University of Southern California Law School
Legal Studies Working Paper Series

Year 2016 *Paper* 215

Forum Selling and Domain-Name Disputes

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Abstract

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.

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Forthcoming in *Loyola University Chicago Law Journal*

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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.

Arbitration of domain-name disputes is different. Unlike other dispute-resolution systems, the complainant unilaterally chooses the arbitration provider. Since arbitration providers are for-profit entities or have non-financial reasons to want to hear more cases, they have an incentive to favor the complainant. The idea that domain-name arbitration favors the complainant, the trademark owner, has been the dominant view among commentators,[1] although 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. As a result, they argued that competition among arbitration providers enhances efficiency and does not produce bias. 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, WIPO and NAF, who were most likely to rule in favor of the complainant, even though WIPO was the slowest provider. 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. 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

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[1] See *infra* Section II.

[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).

them. Forum selling is the idea that courts and judges are not passive participants in forum selection.[3] 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. While most courts and judges do not want to hear more cases, some seek the power, prestige, and benefits to their localities that higher caseloads can bring. When plaintiffs have a 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.

The prime example of forum selling is patent litigation in the Eastern District of Texas.[4] 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. 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 merely by being more efficient and more expert, their decisions also favor patent plaintiffs in a number of subtle, but important ways. In particular, they almost never grant summary judgment, allow plaintiffs to *de facto* choose the judge, and almost never stay cases pending reexamination. As a result, more than a quarter of 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.

Other examples of forum selling include state-court class-action litigation, pre-modern common law adjudication in England, and bankruptcy.[5] Domain-name dispute-resolution is, of course, a little different, because it involves arbitration rather than public courts. Nevertheless, the concept fits very well, if not better. The incentive to hear more cases is clearer for arbitration providers and arbitrators than for courts and 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 non-financial. 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. In contrast, parties can usually choose among numerous arbitration providers. In the domain-name context, complainants' choice is restricted to providers approved by ICANN. Nevertheless, during the period studied in this article, there were four approved providers, so there was substantial room for choice and competition.

Section I discusses the domain-name dispute-resolution system. Section II reviews the literature. Section III reanalyzes Kesan and Gallo's data, and Section IV discusses a simple, easily implementable reform. Section V concludes.

I. The Uniform Dispute Resolution Policy

Since December 1999, trademark disputes relating to many of the most important domain names have been governed by the Uniform Domain-Name Dispute-Resolution Policy (UDRP).[6] That policy was promulgated by the Internet Corporation for Assigned Names and Numbers (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. 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

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[3] Daniel Klerman and Greg Reilly, *Forum Selling*, 90 S. CAL. L. REV. 241 (2016). See also Gerhard Wagner, *The Dispute Resolution Market*, 62 BUFFALO L. REV. 1085 (2014).

[4] *Id;* J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PENN. L. REV. 631 (2015).

[5] Klerman and Reilly, *Forum Selling*, *supra* note _. *Forum Selling* has a brief section on domain disputes. *Id*. at 297-98. 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.

[6] https://www.icann.org/resources/pages/policy-2012-02-25-en

the registrant has "no rights or legitimate interests in respect of the domain name," and that the domain name "has been registered and is being used in bad faith."[7] Although 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 arbitration discretion.[8] The trademark owner unilaterally selects the dispute-resolution provider from among those approved by ICANN.[9] Each dispute-resolution provider has its own roster of arbitrators, and its own procedural rules, including rules about selecting arbitrators for particular cases. If the arbitrator decides in favor of the complainant, the domain name is canceled or transferred to the complainant. 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.[10] Nevertheless, because court proceedings are much more expensive than arbitrations under the UDRP, for most disputes, the UDRP arbitration is final and decisive.

By early 2000, there were four approved dispute resolution providers: the World Intellectual Property Organization (WIPO), the National Arbitration Forum (NAF), eResolution, and the International Institute for Conflict Prevention and Resolution (CPR). eResolution and CPR no longer provide dispute resolution services under the UDRP, but three other providers have been approved: Asian Domain Name Dispute Resolution Centre, The Czech Arbitration Court Arbitration Center for Internet Disputes, and Arab Center for Domain Name Dispute Resolution (ACDR). [11] Because this article analyzes on the first eighteen months of the UDRP, and because CPR heard only a handful of disputes, this article will focus on three providers: WIPO, NAF, and eResolution. NAF and eResolution are both for-profit corporations. WIPO is non-profit.

