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Market for Private Dispute Resolution Services - An Empirical Re-Assessment of ICANN-UDRP Performance, The

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THE MARKET FOR PRIVATE DISPUTE RESOLUTION SERVICES—AN EMPIRICAL RE-ASSESSMENT OF ICANN-UDRP PERFORMANCE

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I. INTRODUCTION

The entities that provide Alternate Dispute Resolution (ADR) services for a specific class of disputes within a defined dispute resolution framework are often studied by comparing them to the courts. But there are very few, and no thorough, empirical studies that compare ADR service providers' performance and study the market for private dispute resolution services.

In the past few years, the number of Alternative Dispute Resolution (ADR) systems has increased dramatically. This is especially due to the Internet furthering the use of new communication technologies for providing arbitration services.[1] Much of the increase in ADR regimes is also a result of the passage of the Alternative Dispute Resolution Act of 1998, legislation that promoted and authorized the use of ADR providers in the United States.[2]

Generally, ADR regimes function as an alternative to the courts for resolving different conflicts.[3] The range and scope of activities and is-

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1. "Informal rulemaking, "one of the greatest inventions of modern government," is about to be transformed by the silent revolution of e-government, the widespread incorporation of Web-based technology in the public sector. Whether the revolution is a boon or a bust for democracy will depend on whether that technology is designed to strengthen the right of citizens to participate in making administrative rules." Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 433 (2004).

"Where offline ADR may help to settle a matter in days or months, as compared to the years it may take to resolved litigation, online ADR promises settlement of disputes within days or even hours. The borderless nature of the Internet diminishes the communication problems faced by parties located in different time zones" Aashit Shah, *Using ADR to Resolve Online Disputes*, 10 RICH. J.L. & TECH. 25, *21 (2004).

2. *See* Alternative Dispute Resolution Act, 28 U.S.C. §§ 651–58 (2000).

3. "The growth of ADR is based on the recognition that there are many ways to resolve disputes, limited only by the parties creativity and willingness to innovate. Parties involved in disputes, their attorneys, mediators and arbitrators should continuously investigate,

sues resolved through ADR is growing fast and includes diverse fields like labor, health services, e-commerce, domain names, and similar pursuits.[4] As such, there are many reasons why ADR is advantageous as compared with the courts.[5] First, ADR is faster than the courts and provides quick relief for a diverse set of issues.[6] Second, ADR tends to have simple procedural rules that parties can easily understand.[7] Third, and closely related to the other two characteristics, ADR is relatively inexpensive and provides valuable dispute resolution services for consumers.[8] As a result, there is a proliferation of different ADR providers in many economic sectors.[9]

There are, however, many commentators and scholars who complain about the actual effectiveness of ADR regimes.[10] Most of the critics focus on the lack of certain characteristics in ADR systems that are key to producing impartial and accurate judgments. First, the appointment and availability of panelists or arbitrators is limited and controlled by the

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discuss and implement innovative procedures that will lead to a fair, efficient and effective resolution of disputes." Robert J. Macpherson, Richard F. Smith and Roy S. Mitchell, *Innovations in Arbitration: Improving the Presentation of Evidence in Constructing Arbitration*, 58 DISP. RES. J. 30, 34 (2003).

4. *See*, Mitchell J. Nathanson, *It's the Economy (and Combined Ratio), Stupid: Examining the Medical Malpractice Litigation Crisis Myth and the Factors Critical to Reform*, 108 PENN. ST. L. REV. 1077 (2004); Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365 (2004); J. Clarence Davies, *Environmental ADR and Public Participation*, 34 VAL. U. L. REV. 389 (2000); Phyllis E. Bernard, *Mediating with an 800-pound Gorilla: Medicare and ADR*, 60 WASH. & LEE L. REV. 1417 (2003); Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements Through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77 (2003); Ayelet Lichtash, *Inappropriate Use of E-mail and the Internet in the Workplace: The Arbitration Picture*, 59 APR DISP. RESOL. J. 26 (2004); Michael L. Rustad, *Punitive Damages in Cyberspace: Where in the World is the Consumer?* 7 CHAP. L. REV. 39 (2004); Aashit Shah, *supra* note 1 (addressing issues concerning ADR in different economic sectors).

5. *See* Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999); Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. 441 (2002); Rex R. Perschbacher and Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1 (2004) (analyzing the effectiveness of ADR regimes).

6. *See supra* note 1 and accompanying text.

7. *See generally* Perschbacher and Bassett, *supra* note 5.

8. "Alternative dispute resolution methods can mitigate the problem of the high cost of litigation. Indeed, its ability to reduce dispute resolution costs is generally regarded as one of the chief benefits of ADR. Because ADR costs less than traditional dispute resolution, it is more accessible for the parties involved." Nathan K. DeDino, Note, *When Fences Aren't Enough: The Use of Alternative Dispute Resolution To Resolve Disputes Between Neighbors*, 18 OHIO ST. J. ON DISP. RESOL. 887, 893 (2003).

9. *See supra* note 4 and accompanying text.

10. *See supra* note 5 and accompanying text.

ADR provider.[11] Second, procedures are usually private.[12] Third, sometimes ADR systems do not provide for an effective appeal of their rulings.[13] Fourth, ADR systems concentrate on specific types of cases, such as labor issues. Such a repetition of the same kind of cases, and also the same parties, creates problems of independence and objective analysis of each case. Finally, ADR systems are usually private, and their stakeholders can have a close relationship with the groups that have an interest in the services provided by the ADR entities. For example, in the case of Trust-e, the companies that supported and created the ADR regime for the protection of online privacy were also using the same system to enter consumer complaints that needed resolution.[14]

Despite the interest in the performance of different ADR providers, most of the literature concentrates on the analysis of the main characteristics of these systems as compared to the courts.[15] Nonetheless, within the world of private dispute resolution, we should naturally observe differences in performance among these private providers. However, literature has addressed neither the effects of this competition nor the consistency and uniformity across ADR providers.

We present a thorough analysis of one of the ADR regimes that is considered a significant success in Internet markets, the Uniform Dis-

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11. "Another, related dimension of the arbitration that should be addressed in the arbitration agreement is which entity should have controlling authority in the proceeding: the administering arbitral institution, the arbitrating parties, or the arbitrators. Traditionally, practice provides the basic guidance on this matter following the rule that "unless the parties provide otherwise, the arbitrators shall decide. . . ." This pragmatic balance between freedom of contract and the authority of the arbitrators has been, and may continue to be, a sufficient hierarchy of authority. In circumstances in which irreconcilable positions develop between the three principal players in the process, however, such as those pertaining to the matter of impartiality, the well-settled hierarchy may be inadequate to resolve the conflict. Party provisions in these circumstances would at least emphasize the importance and argue for the controlling authority of contract in the resolution of these conflicts. Courts may not support, and arbitral institutions may not yield, to that principle of determination." Thomas E. Carbonneau, *The Exercise Of Contract Freedom In The Making Of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1217 (2003).

12. *See* Perschbacher and Bassett *supra* note 5 (analyzing the differences between arbitration and courts).

13. "The lack of appeal from arbitration is another way to challenge mandatory reference to binding arbitration. Since the legal grounds to challenge are very demanding, with a strong presumption in favor of the arbitrator's decision, the lack of appeal can appear to be another hindrance to rights enforcement. Arbitrators' decisions have long been thought to contain compromises of one sort or another." Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 935 (2002).

14. *See* Trust-e at http://www.truste.org (showing that most of the sponsors and founders of the Seal are also users).

15. *See supra* notes 4 and 5 and accompanying text.

pute Resolution Policy (UDRP) implemented by the Internet Corporation for Assigned Names and Numbers (ICANN).[16] In this work, we perform a complete empirical analysis of the UDRP and evaluate its performance. We then extrapolate the results to other sectors of the Internet market and to private dispute resolution in general.

The impressive growth of the Internet in the 1990s and the boom of the e-economy generated competition for the most coveted of the top domain names, *i.e.*, the .com.[17] Nonetheless, the other original generic top level domain names (gTLDs) open to commercial use, .org and .net, were also in high demand from businesses.[18] Other types of top-level domain names, especially the country code TLDs (ccTLDs), were of little commercial value, and registration was not as important as it was with gTLDs.[19] As a result, the artificial scarcity of TLDs created by the managers of the Domain Name System (DNS) sharply increased the value of the registered and most popular domain names. Although a new set of gTLDs were recently introduced in the root system,[20] the .com

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16. This type of ADR regime has also been proposed for other Internet activities such as electronic commerce, business relationships, and the like.

17. ". . .[T]he 'Webification' of domain names was the critical step in the endowment of the name space with economic value. It massively increased the demand for domain name registrations and game common, or famous, or generic terms under the .com space the commercially valuable property of being able to effortlessly deliver thousands if not millions of Web site "hits"." MILTON MUELLER, RULING THE ROOT. INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE, 109 (2002).

"The e-commerce explosion of the late 20th Century has created a rush on Internet domain names. More domain names are being registered, and there are more registrars to do it than ever before. In fact, the Internet may be running out of space. In the most popular top level domain, <.com>, it seems that almost every recognizable word has been claimed." Kevin Heller, *The Young Cybersquatter's Handbook: A Comparative Analysis of the ICANN Dispute*, 2 CARDOZO ONLINE J. CONFLICT RESOL. 2, 2 (2001).

18. "Other gTLDs in existence since 1984 impose additional criteria for registration: .mil (U.S. military), .gov (U.S. government), .int (international organizations), .edu (institutions of higher education, mostly U.S. based), and .arpa. In November 2000, following a complex and convoluted process, ICANN approved in principle the creation of seven new gTLDs." A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy" Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 618 (2002).

"Domain names have become the valuable intangible real estate of cyberspace. For example, the domain name sex.com was valued at $250 million; business.com at $7.5 million; and loan.com at $3.0 million. The monetary value of some domain names suggests that it would be proper to classify domain names as property." Xuan-Thao N. Nguyen, *Cyberproperty and Judicial Dissonance: The Trouble with Domain Name Classification*, 10 GEO. MASON L. REV. 183, 184–85 (2001).

19. *See* Froomkin, *supra* note 18, at 618.

20. "Among the most significant events in the domain name world is the addition of seven new generic top level domain names ("gtlds"): .aero; .biz; .coop; .info; .museum; .name; and .pro. The .info name like .com before it, is unrestricted and anyone will be able to register

domain names are still the most important for e-commerce. Initially, Network Solutions Inc. (NSI), a private for-profit firm, through a special contract with the United States government, managed the domain name system.[21] Later, in 1995, NSI delineated a policy for conflict resolution of domain names without creating an authority to solve disputes.[22] The result was that the management of numerical addresses in the Internet was under the charge of the Internet Assigned Numbers Authority (IANA).[23]

In 1997, because of the expansion of the Internet internationally, the United States government delegated the management of numbers and names on the Internet to a non-profit corporation based in California, the Internet Corporation for Assigned Names and Numbers (ICANN).[24]

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and use it. The other domain names have restricted uses." Barbara Solomon, *Domain Name Disputes: New Developments and Open Issues,* 91 TRADEMARK REP. 833, 833 (2001).

21. "NSI agreed to register second-level domains in .com, .net, .org and .edu and to maintain those top-level domains' master databases. These services were underwritten by the National Science Foundation and were free to users initially. As the number of registrations began to rise, NSI and the National Science Foundation agreed that NSF would no longer underwrite these services. Instead, NSI would charge a fifty dollar (US $50) annual fee to each domain name registrant." Wayde Brooks, *Wrestling Over the World Wide Web: ICANN's Uniform dispute Resolution Policy for Domain Names Disputes,* 22 HAMLINE J. PUB. L. & POL'Y 297, 311–312 (2001).

22. "In July 1995, Network Solutions issued a "Domain Dispute Resolution Policy Statement" designed to shield itself from future trademark-related lawsuits. In this policy statement, Network Solutions declared that it "has neither the legal resources nor the legal obligation to screen requested Domain Names to determine if the use of a Domain Name by an Applicant may infringe upon the right(s) of a third party." It then set out a series of contractual conditions that would be imposed on all registrants in the InterNIC-operated domains. The policy gave Network Solutions the right to withdraw a domain name from use if presented with a court order from an arbitration panel decision transferring the name." MUELLER, *supra* note 17, at 120–121.

"To invoke the NSI Dispute Policy, the complainant would have to give notice to the registrant that there had been an alleged trademark violation because the "creation date" of the registrant's domain name registration followed the "effective date" of the complainant's registration of an identical trademark. After NSI received a copy of the complaint, the registrant would have thirty days to prove that he owned a trademark in the contested name. If he could not, NSI would put the domain name on "hold" until a resolution was reached, either between the parties or through litigation." Keith Blackman, *The Uniform Domain Name Dispute Resolution Policy: A Cheaper Way to Hijack Domain Names and Suppress Critics,* 15 HARV. J. L. & TECH. 211, 222 (2001).

23. "RFC 1083 (December 1988), which defined a standards-making process for the new, extended Internet community, was also the first public document to mention an Internet Assigned Numbers Authority (IANA)." MUELLER, *supra* note 17, at 93 (describing the creation and characteristics of IANA).

24. *See* MUELLER, *supra* note 17, Chapter 8 (describing the political process that resulted in the creation of ICANN in 1997).

"In the White Paper that emerged from the convoluted U.S. government policy process—formally known as the U.S. Department of Commerce's Statement of Policy on Management

From 1997 on, ICANN was in charge of managing the names and numbers system for the Internet.[25] Even though ICANN is the most important organization managing domain names, it is not the only one. There are other alternative root servers: Open NIC, ORSC, Pacific Root, New.net, Name.space, and CN-NIC. [26] The relevance and power of ICANN to implement new policies for the Internet is based on two main characteristics: (1) the monopoly of the main Domain Name system in the Internet; and (2) the lack of technological compatibility between competing Domain Name systems, preventing other private firms from competing with ICANN.[27]

One of the main problems in the medium term was the creation of a system to handle the growing number of conflicts among users caused by the sometimes indiscriminate registration of domain names that collided with already established trademarks in the real life markets.[28] These disputes grew in direct proportion to the increase in Internet commerce

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of Internet Names and Addresses- the government took something of a middle-of-the-road position. It agreed that trademark owners were being victimized by so-called cyberpirates who registered domain names to sell them to the corresponding trademark holder. But rather than proposing direct action, the White Paper called on WIPO to conduct a study and make recommendations for what would become ICANN." Froomkin, *supra* note 18, at 622–623.

25. "In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall, except as limited by Article 5 hereof, pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i)coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv)." Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, November 1998, at http://www.icann.org/general/articles.htm

26. *See* MUELLER, *supra* note 17, at 55 (describing the other root servers of the Internet and the problems of compatibility between them).

