Forum Selling and Domain-Name Disputes

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The system for resolving domain-name disputes is unique in that it gives the complainant—a trademark owner who claims that a domain name violates its mark—the unilateral ability to choose the arbitration provider. As a result, providers, whether motivated by profit or prestige, have incentives to favor the complainant. Empirical analysis confirms that complainants choose providers who are more likely to decide cases for the trademark owner, rather than based on speed. The domain-name dispute-resolution system should be modified to allow both complainant trademark owner and respondent domain-name registrant to strike an equal number of arbitration providers. This reform would give providers an incentive to be neutral rather than biased.

I. INTRODUCTION

Arbitration of domain-name disputes is different. Unlike other dispute-resolution systems, the complainant in domain-name disputes unilaterally chooses the arbitration provider. Because arbitration providers are for-profit entities or have nonfinancial reasons to want to hear more cases, they have an incentive to favor the complainant. The

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idea that domain-name arbitration favors the complainant—the trademark owner—has been the dominant view among commentators,[1] but that view has been challenged by the most sophisticated empirical analysis on the subject—that of Jay Kesan and Andres Gallo.[2] Kesan and Gallo argue that trademark owners choose the fastest arbitration provider, not the one most likely to favor the complainant.[3] As a result, they conclude that competition among arbitration providers enhances efficiency and does not produce bias.[4]

This Article reviews the data and argues that the dominant view is correct. Although the data are not sufficient to fully explain how trademark-owner complainants chose arbitration providers, it is clear they favored the arbitration providers—the World Intellectual Property Organization ("WIPO") and the National Arbitration Forum ("NAF")—who were most likely to rule in favor of the complainant, even though WIPO was the slowest provider.[5] The idea that complainants were motivated by the prospect of pro-trademark decisions, rather than speed, is confirmed by the fact that eResolution, which was least likely to rule in favor of the complainant, was chosen least often, even though it was faster than WIPO.[6] eResolution eventually exited the domain-name dispute-resolution market.

The dynamics of the domain-name dispute-resolution system provide an example of forum selling. The idea of forum *shopping* is well-known: plaintiffs choose the court that is most favorable to them. Forum *selling* is the idea that courts and judges are not passive participants in forum selection.[7] Sometimes they actively seek more cases, and to do so they favor the party with the power to select the forum—which is usually the plaintiff.[8] While most courts and judges do not want to hear more cases, some seek the power, prestige, and benefits to their localities that higher

1. *See infra* Part II (analyzing the literature on the Uniform Domain-Name Dispute-Resolution Policy ("UDRP")).

2. Jay P. Kesan & Andres A. Gallo, *The Market for Private Dispute Resolution Services—An Empirical Re-Assessment of ICANN-UDRP Performance*, 11 MICH. TELECOMM. & TECH. L. REV. 285, 326 (2005).

3. *Id.*

4. *Id.*

5. *See infra* Part III (explaining that Kesan and Gallo's data more firmly support the conclusion that win rates matter more to complainants than the speed of the dispute resolution).

6. *See infra* Part III (reexamining Kesan and Gallo's data to refute the contention that complainants selected providers for speed rather than pro-trademark decisions).

7. Daniel Klerman & Greg Reilly, *Forum Selling*, 90 S. CAL. L. REV. 241, 242–43 (2016); Gerhard Wagner, *The Dispute Resolution Market*, 62 BUFF. L. REV. 1085, 1087 (2014).

8. Klerman & Reilly, *supra* note 7, at 242–43.

caseloads can bring. When plaintiffs have broad jurisdictional choice, those courts and judges tilt the law in favor of the plaintiff, because it is the plaintiff who ordinarily has the power to choose the court. The result is that the judges and courts that are most pro-plaintiff have a disproportionate effect on the law, and the law takes a pro-plaintiff tilt.[9]

The prime example of forum selling is patent litigation in the Eastern District of Texas.[10] For the last decade, judges in that district have openly sought more patent cases. They have publicly stated they find such cases more interesting than other parts of their docket.[11] It is also undisputed that the large number of patent cases in their district has benefited the local bar and economy. Although judges in the Eastern District of Texas claim that they attract cases because they are more efficient and possess more expertise, their decisions also favor patent plaintiffs in a number of subtle, but important ways: they almost never grant summary judgment, they allow plaintiffs to de facto choose the judge, and they almost never stay cases pending reexamination.[12] As a result, more than a quarter of United States patent cases are filed in the Eastern District of Texas—even though that district is home to no major technology companies and no major cities.[13]

Other examples of forum selling include state-court class-action litigation, pre-modern common-law adjudication in England, and bankruptcy.[14] Domain-name dispute-resolution is, of course, different, because it involves arbitration rather than public courts. Nevertheless, the concept of forum selling fits very well, if not better, in the context of domain-name dispute resolutions.[15] Arbitration providers and arbitrators have a greater incentive to hear more cases, compared to courts and

9. *Id.*

10. *Id.*; *see generally* J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631 (2015) (examining the history and implication of forum shopping for patent cases, particularly in the District of Delaware, the Eastern District of Texas, and the Eastern District of Virginia).

11. Klerman & Reilly, *supra* note 7, at 271.

12. *Id.* at 250–65, 277–80.

13. *Id.* at 248–50.

14. *Id.* at 285–99. For an in depth discussion on forum selling in pre-modern common law adjudication in England, see generally Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179 (2007) (examining the history of judicial fees and the shaping of common law through judicial competition).

15. Klerman & Reilly, *supra* note 7, at 285–96, 298–99. Klerman and Reilly's article, *Forum Selling*, has a brief section on domain disputes. *Id.* at 296–98. That section concludes: "It would be helpful if others analyzed the data to see how the simple statistics produced by Mueller and Geist can be reconciled with the more sophisticated analysis produced by Kesan and Gallo." *Id.* at 298. This Article fills that gap.

judges, because arbitration providers and arbitrators are private businesses and individuals with direct financial incentives to hear more cases. In contrast, judges ordinarily have no financial stake in their caseloads, and usually have no desire to hear more cases. Only a few judges want to hear more cases, and their incentives are ordinarily subtle and nonfinancial. In addition, the rules of jurisdiction and venue usually mean that only a small number of courts can hear a particular case. Even judges who want to hear more cases ordinarily cannot affect their caseloads very much.[16] In contrast, parties can usually choose among numerous arbitration providers. In the domain-name context, the complainant's provider choice is restricted to providers approved by the Internet Corporation for Assigned Names and Numbers ("ICANN"). Nevertheless, during the period studied in this Article, there were four approved providers, so there was substantial room for choice and competition.[17]

Part I discusses the domain-name dispute-resolution system. Part II reviews the literature. Part III reanalyzes Kesan and Gallo's data and Part IV discusses a simple, easily implementable reform. Each party should be allowed to strike some providers. This would eliminate the most biased providers and give all providers an incentive to be neutral. Part V concludes.