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. He found that WIPO arbitrators decided for complainants in 67.5% of cases, and that NAF arbitrators decided in favor of complainants 71.5% of the time. In contrast, eResolution arbitrators decided in favor of complainants only 44.2% of the time.[12] Not surprisingly, WIPO and NAF had dominant market shares (61% and 31% respectively), whereas eResolution was chosen only 7% of the time.[13] Mueller also examined other factors that might influence selection of a dispute-resolution provider, including price, complainant's country of origin, and speed.[14] 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

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[7] UDRP 4(a). https://www.icann.org/resources/pages/policy-2012-02-25-en.

[8] 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*, ed. Vincent Gautrais (2002) 577, 599-602 (2002).

[9] UDRP 4(d).

[10] UDRP 4(k)

[11] https://www.icann.org/resources/pages/providers-6d-2012-02-25-en

[12] Milton Mueller, *Rough Justice: A Statistical Assessment of ICANN's Uniform Dispute Resolution Policy*, 17 INFO. SOC'Y 151, 157 (2001). For a critique of Mueller's study, see 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). Mueller also performed a follow up study. Milton Mueller, *Success by Default: A New Profile of Domain Name Trademark Disputes under ICANN's UDRP* (unpublished, June 24, 2002).

[13] *Id* at 159.

[14] *Id* at. 158-60.

procedure."[15] Mueller identified the key problem as "complainant selection of the dispute providers [which] has a tendency to reward providers who deliver name transfers."[16]

Michael Geist, a law professor at the University of Ottowa, reach similar conclusions and explored how the arbitration providers "curry favor with potential complainants."[17] He notes that "the most prominent difference between providers remains case outcome. Simply put, complainants win more frequently with WIPO and NAF than with eResolution."[18] Geist tries to explain why win rates differ among providers, even though their rosters of arbitrators are relatively similar.[19] He argues that NAF and WIPO do 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."[20] Geist also noted that NAF "regularly distributed press releases heralding recent decisions," and that these "releases took on a distinctly *pro-complainant* tone." That is NAF touted its decisions in favor of trademark-owner complainants in order to attract business. In addition, NAF made it difficult for respondents (domain-name registrants) to apply for extensions of time.[21]

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 selecting one of the providers depends on the complainant bias or on the provider's efficiency in handling the cases."[22] 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. To analyze "efficiency" or "performance," the authors measured the duration of cases decided by each of the three main dispute resolution providers. Providers that decided cases more quickly were considered better in terms of efficiency and performance. 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

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[15] *Id* at 160.

[16] *Id* at 161.

[17] 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).See also See also Michael Geist, *Fundamentally Fair.com? An Update on Bias Allegations and the ICANN UDRP*, aix1.uottawa.ca/~geist/fairupdate.pdf. For a critique of Geist's work, see International Trademark Association Internet Committee, *The UDRP by All Accounts Works Effectively: Rebuttal to Analysis and Conclusions of Professor Michael Geist in "Fair.com? and "Fundamentally Fair.com?* (May 6, 2002).

[18] Geist, *Fair.com*?, *supra note _,* at 909.

[19] *Id* at 907.

[20] *Id* at 936. For more recent analysis of arbitrator selection that confirms Geist's conclusions, see Zak Muscovitch, *2010 Domain Name Dispute Study*, DNATTORNEY.COM (Mar. 2010), http://www.dnattorney.com/study2010.shtml; *2012 Domain Dispute Study*, DNATTORNEY.COM (Aug. 28, 2012), http://www.dnattorney.com/NAFdomainnamedisputestudy 2012.shtml.

[21] *Id* at. 908-9. 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. Since consumers seldom pay much attention to those provisions, the financial company *de facto* chooses the arbitration company unilaterally. In 2009, the Minnesota Attorney 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. State of Minnesota, *Press Release: National Arbitration Forum Barred from Credit Card and Consumer Arbitrations under Agreement with Attorney General Swanson* (July 19, 2009). 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 Christopher R. Drahozal, *Arbitration Innumeracy*, 4 Yearbook on Arbitration and Mediation 89 (2012).

[22] *Id* at 328.

complainants."[23] I discuss their methodology in greater depth in the next section. Although Kesan and Gallo 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."[24]

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:

Table 1. Summary Statistics (December 1999 - June 2001)

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

Notes. Market shares do not add up to exactly 100%, because CPR heard a small number (0.6%) 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 % for complainant and duration.