27. *Id.*

28. "Unfortunately for these businesses, registration of SLDs in the three existent gTLDs (.com, .org and .net) and in the ccTLDs which emulate them, is on a first-come, first-served basis. No questions are asked about the proposed use, or about possible trademark conflicts. . . . As there was no limit to the number of names a person could register, name speculators quickly understood that they could register names and seek buyers for them without risking any capital. While some speculators sought common words with multiple possible uses, a few others—who became known as cybersquatters- registered thousands of names that corresponded to the trademarks or companies that had not yet found the Internet and then sought to resell (or, some would say, ransom) the name to those companies." Froomkin, *supra* note 18, at 620.

in the late 1990s.[29] In fact, instead of decreasing the pressure on the use of the .com by creating other kinds of top domain names, ICANN allegedly created an artificial scarcity in this environment and drove up the demand for use of the already fully utilized .com.[30] The usual mechanism to solve these kinds of disputes, court, had difficulty handling cases where parties came from different jurisdictions and had different rights under the law. And even though the courts reached verdicts, the enforcement of those verdicts was typically weak, if it was available at all.[31] Furthermore, typical judicial remedies were too slow and expensive to adequately resolve Internet domain name disputes.[32]

One of the main tasks of ICANN, in accordance with the mandate received through the delegation of power from the United States government, was to provide a fast and inexpensive system to solve domain

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29. "Whether the actual magnitude of the overall "cyber-piracy" problem was .045% or 3.5% of new registrations, or more likely somewhere in between, and whether the problem was growing or shrinking, in absolute terms, it clearly existed." Froomkin, *supra* note 18, at 627.

30. *See* Heller, *supra* note 17 and accompanying text.

Even though there were just three gTLDs open to general public, IANA registered more than 200 applications until 1996. *See* MUELLER, *supra* note 17, at 132–133.

31. "The global reach of the Internet provides both the Internet's appeal and many of the legal problems being encountered. Activity on the web that may be permissible where initiated may violate the law in the locale where the web site is accessed. Until recently there was no easy way to confine modifications to a web site or domain name to a particular geographic area. Thus, any changes that were made or imposed by a court became global in effect even when made in response to local laws or requirements." Solomon, *supra* note 20, at 859.

"Many of these multijurisdictional disputes raise exactly the kinds of issues typically found in U.S. litigation involving citizens of more than one state, such as differences in substantive law, procedural rules, and choice of law rules. As the disputes move from interstate to international, the differences and practical difficulties increase. Difference in substantial law may be more substantial, differences in procedural rules more significant, differences in the ability to acquire jurisdiction more diverse, and differences in choice of law rules more complex. Also, multinational disputes can add a layer of enforcement difficulties." Elizabeth Thornburg, *Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process*, 6 J. SMALL & EMERGING BUS. L. 191, 192–193 (2002).

See Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L REV. 1275 (2002) (analyzing the problems of the courts in handling cases related to the Internet).

32. "Notwithstanding the size of the individual settlements, firms managing large number of brands argued that the cumulative costs imposed an unfair burden and amounted to a windfall to the undeserving. Worse, aggrieved trademark holders in countries with dysfunctional court systems stated that their national court systems were so slow as to make the wait for meaningful relief against improper domain name registrations an eternity in Internet time, or even in ordinary time. Other trademark holders complained of the difficulty of locating cybersquatters who falsified their contact information at the time of registration, or who were located in jurisdictions where the law was uncertain, the courts unreliable, or service was difficult." Froomkin, *supra* note 18, at 629.

name disputes.[33] In 1999, after a series of consultations with many interest groups, ICANN created the Uniform Dispute Resolution Policy (UDRP).[34] The UDRP was a decentralized regime for dispute resolution in which ICANN created the general rules and authorized a series of competing private providers to manage and resolve disputes. ICANN, because of its role as the only manager of the domain name system, almost perfected enforcement of the providers' decisions.[35] Nonetheless, after a few years, scholars and commentators harshly criticized ICANN. Overall, the debate on the performance of the system has been strong, with both unfavorable and a few favorable comments.[36]

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33. "The U.S. Government will seek international support to call upon the World Intellectual Property Organization (WIPO) to initiate a balanced and transparent process, which includes the participation of trademark holders and members of the Internet community who are not trademark holders, to (1) develop recommendations for a uniform approach to resolving trademark/domain name disputes involving cyberpiracy (as opposed to conflicts between trademark holders with legitimate competing rights), (2) recommend a process for protecting famous trademarks in the generic top level domains, and (3) evaluate the effects, based on studies conducted by independent organizations, such as the National Research Council of the National Academy of Sciences, of adding new gTLDs and related dispute resolution procedures on trademark and intellectual property holders. These findings and recommendations could be submitted to the board of the new corporation for its consideration in conjunction with its development of registry and registrar policy and the creation and introduction of new gTLDs." United States Department of Commerce, *Management of Internet Names and Addresses*, June 1998, *at* http://www.icann.org/general/white-paper-05jun98.htm

34. "The UDRP was adopted to provide a relatively fast and effective means of dealing with the issues of bad faith domain name registration. Currently, the UDRP applies to the .com, .net, and .org gtlds and top sixteen cctlds. Moreover, there is a push for all cctld registrars to adopt a policy modeled on the UDRP. If all domain registrars were to adopt the same policy, a complainant could bring a consolidated action concerning objectionable domain names in both gtlds and cctlds. WIPO has received four such cases." Solomon, *supra* note 20, at 835.

35. "Under the UDRP, jurisdiction is contractual. The UDRP is incorporated into every domain name Registration Agreement. By registering a domain name with any accredited registrar, if any third party alleges cybersquatting, respondent subjects himself to the UDRP's mandatory administrative procedure which is in procedural compliance with the Rules." Heller, *supra* note 17, at 4.

36. There is a wide range of critics and some support of the UDRP by ICANN. The following is an incomplete list of some papers that deal with the problems and challenges of the system: Laurence R. Helfer and Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 154–155 (2001); Thornburg, *supra* note 31; Patrick D. Kelley, *Emerging Patterns in Arbitration Under the Uniform Domain-Name Dispute-Resolution Policy*, 17 BERKELEY TECH. L.J. 181 (2002); Adam Goldstein, Note, *ICANNSUCKS.BIZ (And Why You Can't Say That): How Fair Use of Trademarks in Domain Names is Being Restrained*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1151 (2002); Milton Mueller, *A New Profile of Domain Name Trademark Disputes under ICANN's UDRP*, Syracuse University School of Information Studies Working Paper, June 2002 (On file with the authors); Milton Mueller, *supra* note 17; Scott Hejny, Comment, *Opening the Door to Controversy: How Recent ICANN Decisions Have Muddied the Waters of Domain Name Dispute Resolution*, 38 HOUS. L. REV. 1037 (2001); Keith

The characteristics and facts of the disputes together with an analysis of the results of panel decisions have provided the basis for most of the empirical studies of the UDRP.[37] Common criticisms are that the providers have incentives to favor the complainants and that the rules favor

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Blackman, *supra* note 22; Pamela Segal, *Attempts to Solve the UDRP's Trademark Holder Bias: A Problem That Remains Unsolved Despite the Introduction of New Top Level Domain Names*, 3 CARDOZO ONLINE J. CONFLICT RESOL. 1 (2001); Holger P. Hestermeyer, *The Invalidity of ICANN's UDRP Under National Law*, 3 MINN. INTELL. PROP. REV. 1 (2002), *available at*http://mipr.umn.edu/archive/v3n1/hestermeyer.pdf; Michael Geist, *Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT'L L. 903 (2002); Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000); Joe Sims and Cynthia Bauerly, *A Response to Professor Froomkin: Why ICANN Does Not Violate The APA or The Constitution*, 6 J. SMALL & EMERGING BUS. L. 65 (2002); A. Michael Froomkin, *Form and Substance in Cyberspace*, 6 J. SMALL & EMERGING BUS. L. 93 (2002); Joe Sims and Cynthia L. Bauerly, *A Reply to Professor Froomkin's* Form and Substance in Cyberspace, 6 J. SMALL & EMERGING BUS. L. 125 (2002); Froomkin, *supra* note 18; David H. Bernstein, *The Alphabet Soup of Domain Name Dispute Resolution: The UDRP and ACPA*, 716 PLI/PAT 251 (2002); Richard E. Speidel, *ICANN Domain Name Dispute Resolution, The Revised Uniform Arbitration Act, and the Limitations of Modern Arbitration Law*, 6 J. SMALL & EMERGING BUS. L. 167 (2002); Stephen J. Ware, *Domain Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in, the UDRP*, 6 J. SMALL & EMERGING BUS. L. 129 (2002); Jeffrey J. Look, *Law and Order on the Wild, Wild West (WWW)*, 24 U. ARK. LITTLE ROCK L. REV. 817 (2002); David E. Sorkin, *Judicial Review of ICANN Domain Name Dispute Decisions*, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 35 (2001); Lisa M. Sharrock, *The Future of Domain Name Dispute Resolution: Crafting Practical International Legal Solutions From Within the UDRP Framework*, 51 DUKE L.J. 817 (2001); Brooks, *supra* note 21; Stacy H. King, *The "Law That It Deems Applicable": ICANN Dispute Resolution, and the Problem of Cybersquatting*, 22 HASTINGS COMM. & ENT. L.J. 453 (2000); Christopher Rains, Note, *A Domain By Any Other Name: Forging International Solutions for the Governance of Internet Domain Names*, 14 EMORY INT'L L. REV. *355* (2000); Edward Brunet, *Defending Commerce's Contract Delegation of Power to ICANN*, 6 J. SMALL & EMERGING BUS. L. 1 (2002); Kathleen Fuller, *ICANN: The Debate Over Governing the Internet*, 2001 DUKE L. & TECH. REV. 2 (2001); Leah Phillips Falzone, *Playing The Hollywood Name Game In Cybercourt: The Battle Over Domain Names In The Age Of Celebrity-Squatting*, 21 LOY. L. A. ENT. L. REV. 289 (2001); Jonathan Weinberg, *ICANN and the Problem Of Legitimacy*, 50 DUKE L.J. 187 (2000); Neil Batavia, *That Which We Call a Domain By Any Other Name Would Smell as Sweet: The Overboard Protection of Trademark Law as It Applies to Domain Names on the Internet*, 53 S.C. L. REV. 461 (2002); Jessica Litman, *The DNS Wars: Trademarks and the Internet Domain Name System*, 4 J. SMALL & EMERGING BUS. L. 149 (2000); Gregory B. Blasbalg, *Masters of Their Domains: Trademark Holders Now Have New Ways to Control Their Marks in Cyberspace*, 5 ROGER WILLIAMS U. L. REV. 563 (2000); Olivia Baratta and Dana Hanaman, Note, *A Global Update on the Domain Name System and the Law: alternative Dispute Resolution for Increasing Internet Competition—Oh, the Times They Are A–Changin'!*, 8 TUL. J. INT'L & COMP. L. 325 (2000); David G. Post, *Of Black Holes and Decentralized Law-Making in Cyberspace*, 2 VAND. J. ENT. L. & PRAC. 70 (2000); Gillian K. Hadfield, *Privatizing Commercial Law: Lessons From ICANN*, 6 J. SMALL & EMERGING BUS. L. 257 (2002).

37. *Id.*

proprietary interests in the Internet.[38] Some of these perceived flaws may stem from the political structure of ICANN.[39]

In this paper, we thoroughly critique the performance of the UDRP providers and identify the main variables that determine ICANN's efficiency. For example, one of the key variables, and also a main concern of ICANN, is the duration of the procedure to decide these cases.[40] We analyze the decisions of the complainants in deciding to send their claim to a particular dispute resolution provider. Using a multinomial logit regression model to determine if complainants select the provider based on bias or the duration of the procedure, we show that duration is at least as important as bias in selecting providers. This is a key finding because our results show that the emphasis of other theoretical and empirical work that has exclusively concentrated on the effects of bias is misplaced. Consequently, we recommend that more attention should be paid to other performance and efficiency indicators, particularly the indicators proposed in this paper. In our empirical analysis, we used the duration of the cases as the variable to measure the general efficiency of each provider. Additionally, we applied regression models based on the analysis of the system's duration to identify different factors that determine the system's performance.

In studying the actual performance of providers, we have found that the UDRP providers have different duration functions. Moreover, because there are different procedures, different review processes, and different technologies used to handle these cases, forum shopping is very likely to exist. This existence of forum shopping based on the performance of the providers is different from forum shopping based on the bias of the provider towards the complainant.[41] These results are supported

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38. ". . . [T]he procedural design of ICANN's UDRP has a number of special features that resulted in an especially unjust set of outcomes. Key decisions were made by unrepresentative groups or persons who were not subject to any democratic control, and the rules went in effect because of ICANN's monopoly over technical aspect of the Internet, not because any legislature approved them." Froomkin, *supra* note 18, at 712.

See Geist, *supra* note 36 and Thornburg, *supra* note 31 (analyzing the bias of the UDRP providers that favored complainants).

39. Jay Kesan & Andres Gallo, ICANN Politics: Changes and Constituencies, draft manuscript 2004 (on file with the authors).

40. "[T]he main advantage of using the UDRP over filing a lawsuit is that it can generally provide an inexpensive and quick resolution for domain name disputes. Because there is no discovery process and no absolute right to file endless replies and subreplies after the initial filing of the complaint and the response, the costs of a UDRP proceeding can be much less than seeking a preliminary injunction in court. However, using the UDRP effectively requires thorough advance preparation, investigation and research." Look, *supra* note 36, at 824–825.

41. *See* Froomkin, *supra* note 18.

by: (1) the fact that the two most important domain name dispute resolution providers are located at the extremes of the possible technological structures of the UDRP; and (2) the fact that the providers have an unambiguous bias for specific countries. This finding is important because most of the literature discussing provider bias focuses on bias between particular individuals. In addition, the geographical bias towards the countries of origin of the providers is important when analyzing the design of a general dispute system such as the UDRP. Additionally, the evidence of such bias strongly contradicts ICANN's claim that the system is intended to handle the most diverse claims involving the Internet, regardless of the parties' origins.[42]

We also found that some panelists have a completely different duration function in deciding cases than the rest of the cases viewed collectively under any private provider. That said, structural differences among providers can influence the panelists' performance. Interestingly, the fact that some panelists exhibit a different behavior from the rest of the panelists within the same provider could be beneficial and providers should give these panelists more cases to handle. At the same time, panelists consistently favoring one party over another should be evaluated carefully and should perhaps not handle as many cases. This evidence calls into question the overall manner in which providers assign cases to the panelists. In addition, we find that the evidence presented by complainants and respondents affects the performance of the providers. Finally, we evaluate the differences in performance between one and three member panels. We find that three member panels are as efficient as single member panels. Accordingly, changing to a general three member panel system could promote fairness without creating a negative impact on efficiency.