I. THE UNIFORM DISPUTE RESOLUTION POLICY

Since December 1999, the Uniform Domain-Name Dispute-Resolution Policy ("UDRP") has governed trademark disputes relating to many of the most important domain names.[18] That policy was promulgated by ICANN and applies to all domain names ending in .com, .net, and .org, as well as many other top-level domains. All persons or entities that register a covered domain name agree to be bound by the UDRP.[19] Under the UDRP, a trademark owner may file a claim against the person who registered a domain name alleging that the domain name "is identical or confusingly similar to a trademark in which the complainant has rights," that the registrant has "no rights or legitimate interests in respect of the domain name," and that the domain name "has

16. Klerman & Reilly, *supra* note 7, at 271, 303–04.

17. This Article focuses on the period from December 2000, when the UDRP went into effect, until June 2001, when eResolution exited the market.

18. *Uniform Domain Name Dispute Resolution Policy*, ICANN (Oct. 24 1999), https://www.icann.org/resources/pages/policy-2012-02-25-en (last visited Oct. 26 2016) [hereinafter ICANN *Uniform Domain Dispute Resolution Policy*].

19. *Id.* ¶¶ 2–3.

been registered and is being used in bad faith."[20] Although the UDRP refers to legal concepts that vary from country to country—such as whether a registrant has "rights or legitimate interests"—it does not provide any guidance on choice of law, leaving wide scope to arbitrator discretion.[21]

The trademark owner unilaterally selects the dispute-resolution provider from among those approved by ICANN.[22] Each dispute-resolution provider has its own roster of arbitrators and its own procedural rules, including rules about selecting arbitrators for particular cases.[23] If the arbitrator decides in favor of the complainant, the domain name is canceled or transferred to the complainant.[24] The relevant domain-name registrars have adopted the UDRP and implement the decisions of the arbitrators without the need for court orders or other legal or administrative proceedings. Both the trademark-owner complainant and the domain-name registrant respondent retain the right to submit or appeal their cases to a court.[25] Nevertheless, because court proceedings are much more expensive than arbitrations under the UDRP, for most disputes, the UDRP arbitration is final and decisive.[26]

By early 2000, there were four approved dispute-resolution providers: WIPO, NAF, eResolution, and the International Institute for Conflict Prevention and Resolution ("CPR").[27] As of 2016, eResolution and CPR no longer provide dispute-resolution services under the UDRP, but three other providers have been approved: the Asian Domain Name Dispute Resolution Centre, the Czech Arbitration Court Arbitration Center for Internet Disputes, and the Arab Center for Domain Name Dispute Resolution.[28] Because this Article analyzes the first eighteen months of

20. *Id.* ¶ 4(a).

21. Fabien Gélinas, *U.D.R.P.: Utopie de la Décision Rapide et Pondérée ou Univers du Droit Réduit au Pragmatisme?*, *in* DROIT DU COMMERCE ÉLECTRONIQUE 577, 599–602 (Vincent Gautrais ed., 2002).

22. ICANN *Uniform Domain Dispute Resolution Policy*, *supra* note 18, ¶ 4(d).

23. *See, e.g.*, *Dispute Policy and Procedural Rules*, WORLD INTELL. PROP. ORG., http://www.wipo.int/amc/en/domains/rules/ (last visited Dec. 29, 2016) (World Intellectual Property Organization ("WIPO") rules); *Uniform Domain Name Dispute Resolution Policy (UPRP)*, FORUM: ARBITRATION MEDIATION INT'L, http://www.adrforum.com/UDRP (last visited Oct. 26, 2016) (National Arbitration Forum ("NAF") rules).

24. ICANN *Uniform Domain Dispute Resolution Policy, supra* note 18, ¶¶ 2, 4(i).

25. *Id.* ¶ 4(k).

26. *See* Kesan & Gallo, *supra* note 2, at 304 n.71 (noting that only sixty-five of the more than 2,000 UDRP arbitrations decided by mid-2002 had been taken to court).

27. *Id.* at 312.

28. *List of Approved Dispute Resolution Service Providers*, ICANN https://www.icann.org/resources/pages/providers-6d-2012-02-25-en (last visited Oct. 12, 2016)

the UDRP, and because CPR heard only a handful of disputes, this Article focuses on three providers: two for-profit corporations—NAF and eResolution—and one nonprofit corporation—WIPO.

II. PRIOR EMPIRICAL STUDIES OF THE UDRP

In 2001 and 2002, two academic studies questioned the fairness of the UDRP. Milton Mueller, a Professor of Information Studies at Syracuse University, studied decisions rendered under the UDRP through October 2000.[29] He found that WIPO arbitrators decided for complainants in 67.5 percent of cases, and that NAF arbitrators decided in favor of complainants 71.5 percent of the time.[30] In contrast, eResolution arbitrators decided in favor of complainants only 44.2 percent of the time.[31] Not surprisingly, WIPO and NAF had dominant market shares—61 percent and 31 percent respectively—whereas complainants chose eResolution only 7 percent of the time.[32] Mueller also examined other factors that might influence the selection of a dispute-resolution provider, including price, a complainant's country of origin, and speed.[33] Mueller concluded that the "complainant loss rate, though not the only factor correlated with the choice of a provider, is a highly significant one," and that "[t]hese findings have important implications for the fairness of ICANN's procedure."[34] Mueller identified the key problem as "complainant selection of the dispute providers [which] has a tendency to reward providers who deliver name transfers."[35]

Michael Geist, a law professor at the University of Ottawa, reached similar conclusions and explored how the arbitration providers "curry

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[hereinafter *List of Approved Providers*].

29. Milton Mueller, *Rough Justice: A Statistical Assessment of ICANN's Uniform Dispute Resolution Policy*, 17 INFO. SOC'Y 151, 156, 159 (2001) (noting in Figure 1 the UDRP proceedings per month from January to October 2000, and in Table 5 the market share of resolution service providers ("RSPs") from January to October 2000).

30. *Id.* at 157.