WIPO and NAF had the largest market shares and together received over 90% of the cases. eResolution heard less than 7%. WIPO and NAF arbitrators also ruled for the complainant most often (80% or more), while eResolution arbitrators ruled for the complainant only sixty 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 38 days). WIPO was the slowest, taking 50% more time. eResolution was intermediate in speed, taking, on average, 10 days longer than NAF, but 8 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. NAF and eResolution should have had the largest and second largest market share, yet together they garnered less than fifty percent of case filings.

It should be noted that Table 1helps explain eResolution' 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 complainant with nearly the same frequency (80.0% and 81.1% respectively), so

[23] *Id* at 331.

[24] 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).

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. Other factors probably had a large influence in the choice between NAF and WIPO. NAF was seen as American, whereas WIPO had a more international profile. So WIPO was favored by non-US complainants. WIPO also had the prestige that comes from being an international non-profit organization. In addition, WIPO marketed its services extensively and held educational seminars and workshops for lawyers who might file with them.[25]

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)

Provider	Market Share	% 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

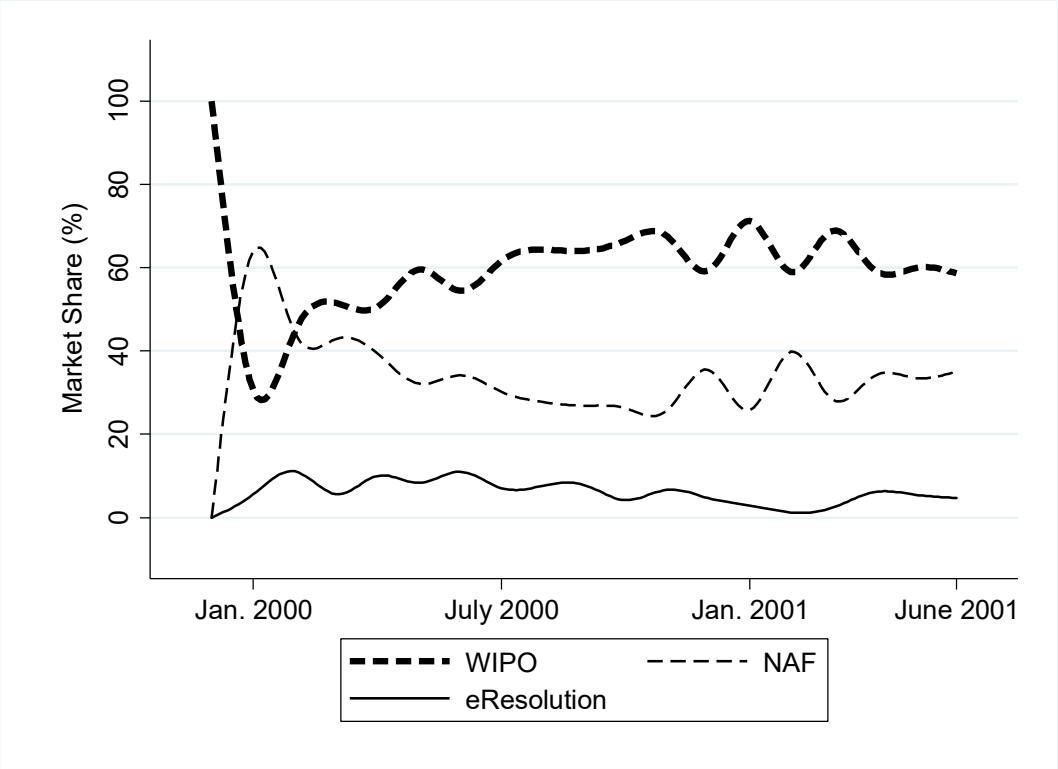
Notes. This table compares outcomes from the first five months of the UDRP (December 1999 to April 2000) to the last three months in which eResolution accepted domain-name cases (April to June 2001). The earlier period is longer than the later period, because only one case was filed in December 1999 and fewer than 10 cases were decided until March 2000, so % for Complainant and Duration cannot be calculated reliably without including March and April 2000 cases.