The paper is organized as follows. First, we describe the ICANN-UDRP system and the providers in charge of the dispute resolution process. Second, we present a regression model to analyze the selection process employed by the complainants in choosing a dispute resolution provider. We also describe the regression technique used for the empiri-

42. "At the UDRP's inception, ICANN had three main objectives it sought to achieve. The first goal was to create global uniformity. An example of this would be to eliminate competition among jurisdictions—forum shopping—and rules that are applied to domain name and trademark disputes. The second goal was to reduce the cost of resolving disputes. Finally, the UDRP was intended to be heavily restricted in its applicability. It was supposed to be geared toward the most flagrant types of cybersquatting, while other disputes would be left to the courts." Pamela Segal, *Attempts to Solve the UDRP's trademark Holder Bias: A Problem That Remains Unsolved Despite the Introduction of New Top Level Domain Names*, 3 CARDOZO ONLINE J. CONFLICT RESOL. 1, 23 (2001).

cal analysis and the characteristics of the database. Third, we present a general empirical analysis of the UDRP system providers. Fourth, we analyze the regression model and present the results from the model. Fifth, we analyze the results in terms of the policy recommendations derived from these results. Finally, we present our conclusions.

II. ICANN-UDRP CHARACTERISTICS

The Internet Corporation for Assigned Names and Numbers (ICANN) manages the IP address space allocation, protocol parameter assignment, domain name system management, and root server system management functions on the Internet.[43] ICANN is a non-profit organization created in 1998 by the Department of Commerce and supported by various countries.[44] Among its various activities, the management of the domain name system has proven to be a delicate area where property and trademark rights from the real world collide with the unregulated aspects of the Internet.[45] Although trademark and property rights laws in different countries could have protected new domain names assigned on the Internet, there are many problems related to local courts' inability to

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43. *See* http://www.icann.org/general/abouticann.htm. For history and development of ICANN, *see* Froomkin, *Wrong Turn in Cyberspace*, *supra* note 36; Michael Froomkin, *Habermas@Discourse.Net: Toward A Critical Theory Of Cyberspace*, 116 HARV. L. REV. 749 (January 2003); Edward C. Anderson and Timothy S. Cole, *The UDRP—A Model for Dispute Resolution in E-commerce*? 6 J. SMALL & EMERGING BUS. L. 235 (2002).

44. "Formed in October 1998, the Internet Corporation for Assigned Names and Numbers (ICANN) is a non-profit, private-sector corporation formed by a broad coalition of the Internet's business, technical, academic, and user communities. ICANN has been recognized by the U.S. and other governments as the global consensus entity to coordinate the technical management of the Internet's domain name system, the allocation of IP address space, the assignment of protocol parameters, and the management of the root server system." See, http://www.icann.org/general/fact-sheet.htm. "Prior to the formation of ICANN, administration of the authoritative list ultimately linking particular names and numbers (Internet Protocol (IP) addresses) to specific computers was the responsibility of various departments of the U.S. government and, later, Network Solutions Inc. (NSI), a for profit corporation operating under contract with the U.S. Department of Commerce. . . . Objections to the monopoly over registration services held by NSI (and the U.S. government) led in 1998 to the creation of ICANN and in particular ICANN's capacity to authorize multiple registrars to compete over registration services." Hadfield, *supra* note 36, at 259–260.

Many critics have said that ICANN received important power from the U.S. government, which were reserved for the government instead of a private institution. See for example, Michael Froomkin, *supra* note 36 (claiming that the ICANN creation is not consistent with both the Constitution and the Administrative Procedure Act). However, this is a highly debatable topic, as can be seen in Brunet, *supra* note 36.

45. *See* Jay Kesan and Andres Gallo, *Optimizing Internet Regulation*, 72 U. CIN. L. REV. 1497 (2004).

adequately handle Internet-based disputes.[46] As a result, conflicts over the rights of domain names on the Internet generated a need for an arbitration mechanism to resolve these disputes.[47]

Private actors interested in creating an arbitration system and with influence over ICANN, together with other organizations like the World Intellectual Property Organization (WIPO), promoted the creation of a dispute resolution mechanism for domain names. WIPO, in turn, produced a report for ICANN detailing the necessity of creating a dispute resolution system and proposing specific rules for such a system.[48] This report was the blue print for the new regime created by ICANN.[49]

In 1999, ICANN enacted the Uniform Domain Name Dispute Resolution Policy (UDRP).[50] The UDRP authorized a number of private third-party institutions (Providers) to evaluate disputes among Internet users regarding rights over domain names.[51] ICANN designed a series of general rules to regulate the dispute resolution procedures, leaving the private providers to add their own complementary rules to the system.[52]

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46. *See* Lee, *supra* note 31 (analyzing the problems courts have in dealing with Internet related issues).

47. "Reconciling the competing interests of trademark owners and domain name registrants has not proved an easy task, either nationally or internationally. The territorial nature of trademark rights, the lack of a single body of rules governing trademark-domain name disputes, the difficulty of locating registrants, and the possibility that different domain name registrants own multiple iterations of a preexisting mark all make the prospect of litigating before national courts protracted, expensive and perhaps even futile. Not surprisingly, trademark owners have expressed interest in streamlined and inexpensive non-national dispute settlement alternatives, particularly for disputes with a class of domain name registrants known as cybersquatters." Helfer and Dinwoodie, *supra* note 36,at 154–155.

48. *See* http://www.icann.org/udrp/udrp-schedule.htm (describing the timetable of creation of the UDRP with links to WIPO initiative). *See* Helfer and Dinwoodie, *supra* note 36 (describing the proposal of WIPO and the reforms introduced by ICANN when implementing the system.)

49. *See* Froomkin, *supra* note 18 (describing the differences between WIPO proposal and the final ICANN's UDRP.)

50. *See* Helfer and Dinwoodie, *supra* note 36. (describing the creation of the UDRP). *See also* ICANN, Timeline for the Formulation and Implementation of the Uniform Domain-Name Dispute-Resolution Policy, *at* http://www.icann.org/udrp/udrp-schedule.htm.

51. The approved providers are: World Intellectual Property Organization (WIPO) December 1st 1999, The National Forum Arbitration (NAF) December 23rd 1999, eResolutions (eRes) January 1st 2000 (terminated November 30th 2001), CPR Institute for Dispute Resolution (CPR) May 22nd 2000 and Asian Domain Name Dispute Resolution Centre (ADNDRC) February 28th 2002. ICANN, *Approved Providers for Uniform Domain-Name Dispute-Resolution Policy*, *at* http://www.icann.org/dndr/udrp/approved-providers.htm.

52. The two main instruments that regulate the system are the Uniform Domain Name Dispute Resolution Policy (UDRP) and the Rules for the Uniform Domain Dispute Resolution Policy, both documents were approved on October 24th 1999. *See*, ICANN, *Domain Name Dispute Resolution Policies*, *at* http://www.icann.org/udrp/. Each provider can produce its own rules in those areas not regulated by the Policy. For supplemental rules, see ICANN, *Approved*

ICANN derives its ability to enforce and apply the UDRP regime to the registered domain names from the contract each user enters into with ICANN at the moment of registering a new domain name.[53] In the following section, we describe the main characteristics of the UDRP system and identify the weaknesses and strengths of this regime. We also delineate the questions tested with our regression model.

A. *Procedure and Enforcement*

The general procedure for considering complaints is a competitive one in which different organizations are able to offer dispute resolution services to users.[54] This process is different from the other typical alternative dispute resolution regimes such as those used to resolve disputes over privacy rights. In alternative dispute resolution regimes, the choice of private provider is imposed by the individual web site that is visited.[55] In the UDRP system, Internet users can choose the provider knowing that the underlying set of rules is uniform. However, by letting the complainant choose the provider, ICANN has created an incentive for providers to favor complainants in their decisions.[56]

Providers for Uniform Domain-Name Dispute-Resolution Policy, *at* http://www.icann.org/dndr/udrp/approved-providers.htm.

53. "When ICANN licenses a registrar to offer a .com, .net, .org, .info, .biz, or shortly, .name second-level domains, that registrar agrees to incorporate the UDRP into its agreement with the registrant; therefore, all domain names in those TLD's are subject to its terms." Goldstein, *supra* note 36, at 1161.

"One can see the superficial appeal of an ICANN-like process to resolve international Internet disputes. First, it applies globally. . . . This eliminates the tricky issue of personal jurisdiction over the domain name holder. It also manages to create a contractually mandated private system for the benefit of noncontracting parties. Second, because the process does not require (or even allow) personal appearances by the parties, it minimizes geographic distance problems. . . . Third, the UDRP attempts to overcome the choice of the law problems raised by differences in national trademark laws by creating its own "law" in the ICANN Policy. Finally, because ICANN has a contract with the company that controls the root server that assigns domain names, it has the power to enforce the arbitrators' decisions without the need to ask a court to enforce the judgment." Thornburg, *supra* note 31,at 196.

54. The two main instruments that regulate the system are the Uniform Domain Name Dispute Resolution Policy (UDRP) and the Rules for the Uniform Domain Dispute Resolution Policy, both documents approved in October 24th 1999. *See*, ICANN, *Domain Name Dispute Resolution Policies*, *at* http://www.icann.org/udrp/. Each provider can produce its own rules in those areas not regulated by the Policy. For supplemental rules, *see* ICANN, *Approved Providers for Uniform Domain-Name Dispute-Resolution Policy*, *at* http://www.icann.org/dndr/udrp/approved-providers.htm.

55. *See* Kesan and Gallo, *supra* note 45 (analyzing the efficiency of top-down and bottom-up regulation for privacy rights in e-commerce).

56. *See* Giest, *supra* note 36, and Froomkin, *supra* note 18 (analyzing the bias of the UDRP providers with respect to complainants).

ICANN provides a set of rules that delimits the regulated issues, the cases in which providers should evaluate penalties, and the minimum requirements for the panel's composition.[57] ICANN also allows providers freedom to implement further rules and to charge the corresponding fees.[58] This framework has both created good incentives for competition among providers of domain name dispute resolution services offered at reasonably low cost[59] and generated problems of bias favoring complainants.[60] The complaints evaluated under the UDRP are only those related to domain name disputes.[61] In summary, the current system favors providers who are friendly to complainants, and the providers' optimal strategy is to favor complainants in order to ensure that they continue to be chosen in the future.[62]

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57. *See* ICANN, *Uniform Domain Name Dispute Resolution Policy*, *at* http://www.icann.org/dndr/udrp/policy.htm (listing the policy rules). See Appendix A for a list of the main requirements for the disputes to be considered valid. For an analysis of the policy *see* Michael Froomkin *supra* note 18.

58. *See supra* note 35 and accompanying text.

59. "Considering that the filling fee for a dispute involving a single domain name, heard by a single panelist, can be as low as $1,150. The UDRP is an attractive alternative to protracted litigation. While there are several factors that contribute to the low cost of a UDRP proceeding, the primary reason is the simplicity of the process. The administrative panel is limited to considering the written submissions made by the parties. The UDRP does not provide for discovery or submission of interrogatories by the parties, elements that typically increase the cost of other processes, in both time and money." Anderson and Cole, *supra* note 43, at 249.

60. "This study provides compelling evidence that forum shopping has become an integral part of the UDRP and that the system may indeed be biased in favor of trademark holders. Both WIPO and NAF, the two dominant ICANN accredited arbitration providers, feature case allocation that suggests that the panelist selection process is not random. Rather, it appears to be heavily biased toward ensuring that a majority of cases are steered toward complainant friendly panelists. Moreover, the data shows that there is a correlation between the provider panelist selection and case outcome. When providers control who decides a case, as they do for all single panel cases, complainants win just over 83% of the time. As provider influence over panelists diminishes, as occurs in three-member panel cases, the complainant winning percentage drops to 60%." Geist, *supra* note 36, at 936.

61. "All other disputes between you and any party other than us regarding your domain name registration that are not brought pursuant to the mandatory administrative proceeding provisions of Paragraph 4 shall be resolved between you and such other party through any court, arbitration or other proceeding that may be available." UDRP part 5, *at* http://www.icann.org/dndr/udrp/policy.htm.

62. It is interesting to notice that the only provider that declared bankruptcy was e-Resolution, which was the one with more cases won by respondents.

"Rather than both sides having equal input into who will decide the case, the complainant chooses the arbitral tribunal from a small list of approved providers maintained by ICANN. Unlike standard arbitration clauses where the provider is specified in the presumably bargained-for contract or negotiated by the parties at the time of the dispute, the respondent has no say in which provider will manage her case, and no peremptory challenges to arbitrators she may fear are biased. The respondent can, however, pick one member of a three-person

Figure 1 shows the different stages the claim goes through during the procedure. These stages can vary marginally because of the providers' different supplemental rules. The complainant can file a complaint with any of the approved providers that ICANN has authorized.[63] Once the provider receives the complaint, the provider has to evaluate the complaint's validity. If the complaint is not valid, then the provider could either ask for further information or discard the complaint. If the complaint is valid, then the case must be resolved by the provider who asks the respondent to submit a defense responding to the complaint. Once the respondent has submitted an answer, or the respondent is declared in default, the provider forms a panel. This panel can be either a one or a three-member panel, depending on the request of the parties.[64] In contrast

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panel at her own expense if the complainant opted for a single panelist and the respondent decides three are needed. Overall, the system gives dispute resolution providers an economic incentive to compete by being complainant-friendly." Froomkin, *supra* note 18, at 671–672.

63. See Appendix A for a graphic description of complaints procedure.

64. According with the UDRP the panel is formed as follows:

> APPOINTMENT OF THE PANEL AND TIMING OF DECISION
>
> (a) Each Provider shall maintain and publish a publicly available list of panelists and their qualifications.
>
> (b) If neither the Complainant nor the Respondent has elected a three-member Panel (Paragraphs 3(b)(iv) and 5(b)(iv)), the Provider shall appoint, within five (5) calendar days following receipt of the response by the Provider, or the lapse of the time period for the submission thereof, a single Panelist from its list of panelists. The fees for a single-member Panel shall be paid entirely by the Complainant.
>
> (c) If either the Complainant or the Respondent elects to have the dispute decided by a three-member Panel, the Provider shall appoint three Panelists in accordance with the procedures identified in Paragraph 6(e). The fees for a three-member Panel shall be paid in their entirety by the Complainant, except where the election for a three-member Panel was made by the Respondent, in which case the applicable fees shall be shared equally between the Parties.
>
> (d) Unless it has already elected a three-member Panel, the Complainant shall submit to the Provider, within five (5) calendar days of communication of a response in which the Respondent elects a three-member Panel, the names and contact details of three candidates to serve as one of the Panelists. These candidates may be drawn from any ICANN-approved Provider's list of panelists.
>
> (e) In the event that either the Complainant or the Respondent elects a three-member Panel, the Provider shall endeavor to appoint one Panelist from the list of candidates provided by each of the Complainant and the Respondent. In the event the Provider is unable within five (5) calendar days to secure the appointment of a Panelist on its customary terms from either Party's list of candidates, the Provider shall make that appointment from its list of panelists. The third Panelist shall be appointed by the Provider from a list of five candidates submitted by the Provider to the Parties, the Provider's selection from among the five being made in a manner that reasonably balances the

to other alternative dispute resolution forums that operate in the privacy rights area (ADRs), the panelists in Figure 1 are elected from a list specified by the provider and agreed to by the parties.[65] As a result, even though the complainant can elect the provider, the respondent has the choice of determining the panel's composition. This makes the panel more transparent than privacy rights forums, where the provider directly appoints the panelists without intervention by the parties.[66]

Nonetheless, respondent participation takes place only in the case of three-member panels. Otherwise, the provider is in charge of appointing the panelists. This procedure has problems caused by the bias providers have in favoring complainants.[67]

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preferences of both Parties, as they may specify to the Provider within five (5) calendar days of the Provider's submission of the five-candidate list to the Parties.