31. *Id.* For a critique of Mueller's study, see generally Ned Branthover, *UDRP—A Success Story: A Rebuttal to the Analysis and Conclusions of Professor Milton Mueller in "Rough Justice"*, INTA INTERNET COMMITTEE (May 6, 2002), http://www.inta.org/Advocacy/Documents/INTAUDRPSuccesscontraMueller.pdf. Mueller also performed a follow up study. Milton Mueller, Success by Default: A New Profile of Domain Name Trademark Disputes under ICANN's UDRP (Syracuse Univ. Sch of Info. Studies, Working Paper, 2002), http://ccent.syr.edu/wp-content/uploads/2014/05/markle-report-final.pdf.

32. Mueller, *supra* note 29, at 159.

33. *Id.* at. 158–60.

34. *Id.* at 160.

35. *Id.* at 161.

favor with potential complainants."[36] He noted, "the most prominent difference between providers remains case outcome. Simply put, complainants win more frequently with WIPO and NAF than with eResolution."[37] Geist tried to explain why win rates differed among providers, even though their rosters of arbitrators were relatively similar.[38] He argued that NAF and WIPO did not assign cases randomly to arbitrators, but rather their systems appear "to be heavily biased toward ensuring that a majority of cases are steered toward complainant-friendly panelists."[39] Geist also noted that NAF "regularly distributed press releases heralding recent decisions," and that these "releases took on a distinctly *pro-complainant* tone."[40] That is, NAF touted its decisions in favor of trademark-owner complainants to attract business. In addition, NAF made it difficult for respondents (domain-name registrants) to apply for extensions of time.[41]

Jay Kesan, a law professor at the University of Illinois, and Andres Gallo, an economist at the University of North Florida, performed the most sophisticated empirical study of the UDRP system. They used multinomial logistic regression to test whether "the probability of

36. Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT'L L. 903, 906 (2002) [hereinafter Geist, *Fair.com?*]. *See also* Michael Geist, *Fundamentally Fair.com? An Update on Bias Allegations and the ICANN UDR*P, aix1.uottawa.ca/~geist/fairupdate.pdf (updating analysis from the 2002 article with more recent data). For a critique of Geist's work, see *The UDRP by All Accounts Works Effectively: Rebuttal to Analysis and Conclusions of Professor Michael Geist in "Fair.com? and "Fundamentally Fair.com?"*, INTA INTERNET COMMITTEE (May 6, 2002), http://www.inta.org/Advocacy/Documents/INTAUDRPSuccesscontraGeist.pdf.

37. Geist, *Fair.com?*, *supra* note 36, at 909.

38. *Id.* at 907.

39. *Id.* at 936. For a more recent analysis of arbitrator selection that confirms Geist's conclusions, see Michael Ettedgui, *2012 Domain Dispute Study*, DNATTORNEY.COM (Aug. 28, 2012), http://www.dnattorney.com/NAF-DomainNameDisputeStudy-Aug28.pdf; Zak Muscovitch, *2010 Domain Name Dispute Study*, DNATTORNEY.COM (Mar. 2010), http://www.dnattorney.com/study2010.shtml.

40. Geist, *Fair.com?*, *supra* note 36, at 907.

41. *Id.* at 908–09. NAF engaged in similar practices in its consumer-credit arbitration business. In that business, arbitration providers are usually specified in form contracts drafted by the bank, credit card company, or other business. Because consumers seldom pay much attention to those provisions, the financial company de facto chooses the arbitration company unilaterally. In 2009, the Minnesota Attorney General filed suit against NAF alleging that it was biased. The parties settled the suit, and the consent judgment barred NAF from arbitrating consumer disputes, although NAF retained the right to arbitrate domain-name disputes. Press Release, State of Minnesota, National Arbitration Forum Barred from Credit Card and Consumer Arbitrations under Agreement with Attorney General Swanson (July 19, 2009) (on file with author). For a discussion of the Minnesota suit against NAF, see Nancy A. Welsh, *What Is "(Im)Partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 427–30 (2010). *But see generally* Christopher R. Drahozal, *Arbitration Innumeracy*, 4 Y.B. ON ARB. & MEDIATION 89 (2012) (defending NAF).

selecting one of the providers depends on the complainant bias or on the provider's efficiency in handling the cases."[42] To measure bias, the authors calculated the percentage of cases won by complainants in cases decided by each of the three providers—WIPO, NAF, and eResolution.[43] To analyze "efficiency" or "performance," the authors measured the duration of cases decided by each of the three main dispute resolution providers.[44] Providers that decided cases more quickly were considered better in terms of efficiency and performance.[45] Kesan and Gallo concluded that "the performance of providers can be considered a better measure in determining the selection of providers by complainants than the supposed bias of the system favoring complainants."[46] I discuss Kesan and Gallo's methodology in greater depth in the next section. Although they were careful to point out the limits of their analysis, others summarized their conclusions in starker terms. David Simon, for example, stated that, according to Kesan and Gallo, "provider selection is mostly a matter of provider efficiency rather than provider bias. In other words, the complainants choose providers that decide disputes the fastest."[47]

III. REANALYSIS OF KESAN AND GALLO'S DATA

Kesan and Gallo generously shared their data with me. My analysis focuses on the period from December 2000, when the UDRP went into effect, until June 2001, when eResolution exited the market. Table 1 below summarizes the key variables:

42. Kesan & Gallo, *supra* note 2, at 328.
43. *Id.* at 327.
44. *Id.*
45. *Id.*
46. *Id.* at 331.
47. David A. Simon, *An Empirical Analysis of Fair Use Decisions Under the Uniform Domain-Name Dispute-Resolution Policy*, 53 B.C. L. REV. 65, 70 (2012).

TABLE 1: Summary Statistics (December 1999–June 2001)[48]

Provider	Market Share	Percent for Complainant	Duration (days)
eResolution	6.3%	60.1%	48
NAF	32.7%	81.1%	38
WIPO	60.4%	80.0%	56

WIPO and NAF had the largest market shares and together received over 90 percent of the cases. eResolution heard less than 7 percent. WIPO and NAF arbitrators also ruled for the complainant most often (80 percent or more), while eResolution arbitrators ruled for the complainant only 60 percent of the time. These raw statistics are consistent with the idea that complainants chose dispute-resolution providers based on how favorably they ruled for the complainant, although these simple statistics do not, of course, prove causation. The fact that even eResolution decided for the complainant more than half of the time reflects the nature of disputes under the UDRP. Many were simple cyber-squatter cases in which the respondent clearly had no right to the domain name and did not even respond to the complaint.