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 eRes with the fewest) did not change. To the extent that there are changes, they are flatly inconsistent with the idea that duration was the key factor. 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 got slightly faster, yet its market share fell. NAF's speed increased only slightly, yet it also lost market share. Looking at % 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% -- and its market share fell 3.1 percentage points. Although 3.1% percentage points may not seem like a large decline, since eResolution started with only 8.6% 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:

[25] Telephone interviews with Karim Benyekhlef, Scott Donahey, Fabien Gélinas, and Joëlle Thibault.

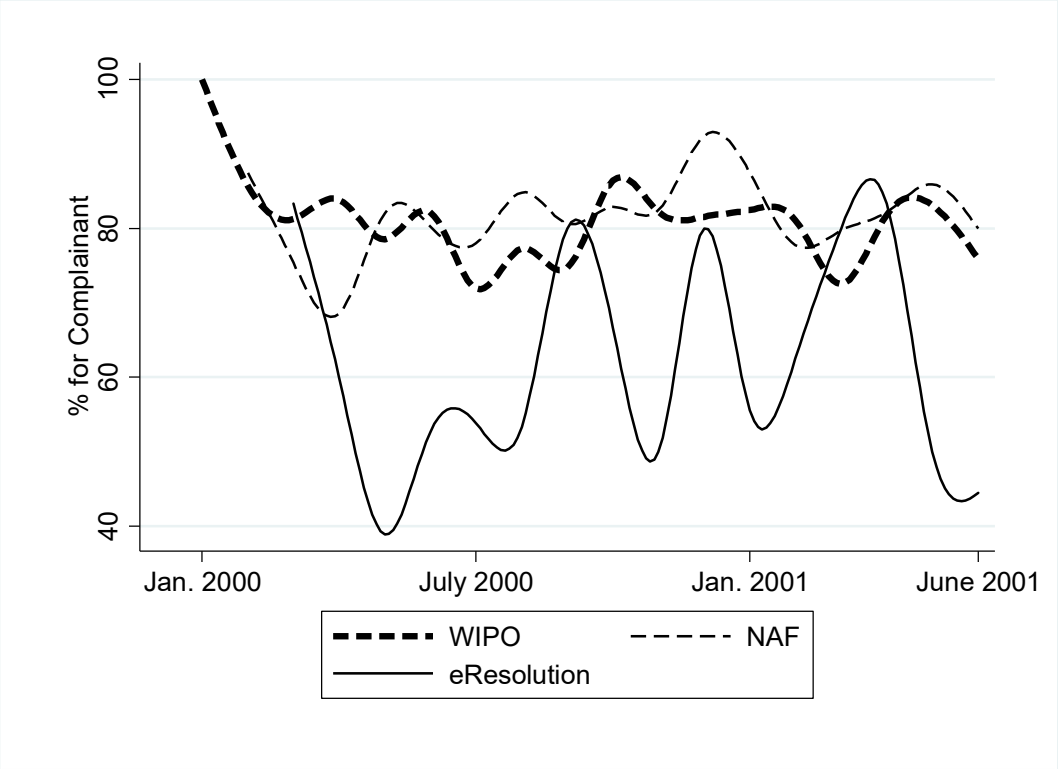
Figure 1. Monthly Trends in Market Share (December 1999 - June 2001)



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. So, for the first month of the UDRP, WIPO had 100% of the market. NAF entered the market in January 2000, and it took more than half the cases filed in that month. That reflects the fact that American trademark owners were the first to take advantage of the UDRP. In over seventy percent of cases filed in January 2000, the complainant was based in the U.S. Because the NAF was also based in the U.S., it was favored by U.S complainants. As more non-U.S. complainants filed cases under the UDRP, NAF's market share fell, because non-US complainants tended to favor WIPO. eResolusions also did relatively well in January and February, with its market share rising to 11%. After that, things stabilized. WIPO and NAF took about sixty and thirty-five percent of the market each, and eResolution's share declined to about five percent.