(f) Once the entire Panel is appointed, the Provider shall notify the Parties of the Panelists appointed and the date by which, absent exceptional circumstances, the Panel shall forward its decision on the complaint to the Provider."

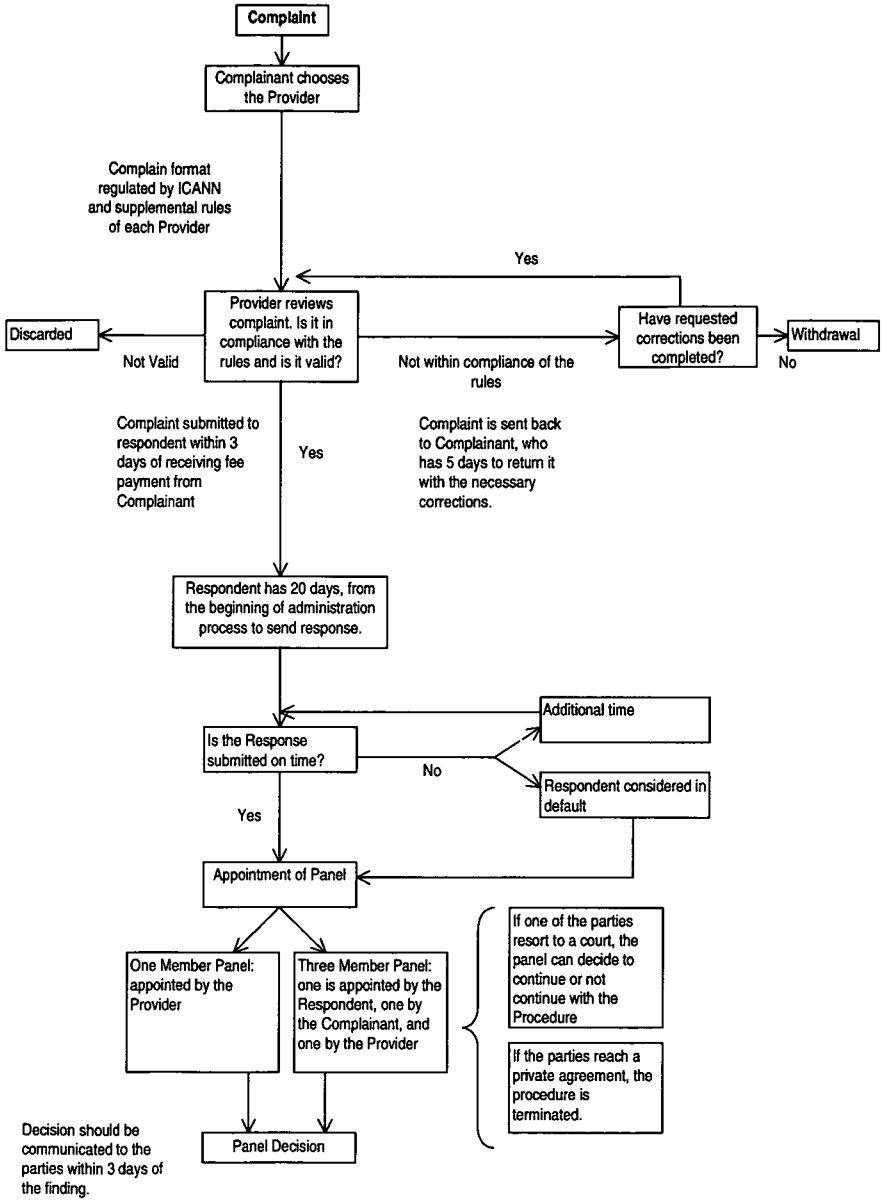
UDRP *at* http://www.icann.org/dndr/udrp/policy.htm

65. Agreement takes place in at least the three-member panel case.

66. *See* previous section.

67. "Given these inevitable biases, the ICANN Policy fails in another important way. Each DRP lists a number of approved arbitrators, but there is no information about how particular individuals are assigned to particular cases, particularly those involving only one arbitrator. In those cases, the parties have no input into the assignment of the arbitrator. Except in cases of the most obvious and improper kind of bias, it is unlikely a party could successfully challenge a panelist. Each DRP has its own procedural rules regarding challenges. The grounds upon which a challenge can be brought also vary. For example, NAF sets forth specific grounds for disqualification. None would preclude an arbitrator with known attitudes about meaning of controversial UDRP provisions from deciding a case. Nor is there a system for allowing parties, after a proceeding is over, to register complaints about a particular decision maker." Thornburg, *supra* note 31, at 222.

FIGURE 1: UDRP GENERAL PROCEDURE



Source: Own Elaboration based on ICANN UDRP, at www.icann.org

Once the panel forms, it has to decide the case. The panel also has the power to ask for additional information from any of the parties. In the event that the parties reach a private agreement, the panel terminates

its process, without any further decision. Also, if any of the parties initiate a court trial, the panel can continue with its deliberations or decide to terminate the case.[68] Even though the rules of the UDRP provide that both parties have the same grace period to take a case to court, some scholars have suggested that the short time available is detrimental for respondents.[69] One of the main limitations of these types of dispute resolution regimes is that providers do not have jurisdiction in matters initiated in court.[70] That said, most UDRP cases do not reach the courts.[71]

One of the problems of the UDRP procedure is the absence of a review mechanism for complaints.[72] This type of mechanism is in place in other private ADRs and could provide for better review and control of

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68. "K. AVAILABILITY OF COURT PROCEEDINGS. The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If an Administrative Panel decides that your domain name registration should be canceled or transferred, we will wait ten (10) business days (as observed in the location of our principal office) after we are informed by the applicable Provider of the Administrative Panel's decision before implementing that decision. We will then implement the decision unless we have received from you during that ten (10) business day period official documentation (such as a copy of a complaint, file-stamped by the clerk of the court) that you have commenced a lawsuit against the complainant in a jurisdiction to which the complainant has submitted under Paragraph 3(b)(xiii) of the Rules of Procedure. (In general, that jurisdiction is either the location of our principal office or of your address as shown in our Whois database. See Paragraphs 1 and 3(b)(xiii) of the Rules of Procedure for details.) If we receive such documentation within the ten (10) business day period, we will not implement the Administrative Panel's decision, and we will take no further action, until we receive (i) evidence satisfactory to us of a resolution between the parties; (ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name." UDRP part 4.k, *at* http://www.icann.org/dndr/udrp/policy.htm.

69. *See* Froomkin, *supra* note 18 (analyzing the extent of the bias for respondents resorting to court action).

70. "Although a UDRP decision is, in some respects, self-enforcing, it is not binding. Either before or after a UDRP decision, either party can take the matter to court. Even after an adverse decision under the UDRP, a respondent could pursue de novo litigation against a successful claimant. This ability to "appeal" an unsuccessful UDRP case was recently affirmed by the First Circuit Court of Appeals." Anderson and Cole, *supra* note 43, at 250.

71. According to UDRPLaw.net, until July 2002, just 65 UDRP cases were taken to court. This is a small number as compared with the more than 6,000 cases UDRP providers had considered since 1999. See, http://www.udrplaw.net/.

72. "UDRP arbitrators have rendered decisions that are inconsistent in their interpretation of the substantive requirements and in their implementation of the procedural rules. Because the process contains no internal appeal process, there is no way to challenge any of these decisions, either to correct the result in an individual case or to reconcile splits in what is becoming the "law" of ICANN. There is no way to correct arbitrators who are creating bad "law" or those who believe that trademark holders should have broader rights than those included in the UDRP as written." Thornburg, *supra* note 31, at 224.

the panelists' decisions.[73] Conversely, one of the main advantages of the UDRP regime in comparison to other private dispute resolution systems for the Internet is that ICANN has the power to enforce the panel decisions.[74] In contrast, the only action that the panel can enforce is the termination or transfer of the disputed domain name under ICANN's management.[75] Enforcement in these situations is almost perfect when compared to the lack of enforcement that privacy rights dispute resolution providers, dealing with different jurisdictions and the lack of government support, have to contend with.[76] The enforcement ability arises from both ICANN's design and the design of the root system that favors an uncompetitive market for root names.[77] The legitimacy of ICANN's functions, at least among the groups that have direct influence on ICANN's Board of Directors, provides the basis for enforcing the rules on domain name dispute resolution.[78] These characteristics, based on governmental delegation of powers to ICANN, make the UDRP one of the most viable systems for dispute resolution on the Internet.

In order to maintain its legitimacy among countries and different Internet users and beyond the groups that are currently part of the policymaking process, ICANN must develop new ways to incorporate the many constituencies of the Internet into its decision-making process.[79] Meanwhile, other groups, mainly users, but also the private sector, have

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73. *See* Kesan and Gallo, *supra* note 45 (describing the procedure of private ADRs).

74. *See supra* note 33 and accompanying text.

75. Again, the characteristic of the Root system for the Internet, which is managed and monopolized by ICANN generates a disincentive to other providers to offer other roots of Domain Names. As a result, the actual design of the system provides ICANN with a well defined power of enforcement of the UDRP. *See* Mueller, *supra* note 36 (describing the lack of competition and monopoly of ICANN and the incentives the organization participants have to maintain the system as it is).

76. One of the main weaknesses in enforcement is the existence of diverse roots in the Internet. Nonetheless, because ICANN is the most important of these servers, there are just a few domain names that cannot be reached by ICANN enforcement capabilities. The case of ccTLDs are special since they are can be limited to the national jurisdictions of the participant countries.

"An important aspect of the UDRP is the enforceability of the decisions. Although trademark holders only have two remedies available to them under the UDRP, enforcement of a successful result is automatic (absent court action by the respondent)." Anderson and Cole *supra* note 43, at 250.

77. *Id.*

78. Legitimacy of ICANN actions have been under strong debate lately. *See*, Helfer and Dinwoodie, *supra* note 36 (discussing how the problems of the UDRP undermine the legitimacy under which it is based).

79. *See* Froomkin, *supra* note 18 (questioning the legitimacy of ICANN to impose its policies in the Internet.) Some constituencies on the Internet have a high degree of control over ICANN's policymaking process

a low level of participation.[80] The future success of the UDRP and ICANN will depend upon the political pressure exerted on ICANN to involve new participants and to develop new ways of allowing influence to wide-ranging interest groups.[81] In contrast to the privacy rights providers, the UDRP's particular structure makes it subject to both criticism and change. At the same time, the UDRP's structure creates an opportunity to maintain the consensus on common set of rules of the system.

B. *Number of Participants*

Under the UDRP system, most of the domain name owners are subject to the regulations of the UDRP.[82] Consequently, every person or entity that registers a new domain name is subject to ICANN's policies.[83] Thus, the UDRP system experiences wide coverage and uniform regulation throughout most of the Internet. This feature is another important distinction from other attempts to create private dispute resolution systems having voluntary regulatory regimes.[84] As the only institution that manages domain names and receives support from different governments, ICANN generates a quasi-automatic jurisdiction for those who request a new domain name in any of the gTLDs.

C. *International Cooperation*

In the case of the UDRP, the nature of the issue regulated permits better enforcement of the rules.[85] However, international cooperation is

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80. *See* Kesan and Gallo, *supra* note 39 (discussing the political process inside ICANN).

81. *Id.*

82. This characteristic depends on the concentrated structure of the root system and the lack of competition. *See* MUELLER, *supra* note 17.

83. "1. PURPOSE. This Uniform Domain Name Dispute Resolution Policy (the "Policy") has been adopted by the Internet Corporation for Assigned Names and Numbers ("ICANN"), is incorporated by reference into your Registration Agreement, and sets forth the terms and conditions in connection with a dispute between you and any party other than us (the registrar) over the registration and use of an Internet domain name registered by you. Proceedings under Paragraph 4 of this Policy will be conducted according to the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules of Procedure"), which are available at www.icann.org/udrp/udrp-rules-24oct99.htm, and the selected administrative-dispute-resolution service provider's supplemental rules." UDRP part 1, *at* http://www.icann.org/dndr/udrp/policy.htm.

84. *See* Kesan and Gallo, *supra* note 45.

85. "ICANN has largely succeeded in solving the enforcement dilemma, although it is not a solution that could easily be replicated in a different context. Because ICANN has a contract with Network Solutions, Inc., which controls the computer that physically assigns each domain name, it can not self enforce the UDRP decision. A winning complainant will

needed to sustain the policy that is put in place throughout the Internet.[86] Because the U.S. government supported ICANN, other developed countries now support ICANN's jurisdiction to resolve domain name disputes.[87] Nonetheless, most ccTLDs are still out of the reach of ICANN's jurisdiction over UDRP policy.[88]

The technical dependency of ccTLDs on ICANN, and on the United States government, hinders the actual reach of the sovereignty of country code managers.[89] The reforms of ICANN's political structure in 2002 provided for more participation to ccTLDs and facilitated a wider international consensus on ICANN policies.[90] Some characteristics of the ICANN structure help explain this success in reaching international consensus. First, the management structure of ICANN has become more open to participation and, after recent reforms, the international community has more influence on ICANN policymaking.[91] Different global constituencies can participate in the decision-making and shaping of ICANN policies.[92] Major changes in the election of Board members and in levels of participation of Country Code Registries (ccTLDs) have

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either be awarded the domain name at issue or the name will be cancelled." Thornburg, *supra* note 31, at 207.

86. The need for international cooperation is explained by the participation of ccTLDs as one of the most active ICANN constituencies. Furthermore, it is through these international actors that ICANN can cooperate in the developing of rules that apply throughout the Internet. Recently, ccTLDs have upgraded their participation and voice in ICANN policymaking process. See next section discussion.

87. *See* http://www.iana.org/cctld/cctld-whois.htm (listing all the countries that participate in ICANN).

88. Up to today, only a handful of ccTLDs have signed Sponsorship Agreements with ICANN. *See* ICANN, *Resources for Country Code Managers*, *at* http://www.icann.org/cctlds/ (showing information about the ccTLDs managers that signed agreements with ICANN).

89. "Technically, the ccTLDs are subdomains of the "root domain" created by the U.S. government and "contained" in the root zone file. Despite the U.S. reservation of technical control over the A root, the U.S. government states that "[n]ational governments now have, and will continue to have, authority to manage or establish policy for their own ccTLDs," thereby attempting to downplay the influence that the U.S. may indirectly have over the policies of nations foreign to the U.S. At the same time, the U.S. maintained that national governments and intergovernmental organizations should not directly manage the Internet names and addresses. On this account, ICANN was intended to be a purely technical coordinating body, whereas national governments would continue to control national politics." Kim G. von Arx and Gregory R. Hagen, *Sovereign Domains: A Declaration of Independence of ccTLDs from Foreign Control*, 9 RICH. J.L. & TECH. 1, 20 (2002).

90. *See* Kesan and Gallo, *supra* note 39. (describing the creation of a ccNSO constituency to participate directly in the management of ICANN).