NAF resolved cases the fastest—on average, in only thirty-eight days. WIPO was the slowest, taking 50 percent more time. eResolution was intermediate in speed, taking, on average, ten days longer than NAF, but eight days fewer than WIPO. These statistics are inconsistent with the idea that complainants chose providers based on speed. If speed were the main determinant, WIPO should have had the smallest market share, not the largest, and NAF and eResolution should have had the largest and second largest market shares, yet together they garnered less than 50 percent of case filings.

It should be noted that Table 1 helps explain eResolution's small share and the dominance of NAF and WIPO, but it does not explain why WIPO had nearly twice the market share of NAF. WIPO and NAF ruled for the

48. Market shares do not add up to exactly 100 percent because CPR heard a small number (0.6 percent) of the cases. A case is counted as "for Complainant" if the domain name was transferred from the registrant (respondent) to the trademark owner (complainant). A small number of domain names were cancelled, but not transferred. Including those cases in the analysis would not change the results significantly. Duration is the average number of days between commencement of the case and issuance of the final decision. A significant number of cases were terminated without a decision by the panel, either because the complainant withdrew the complaint or because the case settled. Those cases are included in calculations of market share, but not in the calculation of percent for complainant and duration.

complainant with nearly the same frequency (80.0 percent and 81.1 percent respectively), so complainant-win rates do not provide a basis for WIPO's dominance. In addition, NAF was considerably faster, so if one looked just at speed and complainant-win rates, one would think that NAF, not WIPO, should have had the largest market share. Clearly, other factors had an influence in the choice between NAF and WIPO. NAF was seen as American, whereas WIPO had a more international profile, which resulted in non-United States complainants favoring WIPO. WIPO also had the prestige that stems from its status as an international nonprofit organization.[49] In addition, WIPO marketed its services extensively and held educational seminars and workshops for lawyers who might file with them.[50]

Analysis of trends over time does not significantly change these conclusions. Table 2 summarizes the trends.

TABLE 2: Change over Time (December 1999–June 2001)[51]

Provider	Market Share	Percent for Complainant	Duration (days)
eResolution	-3.1%	-16.2%	-0.5
NAF	-9.3%	+10.0%	+2.9
WIPO	+11.4%	-2.7%	+19.8

Table 2 indicates that the system was pretty stable over the relevant period. eResolution and NAF lost some market share, and WIPO gained, but their relative positions (WIPO with the most cases and eResolution with the fewest) did not change. To the extent that there were changes, they are flatly inconsistent with the idea that duration was the key factor.

49. Telephone Interview with Karim Benyekhlef, Professor of Law, University of Montreal (Mar. 28, 2016); Telephone Interview with Scott Donahey, Arbitrator (Apr. 29, 2016); Telephone Interview with Fabien Gélinas, Faculty of Law, McGill University (Apr. 18, 2016); Telephone Interview with Joëlle Thibault, Mediator and Ombudsman (Apr. 25, 2016).

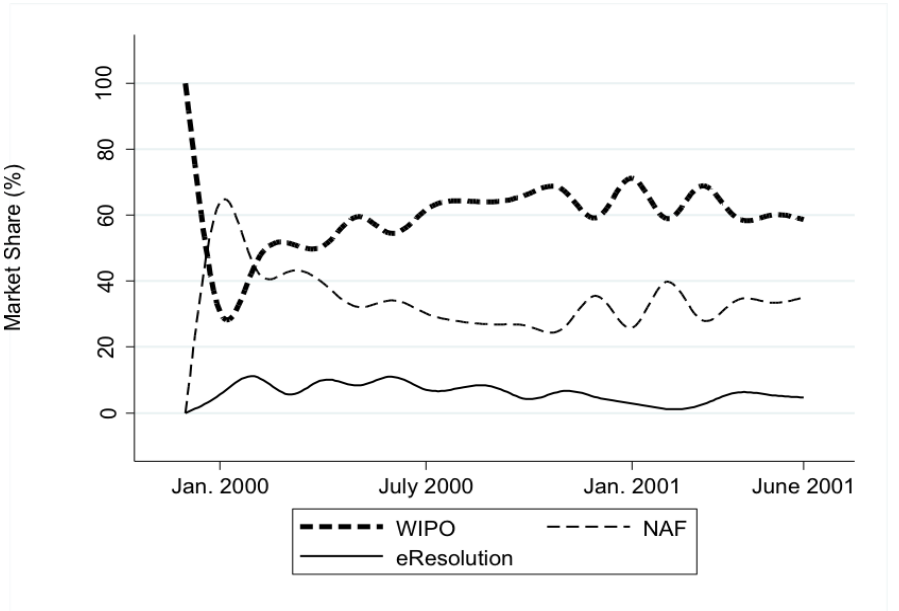
50. Telephone Interview with Karim Benyekhlef, Professor of Law, University of Montreal (Mar. 28, 2016); Telephone Interview with Scott Donahey, Arbitrator (Apr. 29, 2016); Telephone Interview with Fabien Gélinas, Faculty of Law, McGill University (Apr. 18, 2016); Telephone Interview with Joëlle Thibault, Mediator and Ombudsman (Apr. 25, 2016).

51. This table compares outcomes from the first five months of the UDRP (December 1999 to April 2000) to the last three months in which eResolution accepted domain-name cases (April to June 2001). The earlier period is longer than the later period, because only one case was filed in December 1999 and fewer than ten cases were decided in March 2000, so the percentage for Complainant and Duration cannot be calculated reliably without including March and April 2000 cases.

WIPO became noticeably slower, with average case length increasing by nearly three weeks, yet it was the only provider whose market share increased. In contrast, eResolution actually became slightly faster, yet its market share fell. NAF's speed decreased only slightly, yet it also lost market share. Looking at the percentage for complainant column ("Percent for Complainant") helps explain the trends only for eResolution. eResolution became significantly less complainant friendly—its percentage of decisions for the complainant fell 16.2 percent—and its market share fell 3.1 percentage points. Although 3.1 percentage points might not seem like a large decline—because eResolution started with only 8.6 percent of the cases—a 3.1 percentage point decline is actually a loss of more than one third of its market share.

Looking at the trends in more detail reinforces these conclusions. Figure 1 shows monthly trends in market share.