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

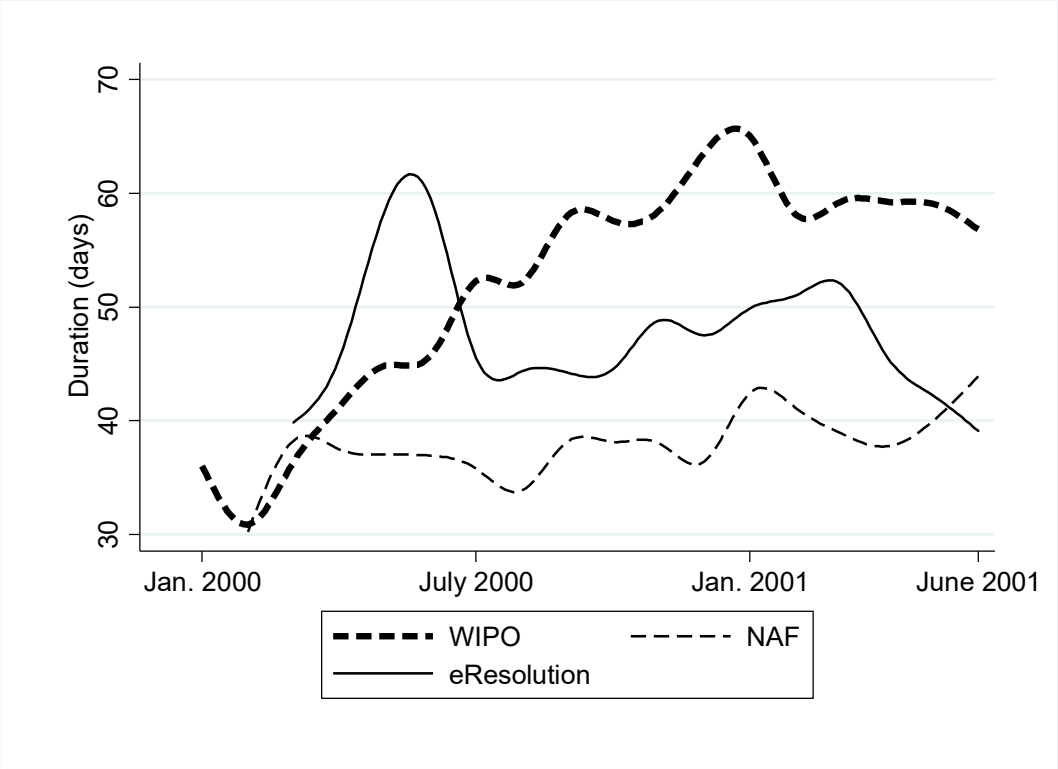
Figure 2. Trends in Complainant Win Rates (December 1999 - June 2001)



Win rates for WIPO and NAF started very high (over eighty percent) and declined slightly, but then held steady around eighty percent for the rest of the period studied. eResolution win rates varied much more, largely because it heard, on average, only twelve cases per month. Percentages of small numbers are statistically more likely to be variable. In some months, eResolution win rates were as high as NAF and WIPO (about 80%), but in a majority of months, eResolution win rates were much lower (between 40% and 60%). It should be noted that the large variations in eResolution 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 2 tracks case duration over time.

Figure 3. Trends in Case Duration (December 1999 - June 2001)



All providers started off relatively fast. This is mostly a statistical anomaly. Duration is measured by averaging the speed of cases terminated in a particular month. 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 show up in statistics for later months. Nevertheless, after the first few months, some notable differences become apparent. eResolution seems to have had some difficulty processing cases in the first half of 2000. The duration of its cases spiked at about 60 days in June 2000. Thereafter, its case durations fell and remained intermediate between WIP and NAF, with a dip at the end of the period, when eRes 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. WIPO got slower and slower through 2000, with average duration peaking at over 60 days in January and February of 2001, declining only slightly thereafter. NAF held steady as the fastest provider for nearly the entire period. As noted above, the fact that WIPO got significantly slower but also increased its market share is inconsistent with the idea that complainants chose arbitration providers based on speed.

This 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% 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, got the dominant market share and its market share increased over time. Meanwhile, NAF and eResolution, which were faster and whose speed did not change much, 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. The unit of observation was the case. The dependent variable was which provider was chosen, and the independent variables measured duration and complainant win rates for each provider. For duration variables, the natural logarithm of average monthly duration was used. There are a number of problems with Kesan 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 or win rates for the prior month.. 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).[26] So, Kesan and Gallo were only able to get 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 the speed is the dominant factor in provider choice, 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. For WIPO, the results were exactly the opposite -- increases in WIPO duration predict increases in WIPO's market share and decreases in NAF and eResolution market share. Results for NAF were not consistent one way or the other. The predictions based on the win rate variables were also inconsistent.[27] Thus, for reasons that will be discussed more below, the regression results are inconclusive, pointing consistently neither to duration nor 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."[28] In addition, rather than claiming definitive conclusions, they suggest more research: "performance should receive more attention than the supposed system bias."[29]

