discussing potential bias among service providers and detailing the possibility that providers may appoint panelists more likely to find in favor of Complainants); Froomkin, *supra* note 8, at 57-58 (arguing that service providers may have a tendency to be biased in favor of Complainants to encourage future Complainants to use their service by creating a perception that they produce Complainant friendly outcomes).

<sup>160</sup> JAMS uses an appellate panel made up three members, or in special cases, only one member. Since UDRP disputes can initially be heard by three member panels, the suggested model provides for appeals to be heard by five panelists, to provide additional perspectives on the case under review and ensure that the correct decision is reached). JAMS Appellate Procedure, *supra* note 150, at § (A).

<sup>161</sup> *See id.* (detailing the process for selecting the members of the appellate panel under the JAMS policy).

<sup>162</sup> *See id.*

<sup>163</sup> *See also* Froomkin, *supra* note 8, at 46 (arguing that service providers need to diversify their roster of panelists to exclude trademark lawyers and include people from a more diverse selection of backgrounds).

which were not presented to the Panel.<sup>164</sup> The appeals board would not be required to give deference to the Panel's interpretation of the facts however, and could ask either party to provide any additional information deemed necessary for the fair resolution of the appeal.<sup>165</sup> Absent exceptional circumstances, the appeals board would have fourteen days to review the case.<sup>166</sup> Upon receipt of the board's decision, ICANN would have three days to forward the decision to both parties involved in the dispute. Service of the decision would be considered effective five days after its deposit in the U.S. Mail.<sup>167</sup>

Decisions made by the appeals board would be binding precedent for future administrative hearings, although the preliminary review board's denial of an appeal request would not be seen as a comment on the merits of the issue. Decisions of Panels on issues which have not been reviewed by the appeals board could be considered by other Panels, but would not be binding.<sup>168</sup> Either party to a UDRP appellate proceeding would retain the right to file suit in a court of mutual jurisdiction while the appeal is pending. Once a decision has been made at the appellate level, the losing party would have ten days from the day the decision became effective to file suit before the domain name would be transferred.

The appellate system described in this model provides a mechanism for correcting errant decisions and harmonizing divergent bodies of precedent that would likely add an increased per-

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<sup>164</sup> See JAMS Appellate Procedure, *supra* note 150, at § (B)(iii) (stating the rule for composition of the record on Appeal under the JAMS policy).

<sup>165</sup> See *id.*

<sup>166</sup> JAMS allows its appeals panel twenty-one days to reach a decision. Since JAMS tends to hear cases involving more complex issues than most UDRP disputes, the JAMS appeals panel may require more time to resolve appeals. Given that UDRP disputes involve a relatively narrow subject matter, fourteen days should be sufficient for the appeals board to reach a decision. <sup>166</sup> See JAMS Appellate Procedure, *supra* note 150, at § (D). See also, Kelly, *supra* note 11 (detailing Michael Froomkin's argument regarding the importance of maintaining the quick, cost effective resolution the UDRP was designed to provide).

<sup>167</sup> See JAMS Appellate Procedure, *supra* note 150, at § (F) (detailing JAMS procedure for serving the appellate decision on the parties).

<sup>168</sup> See Froomkin, *supra* note 8, at 56 (discussing the continued problems created by incorrectly decided cases that have been continually cited as precedent); Kelly, *supra* note 11 (arguing that incorrect decisions and inconsistent treatment of cases with similar underlying facts have created a need for a UDRP appellate process).

ception of fairness to the existing process.<sup>169</sup> Appellate review of Panel decisions would ultimately produce decisions that are more consistent.<sup>170</sup> This would not only add to the perceived fairness of the process, but would make judicial review of UDRP decisions easier. Courts would be able to examine Panel decisions without having to wonder if another Panel would have reached a different conclusion on the same issue. At the same time, the creation of a preliminary review board to decide what cases are worthy of an appeal would likely ensure that the UDRP system does not become bogged down with appeals, which would render it incapable of providing the efficient dispute resolution for which the UDRP was designed.<sup>171</sup>

#### **IV. Conclusion**

Despite the criticism it has received, the UDRP remains the best solution for resolving domain name ownership disputes in a fast, efficient, and inexpensive fashion. This does not mean however, that criticisms of the policy are without merit. While the UDRP remains the best choice for this purpose, it is a system in need of improvement. Eliminating single person UDRP panels in favor of mandatory three-member panels for cases where the Respondent does not default and implementing an appellate process would go a long way towards solving many of the UDRP's problems. By making these changes ICANN will significantly improve the perceived fairness of UDRP proceedings, while taking significant steps towards ensuring the long term viability of the UDRP as the primary system for resolving domain name ownership disputes.

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<sup>169</sup> *See id.*

<sup>170</sup> *See id.*

<sup>171</sup> Kelly, *supra* note 11.