FIGURE 1: Monthly Trends in Market Share (December 1999–June 2001)



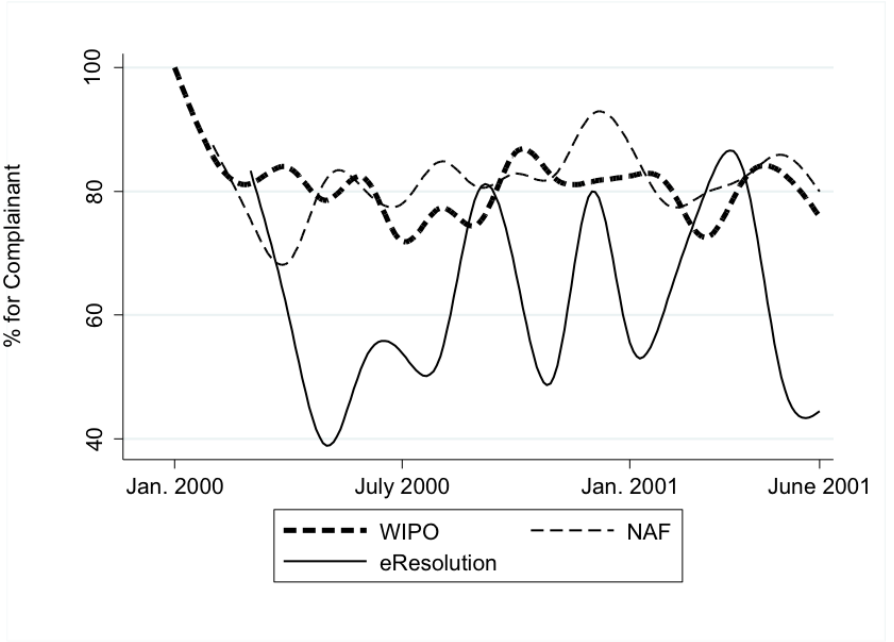
Market share shifted significantly in the early months of the UDRP. WIPO was the first dispute-resolution provider approved by ICANN, and it received the first (and only case) filed in December 1999.[52] So, for the first month of the UDRP, WIPO had 100 percent of the market. NAF

52. Kesan & Gallo, *supra* note 2, at 312.

entered the market in January 2000, and it took more than half the cases filed in that month—reflecting the fact that American trademark owners were the first to take advantage of the UDRP. In over 70 percent of cases filed in January 2000, the complainant was based in the United States. Because NAF was also based in the United States, it was favored by United States complainants. As more non-United States complainants filed cases under the UDRP, NAF's market share fell, because non-United States complainants tended to favor WIPO. eResolution also did relatively well in January and February, with its market share rising to 11 percent. After that, things stabilized—WIPO and NAF took about 60 and 35 percent of the market, respectively, and eResolution's share declined to about 5 percent.

Figure 2 shows that the complainant win rates varied somewhat, especially for eResolution.

FIGURE 2: Trends in Complainant Win Rates (December 1999–June 2001)



Win rates for WIPO and NAF started very high (over 80 percent), declined slightly until July 2000, but then held steady around 80 percent for the rest of the period studied. eResolution's win rates varied much more—largely because it heard, on average, only twelve cases per month, and percentages of small numbers are statistically more likely to be variable. In some months, eResolution's win rates were as high as NAF's

and WIPO's (about 80 percent), but in a majority of months, eResolution's win rates were much lower (between 40 percent and 60 percent). It should be noted that the large variations in eResolution's win rates do not seem to be reflected in volatility in its market share. As will be discussed below, this is important for Kesan and Gallo's analysis, which concludes that complainants made decisions based on monthly win rates.

FIGURE 3: Trends in Case Duration Over Time (December 1999–June 2001)

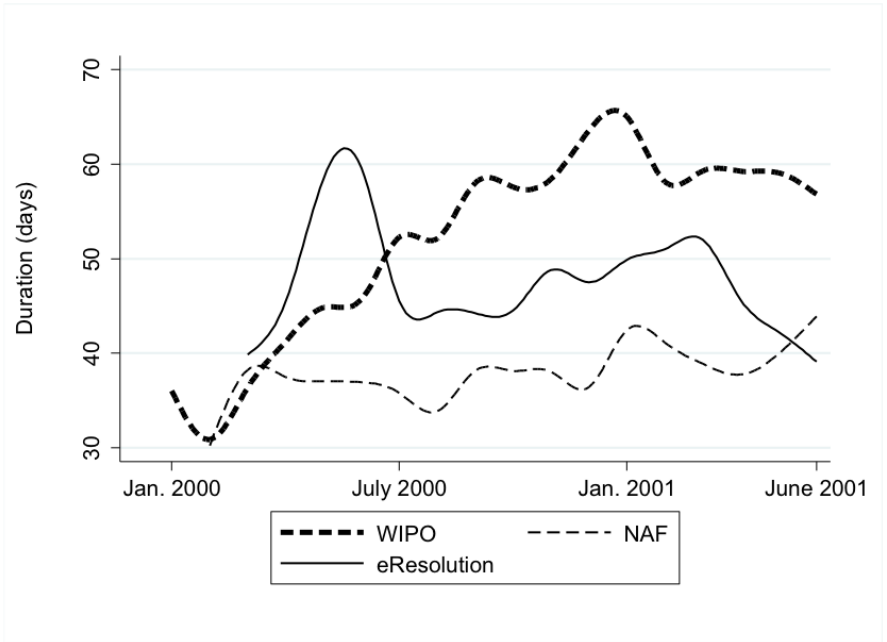


Figure 3 demonstrates that all providers started off relatively fast in terms of case-completion time. This is mostly a statistical anomaly. Duration is measured by averaging the speed of cases terminated in a particular month. Therefore, by necessity, cases decided in the first few months of the UDRP were decided relatively quickly. If it took longer to decide them, their duration would appear in statistics for later months. Nevertheless, after the first few months, some notable differences became apparent. eResolution seemed to have had some difficulty processing cases in the first half of 2000—the duration of its cases spiked at about sixty days in June 2000. Thereafter, its case durations fell and remained intermediate between WIPO and NAF, with a dip at the end of the period, when eResolution was actually faster than NAF. It is possible that complainants formed an impression of eResolution as slow based on its

early 2000 performance and never updated their view. That would provide some support for Kesan and Gallo's conclusion that speed (efficiency) was an important factor in arbitration-provider selection, although it would be inconsistent with their analysis of monthly data.[53] WIPO became slower and slower through 2000, with average duration peaking at over sixty days in January and February of 2001, and declining only slightly thereafter. NAF held steady as the fastest provider for nearly the entire period. As noted above, the fact that WIPO became significantly slower but also increased its market share is inconsistent with the idea that complainants chose arbitration providers based on speed.