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 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 a quarter of the twelve 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 may 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 providers' performance in the month the case was filed or the prior month. Instead, it appears that they made decisions based on coarser, longer-term information. As noted above when analyzing the graphs, eResolution complainant win rates varied considerably from month to month, but complainant decisions did not, yet Kesan and

[26] *Id* at 328-29.
[27] *Id* at. 329.
[28] *Id* at 331
[29] *Id* at 331

Gallo's regressions attempt to measure responses to month-to-month variation. One way of seeing 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 there were three providers whose market shares and complainant win rates did not change over time and were given by the table below:

Table 3. Simulated Data

Provider	Market Share (%)	% 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 decides 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 3 independent variables (% for complainant for each of the 3 providers), so six coefficients needs to be calculated (two for each of the 3 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 thee forms listed below

Table 4. Simulated Data II

Provider Chosen	Provider 1 % for Complainant	Provider 2 % for Complainant	Provider 3 % 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 suggest 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.

In this situation, a more appropriate regression would be a simple linear regression with market share as the dependent variable and % for the Complainant and Duration as the independent variables. The data would be the data in Table 1 above. A linear regression with the real UDRP data produces the results one would expect. The coefficient on % for Complainant is positive (2.1) and the coefficient on Duration is close to zero (0.02). Of course, with just 3 observations, one cannot calculate statistical significance, but the fact that the coefficients make sense indicate that that the approach is more plausible. A slightly more sophisticated approach replicates the simple linear regression with monthly data. The data are presented in the Appendix. Regression results 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**
% 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 % 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. Oddly, 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 slowest. Nevertheless, this result is flatly inconsistent with Kesan and Gallo's conclusion that complainants choose based on efficiency speed or performance. Similar results are obtained when one uses % 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 got a small market share with low complainant win rates and medium speed, (2) WIPO got the largest market share with high complainant win rates and the slowest speed, and (3) NAF got 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 three observations.

IV. Solutions

Several solutions have been proposed to the problem of biased adjudication under the UDRP. Mueller suggested that "registrars rather than complainants select the dispute resolution provider."[30] 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.[31] 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 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 other direction.

Michael Geist argues that the solution is three-member panels rather than arbitration before a single arbitrator.[32] 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. Geist's solution would undermine that advantage.

A better solution 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 was 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.[33] If complainant and respondent each struck two providers, that would usually leave just one provider, and that provider would resolve the dispute. Of course, if complainant and respondent both struck one of the same arbitration providers, then there would be two providers who were struck by neither party. ICANN would then choose randomly among those two. If complainant and respondent both struck both of the same providers, that would leave three providers who were struck by neither party. Each party would then be given another strike, thus leaving one or two providers. As before, if, after the second round of strikes, there were only one remaining provider, it 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 not be more costly than the current system.

V. Conclusion

Reanalysis of Kesan and Gallo's data suggests that complainants did not choose providers based on speed. 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 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% of the time, had the largest market share, while eResolution, which ruled for complainants only about 60% of the time, had the lowest market share, and its market shared declined as its arbitrators ruled less often

[30] Mueller, *Rough Justice*, *supra* note _, at 161.
[31] *Id*.
[32] *Id* at 936.
[33] https://www.icann.org/resources/pages/providers-6d-2012-02-25-en

for complainants. 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 incentives to increase its caseload. WIPO, although a non-profit, 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. Geist's and Muscovitch's analysis suggests that they did, but the analysis in this article does not shed light on that question.[34] In addition, the analysis presented here should be treated cautiously. As noted in Section 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.

[34] See *supra* at note _.

Appendix

Table 6. Data for Linear Regressions with Monthly Data

Month	Provider	Market Share	% for Complainant	Duration	Lagged % Complainant	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
Jun 2000	eResolution	10.97	52.63	59.63	38.89	58.50
Jul 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
Jun 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
Jun 2000	NAF	34.18	80.28	36.94	82.09	37.03
Jul 2000	NAF	30.2	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
Jun 2001	NAF	35.08	80.00	43.90	85.96	39.93
Dec 1999	WIPO	100				
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
Jun 2000	WIPO	54.43	82.18	45.69	78.57	44.84
Jul 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	59.3	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
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
Jun 2001	WIPO	58.64	76.00	56.83	83.10	59.10