91. *Id.* (analyzing how the pressure groups inside ICANN successfully resisted changes to their political influence).

92. *See* ICANN, *Bylaws*, at http://www.icann.org/general/archive-bylaws/bylaws-15dec02.htm (listing the new bylaws of ICANN with important changes in the influence of different groups on the policy process).

resulted from ICANN in becoming an international body with jurisdiction over the Internet.[93] These changes will permit more cooperation at the international level, allowing for better enforcement of dispute resolution policies.[94] Including international actors will also increase the need for UDRP reform to accommodate different international perspectives. For example, the growth of the Internet in Asia and the interest of ICANN to continue being the main source of control and regulation over domain names have prompted the creation of two new offices, one in Hong Kong and the other in Beijing.[95] These offices resolve disputes in the Asian region.[96] As a result, the UDRP could accommodate different views and be open to changes, even though the groups with more power inside ICANN will resist such reforms.[97]

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93. Until December 15th 2002 the Board of Directors of the ICANN was composed of nineteen members. Five of them came from the original Board of Directors established in 1998 and the other 14 came from the following organizations: 5 from the At Large Membership. Each of these directors should represent a different geographic unit: Africa, Asia-Australia-Pacific, Europe, Latin America and the Caribbean and North America. 3 Board Members came from the Domain Name Supporting Organization (DNSO). The DNSO was composed of different constituency groups: Business, Non-Commercial, ccTLD Registries, gTLD Registries, ISPs, Registrars and Intellectual Property Constituency. 3 Board Members came from the Address Supporting Organization (ASO). This group was composed by the Asian Pacific Network Information Center (APNIC), American Registry for Internet Numbers (ARIN), Latin American and Caribbean Internet Address Registry (LACNIC) and Réseaux IP Européens Network Coordination Centre (RIPENCC). Finally, 3 Board Members came from the Protocol Supporting Organizations (PSO). The PSO was composed by the Internet Engineering Task Force (IETF), the World Wide Web Consortium (W3C), International Communication Union (ITU-T) and the European Telecommunications Standard Institute (ETSI).

According to the new By-Laws of the ICANN, beginning in December 15, 2002, the Board of Directors should be composed of 15 members elected as follows: 8 Directors from the Nominating Committee, 2 from ASO, 2 from Country Code Name Supporting Organization (ccNSO), 2 by Generic Name Supporting Organization (GNSO) and the President of ICANN. The Nominating Committee is composed as follows: 5 from At Large Representation, 2 from Business Constituency of GNSO), 1 from gTLD Registry, 1 from gTLD Registrars, 1 from Council Country Code NSO, 1 from ISP constituency GNSO, 1 from Intellectual Property Constituency GNSO, 1 from ASO, 1 designated by ICANN Board to represent Academy and other similar institutions, 1 from Consumer and Civil Society Groups from the Non-commercial constituency of GNSO, 1 from IETF and 1 from ICANN Technical Liaison Group. *See* ICANN, *Bylaws*, http://www.icann.org/general/archive-bylaws/bylaws-15dec02.htm for a complete version of the new By-Laws of ICANN.

94. *See* ICANN, *Resources for Country Code Managers*, *at* http://www.icann.org/cctlds/ (describing the objectives and activities of ccTLDs in ICANN).

95. *See* Asian Domain Name Dispute Resolution Centre, *Home page*, *at* http://www.adndrc.org/adndrc/index.html.

96. *Id.*

97. The analysis of the next section is a good example on how stakeholders of ICANN could resist major reforms on the policymaking and retain power.

Second, the constituencies that form the board of ICANN were created to allow people from different countries to be part of ICANN and to have a voice in the political process.[98] Nonetheless, groups and constituencies that were introduced as initial parts of the organization have controlled ICANN.[99] As ICANN attempts to gain more international influence, these constituencies should accommodate the private sector, internet users, and the government. ICANN is an institution in its formative stage, where different constituencies and groups are trying to establish positions in the management of the institution, but without an established procedure or representation.[100] The forces that shape the political characteristics of ICANN will also shape the rules of its dispute resolution policy. In the end, ICANN's success in promoting and enforcing a set of dispute resolution rules for domain names on the Internet will be due to both the capacity of ICANN's constituencies to accommodate different demands and the political process inside the corporation that enables such a process to occur.

D. *User Participation*

User participation under the UDRP is much higher than the previous study of privacy rights showed to be the case among third party institutions (TPIs).[101] First, every user that registers a domain name on the ICANN-managed root server falls automatically under the jurisdiction of the provider and is subject to the rules of the UDRP.[102] Second, ICANN has provided, at least theoretically, numerous ways by which users can contact the organization and propose reforms to the dispute resolution

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98. "The ICANN Bylaws provide for three Supporting Organizations (SOs) to assist, review and develop recommendations on Internet policy and structure within three specialized areas. (See Bylaws, Article VI.) The SOs will help promote the development of Internet policy and encourage international and diverse participation in the technical management of the Internet. Each SO names three Directors to the ICANN Board" ICANN, *Supporting Organizations*, at *http://www.icann.org/dnso/sonew.htm* (describing the different constituencies that support ICANN).

99. *See* next section.

100. The reform process initiated in 2002 and the debate about the role of ICANN and the division of power among different constituencies is a proof that ICANN is an organization in a formation stage.

101. From the many critics mentioned in footnote 20, user participation in ICANN is far from ideal. However, we found it more important than in the case of purely private regulation systems.

102. "All registrars in the .aero, .biz, .com, .coop, .info, .museum, .name, .net, and .org top-level domains follow the Uniform Domain-Name Dispute-Resolution Policy (often referred to as the "UDRP")." Uniform Domain Name Dispute Resolution Policy, at http://www.icann.org/udrp/

system.[103] In ICANN, users have direct participation on the Board of Directors and elect representatives in the At Large Group and the Generic Names Supporting Organization (GNSO) group.[104] Despite this formal structure, actual user participation in ICANN policymaking is scarce. Instead, the commercial private sector is the main power that is in control of ICANN. Ultimately, although ICANN fares better than the privacy rights TPIs, ICANN tends to prefer private firms' interests regarding domain name policies.

ICANN's critics point to the lack of democratic participation in its decision-making.[105] Because ICANN has strictly controlled the number of top-level domain names, ICANN has created an artificial scarcity in the market.[106] In response, specific private firms have developed an interest in controlling this artificial scarcity.[107] By allowing private firms to compete with each other and provide options in the top-level domain name arena, ICANN could improve users' welfare by providing more alternatives than what currently exists.[108] Competition at this level, however, will decrease the value of the top domain names that already exist today, thus hurting the profits of the firms that control them. As firms develop significant influence over ICANN's decisions, the firms will exert pressure to avoid competition. If, however, ICANN wants to promote cooperation and continue to advance in its governance of the domain name system, it should accommodate users' demands.

One of the most common criticisms of the UDRP is that the domain name rules enforced by providers unfairly protect trademark holders'

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103. *See* ICANN, *at* http://www.icann.org/ (describing multiple instruments users have to reach ICANN and participate).

104. *See* ICANN, *At-Large Advisory Committee*, *at* http://www.icann.org/committees/alac/ (describing the tasks and composition of the At Large Group); ICANN, *Generic Names Support Organization*, *at* http://gnso.icann.org/ (describing and informing about the different constituencies that are part of the GNSO).

105. *See supra* note 35 and accompanying text.

106. "ICANN's attempts to safeguard intellectual property interests in the domain name space also shaped its policies toward the introduction of new top-level domains. New TLDs were given a low priority relative to other objectives. Movement toward that goal was extremely slow. When new ones were introduced, the number was small and the approval process encouraged registries to employ practices that would privilege trademark holders in the initial assignment of names. So-called "sunrise" or "daybreak" procedures, for example, allow all the world's trademark holders the privilege of preregistering their names in a new top-level domain before the domain is opened up to anyone else. Both techniques offer preemptive forms of protection that simply do not exist in traditional trademark law." MUELLER, *supra* note 17, at 193.

107. *Id.*

108. *See* Milton Mueller, *Success by Default: A New Profile of Domain Name Trademark Disputes under ICANN's UDRP*, Convergence Center working Paper, June 2002 (describing the scarcity created by ICANN in the gTLDs registry).

interests on the Internet, at the expense of free speech interests.[109] For example, if somebody registers a domain name called FIFAWorldCup.com, devoted to criticizing the way the Fédération Internationale de Football Association (FIFA) has designed the classification groups for the 2006 World Cup in Germany, FIFA could claim that this domain name infringes on its own trademark rights and seek to cancel this registration by initiating a complaint with a UDRP provider. These kinds of problems have arisen because of the small number of top-level domain names and the broad definitions applied for the type of content that is admissible under each top-level domain name.

Another example arises if ICANN creates a new top-level domain name for free speech, such as .fsp, in which all domain name registrants have to be individuals or non-commercial entities. In such a situation, all names, including trademarks, together with a prohibition against undertaking commercial activities in this space, function to accommodate many of the free speech concerns. ICANN may then have a commercial set of top-level domain names requiring trademarks for name assignment and also a free speech section where users can express themselves without fear censorship. Nonetheless, under the current interests that dominate ICANN, such a simple technical change is unexpected.[110]

Internet users participate more in the UDRP than in any other privacy rights forums.[111] This is because parties have the opportunity to take part in the formation of the arbitration panel and, consequently, they are guaranteed a higher degree of impartiality and independence than when they employ panels constituted directly by the private providers with interests dominated by private businesses.[112] Although, it is clear that the ICANN system is far from independent, given its bias towards private firms, this bias is less than in the case of the completely private, privacy rights forums.[113]

Given that the general governing rules employed by the UDRP providers are supplied by ICANN and users do have the opportunity, although limited, to place representatives on ICANN's Board of Directors, these rules could be subject to review in order to ensure a more fair

109. *See* Blackman, *supra* note 22 (analyzing the issues of free speech in the Internet, with particular reference to the Domain Name System).

110. *See* Kesan and Gallo, *supra* note 39.

111. *See* Kesan and Gallo, *supra* note 45.

112. *See* http://www.icann.org/dndr/udrp/uniform-rules.htm.

113. *See* different points of view and critics detailed in footnote 35.

treatment of non-commercial parties.[114] International users participate more in the rules and management of ICANN than privacy rights providers.[115] As a result, more international cooperation should occur, and the UDRP may achieve a broader consensus.[116] As governments participate in the process, it is more probable that consumers and other users can exert greater influence over ICANN's decisions than the totally private system that regulates privacy in e-commerce.[117]

III. UDRP PROVIDERS

ICANN has authorized private providers to manage Internet users' complaints.[118] These providers should follow ICANN's policy guidelines, but may complement these rules with their own.[119] Initially, ICANN authorized two providers, the World Intellectual Property Organization (WIPO) and the National Arbitration Forum (NAF), approved by ICANN on December 1st and 23rd of 1999, respectively. In 2000, ICANN added two providers, eResolution (eRes) in January and CPR Institute for Dispute Resolution (CPR) in May. eRes ceased to operate in November 2001 and a new provider, Asian Domain Name Dispute Resolution Centre (ADNDRC), with two offices in Beijing and Hong Kong, was approved in February 2002.[120] In this work, we will analyze the cases decided by the four initial providers of UDRP services.

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114. The recent reform of ICANN has drastically reduced the representation of at large groups in the decision making process of ICANN, increasing the doubts about the legitimacy of the Corporation. *See* Kesan and Gallo, *supra* note 39.

115. "ICANN must be understood as a new international regime formed around a global shared resource. Its purpose is to define property rights in Internet identifiers and to regulate their consumption and supply. . . . The emerging Internet governance regime is the product of an informal political agreement among national governments, and the agreement includes much more extensive role for private sector actors. That fact does make ICANN different from other international regimes, but it does not change its basic nature. It is much more accurate and analytically fruitful to define ICANN as a variant of a standard international regime than it is to think of it as something sui generis." MUELLER, *supra* note 17, at 217–218.

116. "ICANN's creation of its own international trademark law is inherently controversial. What right does a California nonprofit corporation have to create and impose law that differs from the law on nation-states?" Thornburg, *supra* note 31, at 208.

117. *See* Kesan and Gallo, *supra* note 45.

118. *See* ICANN, *at* http://www.icann.org

119. *See* ICANN, *Rules for Uniform Domain Name Dispute Resolution Policy*, *at* http://www.icann.org/dndr/udrp/uniform-rules.htm

120. Asian Domain Name Dispute Resolution Center, *at* http://www.adndrc.org/adndrc/index.html (The website of the Asian provider); ICANN, *Announcement: ICANN Announces New Dispute Resolution Provider in the Asia Pacific Region*, *at* http://www.icann.org/announcements/announcement-03dec01.htm (The announcement of ICANN creating the new Asian provider for the UDRP regime).

The United Nations created the first of the UDRP providers, the World Intellectual Property Organization (WIPO),[121] in 1994 with the intention of providing mediation services for private parties in specific areas.[122] WIPO, headquartered in Geneva, Switzerland, was primarily responsible for creating the UDRP regime. In fact, in April 1999, WIPO produced a final report on the creation of a domain name resolution system that became the blueprint for ICANN's own UDRP.[123]

Other dispute resolution services such as the NAF, eRes CPR, and ADNRC emerged after ICANN's inception. The National Arbitration Forum (NAF), composed of judges and lawyers from around the world, was created in 1986 to provide alternative dispute resolution services to different parties.[124] The Center for Public Resources (CPR), a nonprofit organization consisting of more than 500 private corporations, was formed in 1979 by major corporations in order to provide alternative dispute resolution forums for private businesses.[125] Finally, eResolution (eRes), located in Quebec, Canada, was formed in 2000. However, eRes suspended its activities in 2001.

In 2002, ICANN approved the addition of an Asian dispute resolution provider, ADNDRC, with offices in Hong Kong and Beijing.[126]

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121. "WIPO is one of the 16 specialized agencies of the United Nations system of organizations. It administers 23 international treaties dealing with different aspects of intellectual property protection." WIPO, *About WIPO*, *at* http://www.wipo.int/about-wipo/en/overview.html

"WIPO is an organ of the United Nations with specific duties defined by a series of treaties. Signatory nations send delegates to WIPO, and meet occasionally in plenary to make decisions. Being responsible to all its members states rather than just the United States, the WIPO staff felt empowered to define its own terms of reference and proposed to make recommendations concerning: 1) dispute prevention; 2) dispute resolution; 3) a process to protect famous and well-known marks in the gTLDs; and 4) the effects on intellectual property rights of the new gTLDs." Froomkin, *supra* note 18, at 624.

122. "Developed by leading experts in cross-border dispute settlement, the procedures offered by the Center are widely recognized as particularly appropriate for technology, entertainment and other disputes involving intellectual property."

123. *See* WIPO, *Final Report of the First WIPO Internet Domain Name Process*, *at* http://wipo2.wipo.int/process1/report/index.html; *see also* Froomkin, *supra* note 18 (analyzing the characteristics of the WIPO proposal and the final outcome from ICANN policy).