This Article's reanalysis of Kesan and Gallo's data refutes the idea that complainants chose dispute resolution providers based on speed (efficiency), and provides some support for the idea that complainants were influenced by win rates. WIPO and NAF, whose arbitrators ruled most often for complainants, garnered over 90 percent of the market. In contrast, eResolution—whose arbitrators ruled less often for the complainant and whose complainant win rate declined—had a small and declining market share. WIPO, which was the slowest provider and whose speed decreased, received the dominant market share and its market share increased over time. Meanwhile, NAF and eResolution, which were faster and whose speed did not change significantly from 2000 to 2001, witnessed declines in their market shares.

Given their different conclusions based on the same data, it is important to discuss how Kesan and Gallo analyzed the data. Kesan and Gallo ran a series of multinomial logistic regressions.[54] The unit of observation was the case.[55] The dependent variable was which provider was chosen, and the independent variables measured duration and complainant win rates for each provider.[56] For duration variables, the natural logarithm of average monthly duration was used.[57] There are a number of problems with Kesan and Gallo's analysis.

First, it should be noted that Kesan and Gallo's results were not that strong. For both the duration and win-rate variables, Kesan and Gallo used two variables for each provider: one measuring duration or win rates for the current month and the other a lagged variable measuring duration

53. *See supra* Part II (discussing the conclusions from Kesan and Gallo's study).
54. Kesan & Gallo, *supra* note 2, at 326–29.
55. *Id.*
56. *Id.*
57. *Id.* at 328.

or win rates for the prior month.[58] Thus, Kesan and Gallo ran regressions with 12 independent variables (3 current-month win-rates variables, one for each of the providers, 3 lagged win-rate variables, 3 current-month logged duration variables, and 3 lagged logged duration variables). Only five of these twelve independent variables produced statistically significant coefficients—two lagged win-rate variables (eResolution and WIPO), two current-month logged duration variables (NAF and eResolution), and one lagged logged duration variable (WIPO).[59] So, Kesan and Gallo were only able to obtain statistical significance for half of the duration variables and less than half of the win-rate variables.

Even for the statistically significant variables, the direction of the effects was not consistent. Thus, if Kesan and Gallo's hypothesis—that speed is the dominant factor in provider choice—is accurate, the regression results should indicate that an increase in the duration of one provider predicts decreases in the market share of that provider and increases in market shares for the other providers. That was true only for eResolution.[60] For WIPO, the results were exactly the opposite—increases in WIPO duration predict increases in WIPO's market share and decreases in NAF's and eResolution's market share.[61] Results for NAF were not consistent one way or the other. The predictions based on the win-rate variables were also inconsistent.[62]

Thus, for reasons that will be discussed more below, the regression results are inconclusive, pointing sometimes to duration and sometimes to win rates as explaining choice of arbitration provider. Kesan and Gallo realized the limited nature of their results. They acknowledge, for example, that for "the efficiency variable for WIPO, the results are not consistent with the efficiency hypothesis."[63] In addition, rather than claiming definitive conclusions, they suggest more research: "[P]erformance should receive more attention than the supposed system bias."[64]

Second, Kesan and Gallo's results are actually weaker than the ones they published, because they miscoded some of the data. For example, some cases decided by eResolution were coded as having been decided by other providers. Andres Gallo generously corrected the data and reran

58. *See id.* ("[W]e tested a series of similar models using the variables mentioned previously. . . . . The results suggest that only [five variables] are significant . . . .").
59. *Id.*
60. Kesan & Gallo, *supra* note 2, at 329.
61. *Id.*
62. *Id.*
63. *Id.* at 331.
64. *Id.*

the regressions. In the new regressions, only three of the independent variables are statistically significant: lagged WIPO win rate, lagged logged WIPO duration, and logged current-month eResolution duration. Thus, only one fourth of the 12 variables initially tested remain significant. In addition, the coefficients on all variables were much smaller, indicating smaller effects than previously measured.

Third, even the corrected results might not be reliable, because some coding problems remain. For example, it appears that nearly all cases heard by eResolution in 2001 were inadvertently dropped from the analysis.

Fourth, multinomial logistic regression analysis does not fully capture the way win rates affect market share. Logistic regression works by analyzing how *changes* in the independent variables affect market share. This is problematic because, as noted above, there was not a lot of change over time. It appears that complainants were not choosing arbitration providers based on the providers' performance in the month the case was filed or the prior month. Instead, the data suggest that they made decisions based on coarser, longer-term information. As noted above when analyzing the graphs, eResolution's complainant win rates varied considerably from month to month, but complainant decisions did not; yet Kesan and Gallo's regressions attempt to measure responses to month-to-month variation. One way of understanding the problems with the multinomial logistic regression framework, as applied to these data, is to imagine a data set only slightly simpler than the real data. Suppose, as in Table 3, there were three providers whose market shares and complainant win rates did not change over time.

TABLE 3: Simulated Data

Provider	**Market Share (%)**	**Percent for Complainant**
1	60%	60%
2	30%	30%
3	10%	10%

In this simulated data, there is a perfect correlation between each provider's market share and the percentage of cases each provider decided for the complainant. One would therefore expect that the regression analysis would indicate that complainant win rates were very strong predictors of market share. Nevertheless, multinomial logistic

regression fails to yield such results. In fact, regression coefficients cannot be calculated. The problem is that there are three independent variables (Percent for Complainant for each of the three providers), and six coefficients need to be calculated (two for each of the three independent variables, because coefficients need to be calculated for each variable for each provider, except whichever one is chosen as the base). In addition, two constants (one for each provider, except whichever one is chosen as the base) must be calculated. There is no way to calculate six coefficients and two constants with what is, essentially, just three data points. Even if there were thousands of observations (cases), they would all take one of the three forms in Table 4, so they would, for statistical purposes, be equivalent to just three data points.

TABLE 4: Simulated Data II

Provider Chosen	**Provider 1 Percent for Complainant**	**Provider 2 Percent for Complainant**	**Provider 3 Percent for Complainant**
1	60%	30%	10%
2	60%	30%	10%
3	60%	30%	10%

With such data, it is mathematically impossible to compute multinomial logistic regression coefficients. That suggests that multinomial logistic regression is not the appropriate method of analysis here. Multinomial logistic regression is designed for situations where different choices are appropriate for choosers or situations with different characteristics. For example, if one were testing whether complainants from particular countries were more likely to choose particular providers, multinomial logistic regression would be appropriate, because complainants from different countries might prefer different providers. Similarly, if certain case characteristics—such as whether the registrant was a critic of the trademarked product or company, a fan of the trademarked product, or simply a cybersquatter—were the independent variables, multinomial logistic regression would be appropriate. In those situations, each observation presents a variety of different case characteristics that make one provider more or less desirable. When testing the effect of duration and win rates, however, there is little that distinguishes one observation from another. Duration and win rates do not vary much, and one would expect that complainants would always choose the provider with the best combination of win rate and speed. As

seen above, that would suggest always choosing NAF, which clearly did not happen.[65]

In this situation, a more appropriate regression would be a simple linear regression with market share as the dependent variable and Percent for the Complainant and Duration as the independent variables. The data would be the data in Table 1.[66] A linear regression with the real UDRP data produces the results one would expect. The coefficient on Percent for Complainant is positive (2.1) and the coefficient on Duration is close to zero (0.02). Of course, with just three observations, one cannot calculate statistical significance, but the fact that the coefficients make sense indicates that the approach is more plausible. A slightly more sophisticated approach replicates the simple linear regression with monthly data.[67] As shown in Table 5, regression results with such data are clear and in accordance with the informal analysis of the tables and graphs in the beginning of this section.

TABLE 5: Linear Regression with Monthly Data

	Coefficient	**Std. Error**	**P-value**
Percent for Complainant	1.06	0.19	0.000
Duration	1.16	0.27	0.000
Constant	-99.40	20.93	0.000
Observations	**51**		
Adjusted r^2	**0.44**		

As one would expect, the coefficient for Percent for Complainant is positive and strongly statistically significant. That is, a greater win rate for the complainant is associated with a greater market share. Each percentage point increase in the plaintiff win rate is associated with about one additional percentage point in market share. The coefficient for duration is positive and strongly statistically significant as well. That is, slow dispute resolution is associated with *greater* market share. Each additional day of average case duration is associated with a one percentage point in *increased* market share. This is consistent with the fact that WIPO had the greatest market share, even though it was the

65. *See supra* Table 1 (summarizing the key variables).
66. *See supra* Table 1 (summarizing the key variables).
67. *See infra* Appendix (presenting the data).

slowest. Nevertheless, this result is flatly inconsistent with Kesan and Gallo's conclusion that complainants chose providers based on efficiency, speed, or performance.

Similar results are obtained when one uses Percent for Complainant and Duration for the prior month. This specification is more plausible because complainants would only have access to data from disputes resolved before they filed their cases. On the other hand, the fact that results are so similar for current-month and lagged variables indicates that it is probably a mistake to use monthly data. Although doing so increases statistical significance, the analysis is not that different from the simple, three-observation linear regression first performed, because there is not much variation over time. As a result, although there are more sophisticated ways of dealing with time-series data than the simple linear regressions reported above, they are not worth performing. One must frankly acknowledge that there are essentially only three observations: (1) eResolution obtained a small market share with low complainant win rates and medium speed, (2) WIPO achieved the largest market share with high complainant win rates and the slowest speed, and (3) NAF received middling market share with high complainant win rates and the fastest speed. Those observations are consistent with the idea that complainants chose based on win rates, but not based on speed. Nevertheless, more sophisticated statistical analysis is not likely to produce solid results, because, with the small amount of variation over time, there are really only these three observations.

IV. SOLUTIONS

Several solutions have been proposed to fix the problem of biased adjudication under the UDRP. Mueller suggested that "registrars rather than complainants select the dispute resolution provider."[68] Registrars are companies, such as GoDaddy and Network Solutions, that register domain names for consumers and business. As Mueller points out, "[b]ecause consumers have a choice of registrars, this would introduce some options for them. If they felt that a particular RSP [resolution service provider] used by a registrar was biased in favor of trademark holders, they could take their business elsewhere."[69] Unfortunately, this solution is likely to lead to bias *against* trademark owners. Registrars would have an incentive to choose dispute-resolution providers that protect existing registrations against trademark owners, and competition among dispute-resolution providers would give them incentives to favor

68. Mueller, *supra* note 29, at 161.
69. *Id.*

domain-name registrants over trademark owners. Thus, Mueller's proposed solution would probably produce a system just as biased as the current system, although the bias would be in the opposite direction.

Michael Geist argues that the solution is three-member panels rather than arbitration before a single arbitrator.[70] Unfortunately, this solution would be very costly, as it would require paying three arbitrators rather than one. The UDRP's low cost is a key advantage over traditional litigation, and Geist's solution would undermine that advantage.

This Article proposes a solution that would borrow from systems already used routinely for the selection of arbitrators and jurors. Both the complainant and the respondent could be given the list of ICANN-approved arbitration companies. Each could then strike an equal number of providers until only one or two providers were left. If only one provider remained, then that provider would resolve the dispute. If two providers remained, then ICANN would randomly assign the dispute to one of those two providers.

More concretely, there are currently five approved dispute resolution providers.[71] If the complainant and respondent each struck two providers, that would usually leave just one provider, and that provider would resolve the dispute. Of course, if the complainant and respondent both struck one of the same arbitration providers, then there would be two providers who were not eliminated by either party. ICANN would then choose randomly among those two. If the complainant and respondent both struck the same two providers, that would leave three providers who were not struck by either party. The system could then afford each party one more strike—thus leaving one or two providers. As before, if, after the second round of strikes, there was only one remaining provider, that provider would resolve the dispute; if there were two remaining providers, ICANN would choose randomly between the two. Of course, if there were more (or fewer) approved dispute resolution providers, the number of strikes would be modified accordingly, but the procedure would be the same.

The advantage of this solution is that it would encourage arbitration providers to be unbiased. Each party would use its strikes to eliminate the most biased providers, so the most neutral would be chosen more often. Thus, in contrast to both the present system and to Mueller's proposal, this solution would reward neutrality rather than bias. In addition, unlike Geist's proposal, this solution would be only slightly more costly than the current system, because allowing each party to strike

70. Geist, *Fair.com?*, *supra* note 36, at 936.

71. *List of Approved Providers*, *supra* note 28.

some providers would cost very little.