124. "[T]he Forum's only mission is to provide superior dispute resolution services to parties seeking an alternative to litigation." National Arbitration Forum, *at* http://www.arbforum.com/. The NAF is located in the United States. Most of the UDRP cases evaluated by the NAF are from the North American region.

125. "Founded in 1979 as the Center for Public Resources, CPR's mission is to spearhead innovation and promote excellence in public and private dispute resolution, and to serve as a primary multinational resource for avoidance, management and resolution of business-related and other disputes." CPR Institute for Dispute Resolution, *About Us*, *at* http://www.cpradr.org/CPR_AboutUs.asp?M=1.1

126. *See supra* note 117 and accompanying text.

ADNDRC is a combination of the China International Economic and Trade Arbitration Commission (CIETAC) and the Hong Kong International Arbitration Centre (HKIAC).[127] The CIETAC is the only dispute resolution provider for the top domain name .cn. Meanwhile, HKIAC, created in 1985, is an alternative dispute resolution system. In 200, HKIAC became the sole dispute resolution provider for the top domain name .hk.[128]

A. *Characteristics of the Providers*

As previously explained, ICANN provides the rules for the administration of the UDRP. Accordingly, the authorized providers must follow these rules. There are, however, some differences between the providers. In this section we analyze the differences between these providers, focusing on the supplemental rules, fees, and relative representation afforded by the arbitration panel.

1. Supplemental Rules

Besides the UDRP rules provided by ICANN, private providers can add rules that do not contradict ICANN policy.[129] Most of these additional rules concern general procedures for the cases evaluated by the provider. Table 1 presents the main characteristics of the supplemental rules for each provider.

127. *See* Asian Domain Name Dispute Resolution Centre, *at* http://www.adndrc.org/adndrc/index.html.

128. *Id.*

129. *See* ICANN, *Rules for Uniform Domain Name Dispute Resolution Policy*, *at* http://www.icann.org/dndr/udrp/uniform-rules.htm

TABLE 1: SUPPLEMENTAL RULES OF AUTHORIZED UDRP PROVIDERS

	WIPO	NAF	CPR	eRes	ADNDRC
Submission Requirements	Cover sheet and copies to Registrar(s) and Respondent	Coversheet plus 3 copies (single panel) or 5 copies (Three Member Panel)	5 Copies	Three parts: Complaint proper, Annexes and Cover Sheet	Cover Sheet, hard and electronic copy. Detailed format of Complaint
Compliance Review	Center has 5 days to review		Left to the Panel without a specific requirement	Clerk has 10 days to review and Complainant has 5 days to correct any deficiency.	Three days from fee payment
Official Administering the Case	Center appoints Case Administrator			Clerk's Office	Relevant office at the Centre
Panel Appointment	Three Member Panel: Parties should provide list of 3 candidates, ordered by preference. The third panelist appointed is the president. Parties can agree on naming the president.	Single Member Panel: Appointed by the Forum Three Member Panel: Chair elected by the Provider and not part of the Parties' list of candidates	Not mentioned	Single Member Panel: Appointed by the Clerk's Office Three Member Panel: Appointed by Provider: One panelist from the lists of each party and the third appointed by the Provider (President).	Single Member Panel: appointed by Centre Three Member Panel: Both parties propose three candidates. Centre selects one from each of these lists, and the third one from the list at the Centre.
Recusation of Panelists	Not Mentioned	Not Mentioned	Not Mentioned	Decided by the Clerk's Office	Not Mentioned
Respondent Default	Panel should be appointed by the Center.	Panel appointed by the Center. Option to change to a one member panel should be provided.	Not Mentioned	Panel Appointed by Provider	Decided by Centre
Limits to Submission	Word limit: Paragraph 3(b)(ix) 5000 words 5(b)(i) 5000 words 15(e) no word limit	Complaint and Response no longer than 10 pages total	Complaint and Response not to exceed 10 pages plus annexes and exhibits.	Not mentioned	Not Mentioned
Extension for Response	Not mentioned	Extension can be given subject to: Parties agreement, notice to the Forum, state exceptional circumstances, state extension (no more than 20 days) and pay extension fee of $100. Forum will decide on the extension.	Not Mentioned	Could be extended by the Panel	Could be extended by the Panel
Additional Submissions	Not Mentioned	Within 5 days of submission of the Response and it should be accompanied by a fee of $250.	Not Mentioned	Not Mentioned	Not Mentioned

Source: Own Elaboration based in: http://www.udrpinfo.com/eres/supprules.htm, http://arbiter.wipo.int/domains/background/index.html, http://www.arbforum.com/domains/UDRP/rules.asp, http://www.cpradr.org/ICANN_RulesAndFees.htm.

Even though the differences in the supplementary rules are minimal, and most of them are related to the format and timing of the submissions of information and evidence to the panel, the effects of such differences in procedure could have important consequences on the efficiency and results of the procedure.[130] Some of the providers, such as WIPO[131] and eRes,[132] have a more complex system of procedure than others such as NAF[133] and CPR. For example, CPR's rules are minimal and most of the decisions are left to the panel to decide what is best. In fact, because it is the only provider that charges for extra submissions and time extensions, NAF is the only provider that offers incentives to minimize information submissions and time. These fees could, however, be a problem for parties attempting to submit new evidence or information regarding a case.[134] Nonetheless, the general fee for NAF is lower than the other providers, and the extra fees are much smaller. Beyond these small differences, most of the rules are similar for all of the providers (Table 1).

2. Fees

Fees are another way of distinguishing providers. Given that the rules are applied uniformly across providers, differences among the fees that providers charge can induce complainants to switch from one provider to another. Table 2 shows the schedule of fees charged by each provider.

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130. *See* Section IV.1 (analyzing the results of cases handled by the same panelists in different providers).

131. "The WIPO/AMC Supplemental Rules include very few changes to ICANN's Rules. The Supplemental Rules do, however, provide for cases to be filed through the Center's "Internet based case filing and administration system"." Stacey King, *supra* note 36, at 476–477.

132. "eResolution's Supplemental Rules include twenty-one definitions. These include the definitions set out in the Rules, as well as adding a number of additional definitions. None of the definitions however, significantly changes the process or procedures. They simply act to clarify certain terms." *Id.* at 47 8–479.

133. "Like the WIPO/AMC, the National Arbitration Forum (NAF) has adopted the definitions set forth in the Rules without supplementing them." *Id.* at 481.

134. "The NAF "sandbag" rule is one of the most pernicious examples of a provider's attempt to distinguish itself as plaintiff-friendly. A rule that allows a party to pay to put in a surprise pleading, perhaps with new factual allegations or even a new case in chief, is not a rule calculated to achieve justice." Froomkin, *supra* note 18, at 703.

TABLE 2: FEES CHARGED BY PROVIDERS

NAF		
No. Domain Names	*Single Panel*	*Three Member Panel*
1	$1,150	$2,500
2	$1,300	$2,600
3–5	$1,400	$2,800
6–10	$1,750	$3,500
11–15	$2,000	$4,000
16 or more	To be Determined	To be Determined
WIPO		
No. Domain Names	*Single Panel*	*Three Member Panel*
1–5	$1,500	$4,000
6–10	$2,000	$5,000
More than 10	To be Determined	To be Determined
CPR		
No. Domain Names	*Single Panel*	*Three Member Panel*
1–2	$2,000	$4,500
3–5	$2,500	$6,000
More than 6	To be Determined	To be Determined
ADNDRC		
No. Domain Names	*Single Panel*	*Three Member Panel*
1–2	$1,000	$2,000
3–5	$1,200	$2,400
6–9	$1,600	$2,900
More than 10	$3,000	$5,500

Source: http://arbiter.wipo.int/domains/, http://www.arbforum.com/domains/, http://www.cpradr.org/ICANN_Menu.htm, http://www.adndrc.org/adndrc/bj_supplemental_rules.html

There are two main characteristics of Table 2. First, the cost of the procedure across providers is not prohibitive. In fact, the cost is much lower than the expected costs of resorting to court action to resolve the conflict.[135] Second, the differences in prices among providers are not big enough to promote a high substitution effect among providers. For example, the most popular provider is WIPO, which charges a higher fee than NAF, the second most popular provider. WIPO's fees average 16%

135. "[E]ven though the DRP's fees have already increased by at least 50% in the short time the policy has been in operation, it is still regarded as a bargain by trademark holders." Thornburg, *supra* note 31, at 204.

more than NAF's for those cases where the number of domain names is between one and five. For the cases between six and ten domain names, the difference is just 14% among these two providers. CPR has a 24% higher cost that NAF for cases involving one to five domain names. Accordingly, these figures suggest that the system is providing affordable dispute resolution services without producing a high level of competition among providers.

3. Geographical Representation of Arbitrators

The type of panelists offered to complainants and respondents is the third main variable the providers must manage. In most instances, panelists are usually former judges or lawyers from different countries.[136] Consequently, the panelists' different backgrounds could have an influence over the final results of their verdicts. This is a very important issue on the Internet, where people from different parts of the world do business. As a result, a common set of rules for every user of the Internet should take into account the diversity of the panelists offered by each provider. Of equal importance is that those countries with higher levels of connectivity to the Internet should receive a greater share of the panelists. Table 3 shows the distributions of panelists for each provider across countries.

TABLE 3: PANELISTS

	WIPO	NAF	CPR	ADNDRC	% World Internet Users	Panelists (% of Total)			
						WIPO	*NAF*	*CPR*	*ADNDRC*
Argentina	4	2			0.66%	1.20%	1.40%		
Australia	19	1	1	1	1.44%	5.80%	0.70%	2.70%	2.22%
Austria	2	1			0.52%	0.60%	0.70%		
Belgium	5	1			0.64%	1.50%	0.70%		
Brazil	8	3			1.60%	2.40%	2.20%		
Canada	21	7	1	2	2.69%	6.40%	5.00%	2.70%	4.44%
Chile	5				0.62%	1.50%			
China	2	2	1	22	6.72%	0.60%	1.40%	2.70%	48.89%
Colombia	2	3			0.23%	0.60%	2.20%		
Croatia	1				0.05%	0.30%			
Cyprus	1				0.03%	0.30%			
Czech Republic	3				0.28%	0.90%			
Denmark	2	1			0.58%	0.60%	0.70%		

136. *See UDRP Panelists*, *at* http://www.udrpinfo.com/panl.php (providing information and profiles of the panelists of the UDRP system).

	WIPO	NAF	CPR	ADNDRC	% World Internet Users	Panelists (% of Total)			
						WIPO	*NAF*	*CPR*	*ADNDRC*
Ecuador	1	1			0.07%	0.30%	0.70%		
Egypt	3				0.12%	0.90%			
Finland	1				0.45%	0.30%			
France	17	2		1	3.12%	5.20%	1.40%		2.22%
Germany	9				6.14%	2.80%			
Ghana	1				0.01%	0.30%			
Greece	2				0.28%	0.60%			
Hungary	2	1			0.30%	0.60%	0.70%		
India	6	2		2	1.40%	1.80%	1.40%		4.44%
Ireland	2	2			0.18%	0.60%	1.40%		
Israel	5	2			0.36%	1.50%	1.40%		
Italy	10	2	1		3.27%	3.10%	1.40%	2.70%	
Jamaica	2				0.02%	0.60%			
Japan	8	1			11.15%	2.40%	0.70%		
Liechtenstein		1			0.00%		0.70%		
Malaysia	2	1			1.30%	0.60%	0.70%		
Mexico	6	2		1	0.72%	1.80%	1.40%		2.22%
Netherlands	6				1.58%	1.80%			
New Zealand	6	1		2	0.22%	1.80%	0.70%		4.44%
Nigeria	1				0.02%	0.30%			
Norway	4				0.54%	1.20%			
Pakistan	1				0.10%	0.30%			
Paraguay		1			0.01%		0.70%		
Puerto Rico		1			0.12%		0.70%		
Portugal	3				0.50%	0.90%			
Republic of Korea	9	5		3	4.86%	2.80%	3.60%		6.67%
Romania	1				0.20%	0.30%			
Singapore	6			1	0.30%	1.80%			2.22%
South Africa	2	1			0.61%	0.60%	0.70%		
Spain	10	3	3	3	1.47%	3.10%	2.20%	8.10%	6.67%
Sweden	6	2			0.92%	1.80%	1.40%		
Switzerland	14	2			0.44%	4.30%	1.40%		
Uganda	1	1			0.01%	0.30%	0.70%		
UK	28	2		1	4.79%	8.60%	1.40%		2.22%
US	93	85	30	3	28.48%	28.40%	61.20%	81.10%	6.67%
Vietnam		1			0.20%		0.70%		
Zimbabwe	1				0.02%	0.30%			
Other				3					6.67%
Total	327	139	37	45					

Source: http://arbiter.wipo.int/domains/, http://www.arbforum.com/domains/, http://www.cpradr.org/ICANN_Menu.htm, World Bank Country Indicators, at http://www.worldbank.org/

Although there are important differences between providers, WIPO has a more diverse group of panelists from both developed and less-developed countries.[137] The most favored countries in WIPO are Australia, Canada, France, Spain, Switzerland, and the United Kingdom. These countries account for 33.4% of the panelists and only 13.95% of Internet users. The least represented (Organization for Economic Co-operation and Development) OECD member countries are Japan, Germany, and Korea. These countries account for 8% of the panelists and 22.5% of Internet users. The United States' representation in the group of panelists is almost equal to the share of U.S. Internet users. WIPO's relative diversity may be due to the relationship WIPO has with the United Nations and WIPO's need for worldwide representation.[138] Nevertheless, Asia, especially East Asia, receives unfavorable treatment with respect to the choice of panelists.[139] This region accounts for 26% of total Internet users, but their representation is just 10% (WIPO), 8% (NAF), and 2.4% (CPR). This bias may explain the creation of new UDRP providers for the East Asian region in 2002.[140] In the next section we explore the effects panelists and specific country cases have on the providers' performance.

IV. Empirical Evidence

The development of the UDRP system has drawn the attention of many researchers since the regime's inception in 1999.[141] The creation of a global dispute resolution system that covered all gTLDs domain names was an ambitious task undertaken in a basically unregulated environment.[142] Up until now, however, most of the studies about ICANN UDRP

137. Even though countries from the OECD represent 87% of the total panelists and account for 75% of Internet users in the World.

138. On the other hand, in both CPR and NAF, the United States is heavily represented, having most of the panelists in the list of both providers.

139. This region includes the following countries: India, Singapore, Malaysia, Japan, China (including Hong Kong), and Republic of Korea.

140. *See supra* note 117.

141. *See supra* note 36 and accompanying text.

142. "All in all, about 70% of the world's domain name registrations now fall under the jurisdiction of the UDRP. The percentage will probably increase in the future as new top-level domains are introduced by ICANN." Milton Mueller, *Rough Justice; An Analysis of ICANN's Uniform Dispute Resolution Policy*. Convergence Center, Syracuse University School of Information Studies.

are devoted to the theoretical debate of the virtues and failures of the system in providing effective regulation of Domain Names complaints.[143]

Professor Milton Mueller at Syracuse University undertook one of the first empirical attempts to understand and evaluate the performance of the UDRP.[144] Professor Mueller constructed a database with most of the data concerning the cases evaluated through the ICANN UDRP regime.[145] His first empirical work was an attempt to describe the performance of the system and explain the differences in providers' market shares.[146] The work provided useful empirical information on the characteristics of the providers and the performance of both the system as a whole and individual private providers.

Professor Mueller determined that a bias existed in the system because the providers that favored complainants were also the ones that received the higher market share.[147] WIPO and NAF received 61% and 31% of the cases respectively, having a winning rate for complainants of 67.5% and 71.5% respectively.[148] On the other hand, eRes, which was seen as being more lenient with respondents, had a market share of just 7% with a winning rate percentage for complainants of just 44.2%.[149] The winning rate for complainants was very high in those cases where the respondent defaulted, thus providing an explanation for the differences in complainant winning rates among providers.[150]

Professor Mueller's work also presents an econometric analysis of the cases. The conclusions of the analysis are that the market shares that the NAF and WIPO receive depend on their influence over the U.S. and

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143. *See supra* note 36.

144. *See supra* note 137, and Milton Mueller, *Success by Default, A New Profile of Domain Name Trademark Disputes under ICANN's UDRP,* Convergence Center, Syracuse University, June 2002.

145. To access the database see, http://dcc.syr.edu/markle/mhome.htm

146. *See* Mueller, *supra* note 142.

147. "There is statistical evidence that selection of dispute resolution service providers by challengers leads to forum shopping that biases the results." *Id.* at 2.

148. *Id.* at 1 1–14.

149. *Id.*

150. "The high default rate can be interpreted in two opposing ways. Either the UDRP procedure moves too fast for ordinary domain name registrants to receive notice or to defend themselves adequately, or many of the challenged names were abandoned by registrants, who saw little point in defending them. We tend toward the latter interpretation, without ruling out the possibility that a significant minority of cases fall into the former category. We found a small number of cases with late responses, but many panelists accepted the late submissions or delayed the proceedings to obtain a response." *Id.* at 12. When the respondent contested the complaint, the winning percentage for the complainant was 43% eRes, 50% NAF, and 54% WIPO. *Id. at 12.*

rest of the world.[151] Furthermore, the system is biased towards the complainants and eRes's low market share is due to the fact that its resolutions favor respondents.[152] The author also proposed some changes in the system in order to avoid forum shopping.[153] Nonetheless, an International Trademark Association (INTA) report criticized the results of this research effort.[154] This report notes flaws in Professor Mueller's analysis including: (1) misunderstandings in the functioning of UDRP; (2) inappropriate statistical evidence to support the claims of bias; (3) inadequate review of UDRP cases; (4) lack of analysis and data showing the rate of challenges to UDRP decisions; (5) the fact that disputed domain names are a small percentage of total domain names; and (6) the UDRP effect of discouraging registrations that infringe domain names.[155]

Professor Michael Geist provides another major piece of empirical evidence on the ICANN UDRP system.[156] He based his work on the analysis of the general data from UDRP cases. Professor Geist's conclusions are similar to Professor Mueller's, finding evidence of bias and forum shopping among providers. Furthermore, Geist suggests that panel performance is quite different when separated into one member and three-member panels.[157] Geist's work suggests that three-member panels

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151. For eRes, the market share was determined by the high complainant loss rate. *Id.* at 18.

152. *Id.*

153. "To remedy the bias inherent in complainant forum shopping, ICANN should modify the UDRP to allow domain name registrars to select the dispute resolution provider(s) who will handle disputes over names they register. The incentives of registrars are more balanced because end users have a choice of which registrar to use. Registrar selection compares favorably to other possible remedies, such as random assignment of cases to dispute resolution service providers, an appeal process, or modification of the language of the policy." *Id.* at 2.

154. Ned Branthover, *UDRP—A Success Story: A Rebuttal to the Analysis and Conclusions of Professor Milton Mueller in "Rough Justice,"* International Trademark Association (INTA) Internet Committee, May, 2002.

155. *Id.* at 1–2.

156. Michael Geist, *supra* note 36 and Michael Geist, *Fundamentally Fair.com? An Update on Bias Allegations and the ICANN UDRP*, University of Ottawa, *at* http://64.233.179.104/search?q=cache:IcTBTMqnAJUJ:aix1.uottawa.ca/~geist/fairupdate.pdf+fundamentally+fair.com&hl=en&start=1&client=safari

157. "At least three factors contribute to the greater confidence in the three-person panel. First, this panel configuration eliminates the possibility that a single panelist may simply misinterpret the UDRP and render the wrong decision. Second, the three-person panel forces panelists to more carefully consider their decision by justifying it before their counterparts on the panel. . . . Third, and most importantly, the three-member panel completely alters the panelist selection process. In a single panel case, the arbitration provider is exclusively responsible for allocating the case to a panelist. Conversely, in a three member panel, the arbitration provider wields comparatively little influence over the selection process. Both the complainant and respondent are typically allowed to select one of the three panel members by submitting a list of three or five acceptable candidates of which the provider will select one.

offer a lower winning rate for complainants: 62% (WIPO), 49%(NAF), and 50% (eRes) for three-member panels versus 83% (WIPO), 86%(NAF), and 64%(eRes) for single member panels.[158] Accordingly, Geist suggests that straightforward changes to a mandatory three-member panel regime will reduce system bias.[159]

The INTA has also criticized Geist's work.[160] The INTA's critical review suggests that Professor Geist's work: (1) was nothing more than a simple statistical analysis of the cases without adequately measuring for fairness; (2) did not consider the default cases in the calculation of the winning percentage for complainants; (3) did not analyze other causes that could justify high winning percentage ratio; and (4) did not consider that forum selection can be the result of other factors such as quality and reputation, costs, etc, rather than bias.[161] Although, both Geist and Muller asserted that the UDRP was created to solve the problem of abusive registration and that a higher winning rate for complainants than for respondents should be the expected norm, both INTA reports criticized Geist and Muller's assumption that a 50% winning rate for complainants and respondents is normal.[162]

Dr. Annette Kur of the Max-Plank-Institute completed the last major piece of empirical work on ICANN.[163] Kur presented an excellent empirical description of the performance of the UDRP system that considered the most disparate variables and characteristics of the panels'

The provider selects the third member of the panel, but only after it has provided both the complainant and respondent with the opportunity to indicate which panelist they prefer." Geist, *supra* note 36, at 22.

158. *Id.* at 19. Note that CPR and ADNDRC are not included as they have too few cases for statistical analysis.

159. "Rather than focusing on provider selection as a means of solving the forum shopping issue, ICANN must turn its attention to panelist selection. If providers continue to maintain exclusive and unchecked authority over the selection of panelists in 90% of all the cases, no reform of the rules nor to (of?) how a provider is selected will remove the potential for bias in panelist allocation." *Id.*, at 28.

160. INTA, *The UDRP by All Accounts Works Effectively. Rebuttal to Analysis and Conclusions of Professor Michael Geist in "Fair.com?" and "Fundamentally Fair.com?"* International Trademark Association, INTA Internet Committee, May 2002.

161. *Id.* at 2.

162. "At one point in Fair.com, Professor Geist asserts that "only one panelist had a respondent winning percentage under 50%". The use of the word "only" and the use of 50% as a point of reference suggest that Professor Geist is treating 50% as "the norm". However, 50% is not a norm for litigation; 50% is a norm for probability." *Id.* at 3.

163. Annette Kur, *UDRP*, A Study by the Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law, Munich and Institute for Intellectual Property Law and Market Law, University of Stockholm, Institute for Information Law, Technical University of Karlsruhe, *at* http://www.intellecprop.mpg.de/Online-Publikationen/2002/UDRP-study-final-02.pdf.

decisions. The main conclusion of Kur's work is: "[g]enerally speaking, the survey shows that fears concerning the risk that the policy might be misused by large companies in order to freeze competition and free speech are largely unfounded. [A]lthough UDRP is functioning well as a matter of principle, there are certain points where the picture becomes somewhat unclear."[164]

Most of the current debate centers on the assumption that providers' bias towards complainants is the main variable that matters in explaining user and provider behavior.[165] Although bias is important, provider performance can be more important in determining the users' choice of provider. In this respect, our work offers a richer empirical analysis, looking at the different factors that explain the performance of the UDRP. Furthermore, there are other variables, such as providers' efficiency, that help to explain the selection process better than the argued bias toward complainants. The aim of this work is to re-evaluate the claims of the main empirical work in this area and to provide a more accurate explanation of UDRP performance.

V. ECONOMETRIC MODEL

ICANN strictly controls the UDRP with guidelines and rules. As a result, the system has a common policy that should normalize the decisions and performance of private courts. Given that ICANN fixes the general rules, the other two main variables that can affect the performance of the system are the price charged in each case and the speed of the procedure.[166] We found that the duration of each case is the only variable each provider can use to differentiate from the other providers. In fact, the duration of the trial is one of the main factors for the UDRP's existence.[167]

The creation of a cheap and fast procedure for conflict resolution was one of ICANN's main objectives. The duration of the trial will de-

164. *Id.* at 57–58.

165. *See supra* note 36.

166. Prices charged by each provider are not different enough to generate a bias favoring any of the providers. Also, there is no evidence of systemic price competition.

167. "The UDRP also succeeds in being a process that resolves disputes quickly. Most of the cases are disposed of within the allotted times, which are themselves very short. The ability to transmit information electronically undoubtedly adds to the speed of the process. While the process achieves speed by allowing very little input and by limiting the issues involved, it must be said that speed was the drafters' primary goal and it was successfully accomplished. Note, however, that this speed is far more likely to benefit the complainant than the respondent." Thornburg, *supra* note 31, at 20 4–205.

pend on the specific technology each provider uses to decide cases. In general, both complainants and defendants prefer a faster system because both providers have a uniform and independent review system.[168] The duration of the trial will depend on the general characteristics of each provider, as well as the characteristics of the case presented. In this section we explore some regression models to determine the characteristics of the UDRP system as a whole, and of each provider.

A. *Are Complainants Selecting Providers by Bias or Efficiency?*

Most empirical analyses of the UDRP have focused on analyzing the cases for each provider and the differences among them. Some of the most complete empirical works are by Geist (2001), Mueller (2001), and Kur (2002).[169] Mueller (2001) contends that the UDRP is biased in favor of the private firms most of the time. The fact that the only provider that had favored consumers and individuals lost market share and went bankrupt is strong evidence in support of the bias claims.[170] Kur's study also described the performance of the UDRP in terms of the results from the cases presented. These studies do, however, show only part of the empirical evidence, and their analysis is mostly based on descriptive statistics. The INTA criticized Geist and Muller's works for the use of simple statistics and the lack of a qualitative analysis.[171] In short, the main critiques of these studies are their reliance on ex-post analysis, looking at the results of the UDRP and analyzing the presence of bias favoring complainants.

Geist and Muller's analyses are based on simple statistics that describe the results of the model. The analyses lack a clear model testing

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168. *See*, Froomkin, *supra* note 18, at 675 (discussing the problem of allowing short time for the case of small firms and consumer responses).

169. They present evidence on the differences in treatment of private firms and individuals in the UDRP regime. *See* Mueller, *supra* note 142; Geist, *supra* note 36; Kur, *UDRP*, *supra* note 163.

170. *See* Section III.

"The Fair.com study concluded by arguing that there was compelling evidence that forum shopping has become an integral part of the UDRP and that the system may indeed be biased in favor of trademark holders[ ]. In the seven months since the release of that study, evidence to that effect has continued to mount, while the explanations of UDRP supporters have been proven incorrect. With eResolution now in bankruptcy court, NAF granting an ever-larger share of its caseload to a small group of panelists, and the red herring of defaults vs. non-defaults conclusively disproved, the need for ICANN UDRP reform has become increasingly urgent." Geist, *supra* note 36, at 8–9.

"Moreover, the fact that eResolutions is now in bankruptcy may have been due to a number of factors wholly unrelated to alleged forum shopping." International Trademark Association, *supra* note 160 at 7.

171. INTA Internet Committee, *supra* notes 154 and 160.

the authors' thesis. In this paper, we will look at an important measure of efficiency, as we will try to understand the technology behind each of these providers. This analysis, based on econometric techniques, will provide better tools for determining the actual functioning of the UDRP system. Although we will examine some of the questions posed by these empirical studies, we will also examine the productivity conditions of each provider. The providers' performance is an overlooked part of most of the UDRP studies that are based on an ex-post analysis of the results.

Most studies point to the high ratio of cases in which complainants win as an indicator of the bias of the system. Furthermore, the studies predict that the higher ratio of complainants winning cases will induce future complainants to forum shop and select those providers with a higher winning percentage. Nonetheless, these studies do not assert what should be a fair ratio of complainants winning cases. More importantly, there was no testing of the choices complainants faced at the moment of selecting the provider. In this section, we intend to develop an ex-ante model, explaining complainants' behavior at the moment of selecting the provider. We assume that the price variable is not significant in selecting the provider.

Complainants have two main motivations for choosing a provider. First, complainants can choose a provider based on the bias favoring the complainants. This has been the main argument for those analyzing the UDRP system. Second, complainants are also willing to choose the provider that is most efficient at handling the case and generating a shorter waiting time.[172] We assume that each complainant (or consumer) who has a complaint will pick a provider j from a set of J providers at time i and the utility derived from this choice is given by a random utility model,

$$U_{ij} = \beta' z_{ij} + \varepsilon_{ij} \qquad (1)$$

Where U_{ij} is the utility of complainant i for choosing provider j, and i=1, . . . ,n and j=1, . . . ,m;

β' is a vector of the coefficient for the vector of explanatory variables z_{ij} for each consumer; and ε_{ij} is an error term.

According to equation 1, if the complainant makes the choice j, we assume that U_{ij} is the maximum among the possible utilities derived from the rest of the providers in the set J. As a result, the statistical model is driven by the probability that choice j is made, which is,

172. This is an efficiency motive for choosing providers, which has been neglected in the literature about the UDRP.

$$\Pr ob(U_{ij} > U_{ik}) \qquad \text{for all other } k \neq j \tag{2}$$

Accordingly, given a random variable that represents the choice made by complainants, Yi, then the probability can be expressed as,

$$\Pr ob(Y_i = j) = \frac{e^{\beta' z_{ij}}}{\sum_{j=1}^{J} e^{\beta' z_{ij}}} \tag{3}$$

This model is the conditional logit model. In our case, the dependent variable Y_{ij} is given by the selection of each complainant in the UDRP system. The providers are NAF, WIPO, and eRes, i.e. J=3. The explanatory variables that determine the probability that a given utility under a given provider is bigger than the utility of any of the others are: (1) the two main characteristics of each providers; (2) the bias favoring complainants; (3) represented by the ratio of cases that have been decided in the favor of complainants by each provider; and (4) the efficiency of each provider, measured by the average duration of the cases managed by each provider. In accordance with this model, we are evaluating the probability of each complainant choosing a provider based on these measures of the performance of the providers. This model is more suitable for analyzing the causes of the preference for some providers with respect to others instead of simply looking at the ex-post results of the system and elaborating a suitable explanation for those results.