V. CONCLUSION

Reanalysis of Kesan and Gallo's data suggests that complainants did not choose providers based on speed.[72] Kesan and Gallo's emphasis on speed is inconsistent with the fact that WIPO had the largest market share, even though it was the slowest and became even slower over time. While the data are not conclusive, they provide some support for the idea that complainants selected providers that were most likely to rule in favor of the complainant. WIPO and NAF—which ruled for complainants about 80 percent of the time—had the largest market share, while eResolution—which ruled for complainants only about 60 percent of the time—had the lowest market share, and its market share declined as its arbitrators ruled less often for complainants.[73] These conclusions are consistent with the hypothesis of forum selling—that providers tried to increase their market share by ruling more often for complainants—although, of course, the actual motive of NAF and WIPO is unknown. NAF, a for-profit company, had a financial incentive to increase its caseload.[74] WIPO, although a nonprofit, revealed through its marketing that it wanted more cases. Nevertheless, although both had incentives to hear more cases, that does not mean that they consciously manipulated the choice of arbitrators or other factors to favor complainants.[75] In addition, the analysis presented in this Article should be treated cautiously. As noted in Part III, there is not much variation over time, so there are essentially only three observations. Quantitative analysis of such a dataset is necessarily limited.

The problem of bias, if it is real and remains to this day, could be solved by allowing complainant and respondent to strike an equal number of arbitration providers, until only one or two providers remained. If there were two unstruck providers, ICANN would choose among them randomly. This system would give dispute-resolution providers an incentive to be unbiased.

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72. *See supra* Part III (reanalyzing Kesan and Gallo's data).

73. *Id.*

74. *See supra* Part I (discussing in detail the UDRP).

75. Although Geist's and Muscovitch's analyses suggest that providers did consciously manipulate the choice of arbitrators to favor complainants, the analysis in this Article does not shed light on that issue. *See generally* Geist, *Fair.com?*, *supra* note 36 (providing evidence suggesting providers manipulate the choice of arbitrators in favor of complainants); Muscovitch, *supra* note 39 (same).

APPENDIX: Data for Linear Regressions with Monthly Data

Month	Provider	Market Share	Percent for Compl.	Duration	Lagged Percent Compl.	Lagged Duration
Dec. 1999	eResolution	0				
Jan. 2000	eResolution	5.56				
Feb. 2000	eResolution	11.11				
Mar. 2000	eResolution	5.61	83.33	39.83		
Apr. 2000	eResolution	10	60.00	45.40	83.33	39.83
May 2000	eResolution	8.33	38.89	58.50	60.00	45.40
June 2000	eResolution	10.97	52.63	59.63	38.89	58.50
July 2000	eResolution	7.06	53.85	45.54	52.63	59.63
Aug. 2000	eResolution	7.62	53.33	44.33	53.85	45.54
Sept. 2000	eResolution	7.85	80.00	44.25	53.33	44.33
Oct. 2000	eResolution	4.18	66.67	44.54	80.00	44.25
Nov. 2000	eResolution	6.67	50.00	48.80	66.67	44.54
Dec. 2000	eResolution	4.65	80.00	47.50	50.00	48.80
Jan. 2001	eResolution	2.92	55.56	49.89	80.00	47.50
Feb. 2001	eResolution	1.24	62.50	51.00	55.56	49.89
Mar. 2001	eResolution	2.33	80.00	52.00	62.50	51.00
Apr. 2001	eResolution	6.09	83.33	45.67	80.00	52.00
May 2001	eResolution	5.49	50.00	42.25	83.33	45.67
June 2001	eResolution	4.71	44.44	39.11	50.00	42.25
Dec. 1999	NAF	0				
Jan. 2000	NAF	63.89				
Feb. 2000	NAF	44.44	87.50	30.25		
Mar. 2000	NAF	42.86	75.41	38.23	87.50	30.25
Apr. 2000	NAF	39.44	68.57	37.50	75.41	38.23
May 2000	NAF	32.14	82.09	37.03	68.57	37.50
June 2000	NAF	34.18	80.28	36.94	82.09	37.03

Month	Provider	Market Share	Percent for Compl.	Duration	Lagged Percent Compl.	Lagged Duration
July 2000	NAF	30.20	78.05	35.80	80.28	36.94
Aug. 2000	NAF	27.74	84.85	33.85	78.05	35.80
Sept. 2000	NAF	26.86	80.65	38.15	84.85	33.85
Oct. 2000	NAF	26.24	82.89	38.13	80.65	38.15
Nov. 2000	NAF	25.71	82.46	38.05	82.89	38.13
Dec. 2000	NAF	35.47	92.45	36.40	82.46	38.05
Jan. 2001	NAF	25.83	87.50	42.45	92.45	36.40
Feb. 2001	NAF	39.83	77.78	41.15	87.50	42.45
Mar. 2001	NAF	28.37	79.75	38.87	77.78	41.15
Apr. 2001	NAF	33.91	82.19	37.74	79.75	38.87
May 2001	NAF	33.52	85.96	39.93	82.19	37.74
June 2001	NAF	35.08	80.00	43.90	85.96	39.93
Dec. 1999	WIPO	100.00				
Jan. 2000	WIPO	30.56	100.00	36.00		
Feb. 2000	WIPO	44.44	85.71	30.86	100.00	36.00
Mar. 2000	WIPO	51.53	81.25	36.33	85.71	30.86
Apr. 2000	WIPO	50.56	83.87	41.23	81.25	36.33
May 2000	WIPO	59.52	78.57	44.84	83.87	41.23
June 2000	WIPO	54.43	82.18	45.69	78.57	44.84
July 2000	WIPO	61.57	71.91	52.28	82.18	45.69
Aug. 2000	WIPO	64.33	77.31	52.13	71.91	52.28
Sept. 2000	WIPO	64.05	74.77	58.02	77.31	52.13
Oct. 2000	WIPO	66.54	86.45	57.57	74.77	58.02
Nov. 2000	WIPO	67.62	82.22	58.41	86.45	57.57
Dec. 2000	WIPO	59.30	81.58	63.56	82.22	58.41
Jan. 2001	WIPO	71.25	82.48	65.04	81.58	63.56
Feb. 2001	WIPO	58.92	81.13	58.17	82.48	65.04

Month	Provider	Market Share	Percent for Compl.	Duration	Lagged Percent Compl.	Lagged Duration
Mar. 2001	WIPO	68.84	72.54	59.29	81.13	58.17
Apr. 2001	WIPO	59.57	81.82	59.26	72.54	59.29
May 2001	WIPO	59.89	83.10	59.10	81.82	59.26
June 2001	WIPO	58.64	76.00	56.83	83.10	59.10