We have calculated a complete series of different indicators for the bias and the efficiency measures. First, for measuring bias we have the following variables. Complaint is the ratio of cases won by the complainants to cases brought by complainants since the beginning of the provider's operations and up to the day the complainant presents the case to a provider.[173] Monthly Complaint is the measure of cases won by the complainants in the current month the complaint is being presented. Monthly Complaint Lagged is the same measure as Monthly Complaint, but lagged one month. Duration is the natural logarithm of the average duration of the cases for each provider since the beginning of the operations of the provider.[174] Monthly Duration is the natural logarithm of the average duration of the cases for each provider in the current month the case is being presented to a provider. Monthly Duration Lagged is the same measure as Monthly Duration, but lagged one month.

173. Complaint is calculated in a daily basis from January 2000 to November 2002.
174. Duration is calculated daily from January 2000 to November 2003.

Our analysis focuses on testing whether the probability of selecting one of the providers depends on the complainant bias or on the provider's efficiency in handling the cases. In order to be sure of the relationship between the election of provider and these variables, we tested a series of similar models using the variables mentioned previously.[175] The dependent variable, Provider, represents the selection of the provider made by each claimant. Table 4 lists the results of our regression models. According to this model, the explanatory variables we considered for the provider selection are: (1) the ratio of complainants winning the cases for each provider during the current month in which the complainant was presented (Cmnaf, Cmwipo and Cmeres); (2) the lagged variables (Cmnafl, Cmwipol and Cmeresl); (3) the natural logarithm of the average duration of the cases in each provider to include the current month (Ldnaf, Ldwipo and Lderes); and (4) the lagged variables (Ldnafl, Ldwipol and Lderesl). The results suggest that only the complainant and variables for WIPO and eRes lagged one month. The variables for NAF and eRes for the current month are significant and the lagged monthly duration for WIPO is significant. Now, we would like to see the magnitude of the impact of each variable in the probability of selection. Table 5 shows the probabilities calculated by the model and the effects of changing each of the explanatory variables in one deviation standard.

TABLE 4: MULTINOMIAL REGRESSION

Model 1		
Variables	*Coefficient*	*Z*
NAF		
Cmeresl	1.956	3.013(***)
	(0.649)	
Cmwipol	6.879	3.256(**)
	(2.113)	
Ldnaf	-8.014	-3.382(***)
	(2.370)	
Ldwipol	3.953	6.605(***)
	(0.598)	
Lderes	4.001	5.537(***)
	(0.723)	
Constant	-6.190	-0.746
	(8.296)	

175. *See* Appendix A for the summary of the variables used in the regression analysis.

Variables	*Coefficient*	*Z*
	WIPO	
Cmeresl	2.463 (0.621)	3.968(***)
Cmwipol	3.994 (2.024)	1.973(**)
Ldnaf	-6.967 (2.309)	-3.017(***)
Ldwipol	5.009 (0.579)	8.644(***)
Lderes	3.879 (0.714)	5.433(***)
Constant	-11.200 (8.081)	-1.386
Number of observations=2861 LR chi2(10)=121.78 Prob > chi2=0.0000 Log Likelihood= -2255.66 Pseudo R2= 0.0238 Coefficient tests: (***) Significant 1%; (**) Significant 5%; (*) Significant 10%		

TABLE 5: PROBABILITIES MODEL I

		Prob (NAF)	% Change	Prob (WIPO)	% Change	Prob (eRes)	% Change
Total Probability		*0.268*		*0.685*		*0.047*	
Cmeresl	Increase	0.254	-5.22%	0.716	4.5%	0.030	-36.2%
	Decrease	0.280	4.5%	0.650	-5.1%	0.071	51.1%
Cmwipol	Increase	0.304	13.4%	0.660	-3.64%	0.036	-23.4%
	Decrease	0.166	-38.1%	0.791	15.5%	0.043	-8.5%
Ldnafl	Increase	0.221	-17.5%	0.658	-3.9%	0.121	157.4%
	Decrease	0.307	14.6%	0.676	-5.5%	0.016	-66.0%
Ldwipol	Increase	0.238	-11.2%	0.741	8.1%	0.020	-57%
	Decrease	0.288	7.4%	0.608	-11.2%	0.103	120%
Lderes	Increase	0.281	4.9%	0.699	2.0%	0.019	-60.0%
	Decrease	0.246	-8.2%	0.647	-5.5%	0.108	129.8%

The above results suggest that there is a much higher probability of the complainants selecting WIPO compared to NAF and eRes. This is true for at least the period of time covered by this study, including the period when eRes was still receiving cases. For NAF, column 1 in Table 5, the probability of being selected is 26.8%. An increase (decrease) in the ratio of complainants winning in eRes will slightly increase (decrease) the probability of complainants selecting NAF. Even though the impact is small, it is in the opposite direction. One would expect that if there is a bias, an increase in the winning ratio of complainants in eRes should decrease the probability of receiving a case for NAF and WIPO. In our study, the findings suggest that an increase in the bias favoring complainants by eRes will produce an

increase in the number of complainants presented to NAF. The same result is true for NAF in the case of a change in the complainant winning ratio for WIPO. In this instance, an increase/decrease in the complainant winning ratio for WIPO will result in an important increase/decrease in the probability of cases received by NAF. Again, these results are counterintuitive to the bias thesis presented before.

An increase (decrease) in the duration of NAF procedure will decrease (increase) the probability of NAF receiving the next case. The effect of this variable is more important than the effect of the bias variables. More importantly, the effect is as expected, *i.e.*, a worsening in the efficiency of NAF should decrease the probability of receiving the next claim. For eRes, the changes are also as expected. A higher/lower duration in eRes produces a higher/lower probability of selection in NAF, thus increasing/decreasing the probability of receiving a claim. Nonetheless, in the case of the duration variable for WIPO, the results are counterintuitive. Specifically, an increase/decrease in the duration for WIPO will produce a decrease/increase in the probability of receiving a case in NAF.

WIPO has the highest probability of being selected, 68.5%. In this case, an increase/decrease in the complainant ratio in eRes will produce a slightly negative/positive effect on the probability of WIPO being chosen.[176] The same result is observed with the changes in the complainant ratio in WIPO.[177] Accordingly, all of the results in testing for bias in WIPO contradict the claim of the existence of such a bias. The duration results suggest that both an increase and a decrease in the duration of NAF will produce a negative impact on the WIPO's probability of receiving cases. Nonetheless, the negative effect is more important when the duration of NAF procedure decreases. This is consistent with the efficiency argument. In fact, the effect of its own duration is not consistent with what we should expect. An increase/decrease in the duration of WIPO will increase/decrease the probability of receiving the next case.

The duration of eRes has the expected effect on the probability of WIPO. The probability of eRes receiving a case is the lowest of the three providers studied. An increase/decrease in the complainant bias by eRes has a negative/positive effect on the probability of receiving the next case, which is again, counterintuitive to the bias hypothesis. That said, an increase in WIPO's bias variable results in a decrease in

176. This is again a result contrary to what should be expected.
177. These have a negative impact in WIPO probability.

the probability of eRes being chosen as a provider, and this result is consistent with the bias hypothesis. However, a decrease in WIPO's bias variable does not result in an increase in the probability of eRes being chosen as the provider, and this result is inconsistent with the bias hypothesis. Hence, we only see partial support for the bias hypothesis between WIPO and eRes.

The impact of the efficiency variable in eRes is very important. An increase/decrease in the duration of NAF generates an important increase in the probability of eRes being chosen. Thus, eRes's efficiency results with respect to NAF are as expected. In the case of the efficiency variable for WIPO, the results are not consistent with the efficiency hypothesis. In other words, an increase/decrease in WIPO's efficiency does not result in a decrease/increase in the probability of being chosen for the other providers, suggesting that WIPO is being chosen by complainants for reasons unrelated to duration, such as geographical considerations, or, initially, for its UDRP experience since it is the earliest UDRP provider.

Table 6 shows how the bias and efficiency hypotheses perform in our econometric model. Table 6 shows the expected and actual signs for changes in the probability of being chosen as a provider corresponding to increases or decreases in the explanatory bias and efficiency variables. The signs when there is agreement between the actual and expected changes are shown in parentheses in Table 6. The results illustrate that bias variables produced partial results, with just one instance where the signs completely match those expected (the case of changes in the complainant bias in eRes and its impact on NAF being chosen is consistent with the bias hypothesis). However, in analyzing the efficiency variables, the results are as expected in all the cases for NAF and eRes. The only variable that is not according to what we expected is the efficiency measurement for WIPO. Hence, the performance of the providers can be considered a better measure in determining the selection of the providers by the complainants than the supposed bias of the system favoring complainants. Accordingly, in contrast to most of the empirical papers about the UDRP system based on general results and supporting the bias theory, our paper examines the performance of the providers and how differences among them affect the UDRP results. In actuality, because performance is an important determinant of provider success, performance should receive more attention than the supposed system bias.

TABLE 6: EXPECTED AND ACTUAL RESULTS

Variables		NAF		WIPO		ERes	
		Expected	*Actual*	*Expected*	*Actual*	*Expected*	*Actual*
Cmeresl	Increase	-	(-)	-	+	+	-
	Decrease	+	(+)	+	-	-	+
Cmwipol	Increase	-	+	+	-	-	(-)
	Decrease	+	-	-	+	+	-
Ldnafl	Increase	-	(-)	+	(-)	+	(+)
	Decrease	+	(+)	-	-	-	(-)
Ldwipol	Increase	+	-	-	+	+	-
	Decrease	-	+	+	-	-	+
Lderes	Increase	+	(+)	+	(+)	-	(-)
	Decrease	-	(-)	-	(-)	+	(+)

B. *How Important is Efficiency for Analyzing Provider Performance?*

According to the analysis from the previous section, each provider for the UDRP system has to evaluate and decide each complaint.[178] The two main characteristics of this alternative dispute resolution system are low cost and quick results. The low cost of presenting a complaint is relatively uniform across providers. ICANN attempted to generate a simple set of rules for processing each complaint designed to create a shortened administrative process. By providing common rules for the process, ICANN sought to avoid both excessive differentiation among providers as well as forum shopping. Despite these efforts, the providers can still find ways to attract more complainants than their competitors. First, given that it is the complainant who chooses the provider, a bias favoring complainants would help attract complaints toward this provider. This effect has been widely analyzed in literature but, as illustrated in the previous sections, is not the main determinant used by complainants in selecting a provider. Second, providers can increase business by shaping their supplemental rules to be more efficient than those of other providers. Supplemental rules do not vary much among providers. Third, although prices are similar among providers, competitive prices could attract more complainants. This effect is similar to other oligopolist industries where producers do not compete with prices but with customer service.

Most of these variables will determine the speed of the process, which in the end is one of the main characteristics of the system and related to the success of the provider in the long run. The time that it takes

178. *See* Sections II and III.

to evaluate and decide each complaint depends on a number of instruments the provider has on hand.

First, bias for or against some group will alter the process, and therefore, also affect timing. For example, if a given provider favors people from a given country, then all the complaints or responses coming from this country will be treated differently and, as a consequence, will be resolved at a different speed.

Second, differences in the supplemental rules, and/or internal procedure for each provider will determine the capacity of a certain provider to review the complaints efficiently. For example, if a provider has created simple rules with good incentives for both complainants and respondents to submit accurate and on time information, then the resolutions of the cases will be faster.

Third, the type of complaints and procedure will have an impact on the speed of the process. For example, if the respondent fails to submit a defense for its case, the panelist will then be in a position to reach a faster decision.

Fourth, the panelists the provider appoints and their specific background and precedence will have an impact on the speed of the results. For example, a panelist from India will be more knowledgeable about property laws in India and better equipped to quickly handle a case involving parties from India than a case with parties coming from the European Union.

Fifth, the geographical origin of the parties should have an impact on the speed of the resolution of the conflict. Differences in law, language, customs, etc. will be a barrier to a smooth and fast resolution in each case. This is one of the main barriers a universal system like the UDRP has to be able to overcome in order to be successful in the long run. As a result, the duration of the procedure will be influenced by the many instruments each provider has available to improve their efficiency and share of cases. Accordingly, we can represent the speed of the procedure as,

$$d = D(Bias, Rules, Type, Panelists, Parties) \tag{4}$$

where:

Bias is the specific preference the provider has with respect to some specific group. *Rules* are the differences in the procedure and rules of each provider. *Type* is the type and complexity of each complaint. *Panelists* represent individual characteristics of each panelist. *Parties* represent the precedence of each party

In the previous equation, the duration of the procedure will depend on the series of variables under the control of the provider. The analysis

of this duration function will help to determine the differences between providers and the different factors that explain the performance of the UDRP system. Accordingly, our analysis departs from most of the empirical studies of the UDRP. Although other studies have attempted to determine the bias of the system in favor of complainants and the general characteristics of the providers, our analysis goes a step beyond that and examines the determinants of the duration of the process.

We use duration models to test the performance of each provider and the system as a whole. Duration models are widely used in medicine and labor economics to measure the expected length of an event. In labor economics, researchers have measured the expected duration for a strike by using models to measure the probability that the strike will be maintained an extra day. Accordingly, we use the model where once a trial begins, there is a probability that it will be terminated the next day or else it will continue to be analyzed by the respective provider.

Data

We use two different databases for the four providers, WIPO, NAF, eRes, and CPR, for the period from January 2000 to November 2002. The first database utilized in this section was obtained from the UDRP web site and contains 7148 cases from January 2000 to November 2002. The cases are separated by provider and by the duration, in days, of each case. The second database was obtained from the work of the Convergence Center.[179] This database contains a series of variables for the first 3850 cases from December 1999 to July 2001.[180] From this database we have been able to compile a series of different variables as described in Appendix B.

C. *Results*

Figure 2 depicts the evolution of the total number of cases presented in each month. There was a sharp increase in the number of complaints presented during the initial months of 2000, possibly a consequence of the implementation of the UDRP regime.[181] Starting in August 2000 and

179. *See* Convergence Center, *Current Projects*, *at* http://dcc.syr.edu/projectlist.htm

180. *See* Convergence Center, *The UDRP Tracking Project*, *at* http://dcc.syr.edu/marklepage.htm

181. "If we examine when the names challenged under the UDRP were registered, we find a significant concentration of challenged names in the first quarter of 2000. . . The first quarter of 2000 stands out as a huge peak. The period was too early for the UDRP to have a significant deterrent effect on cybersquatters, yet immediately followed ICANN's introduction of registrar competition which stimulated the marketing and consumption of gTLD domains. The number of disputed names drops off precipitously in the second and third quarters of 2000." Mueller, *supra* note 36, at 5.

throughout 2001, the number of cases steadily decreased. In 2002, there was a small increase in the number of cases from March to June, but afterwards the number of cases continued to decline.

The declining number of cases is the consequence of two main factors. First, because most of the disputes associated with earlier domain names were already settled during 2000 and 2001, the incoming number of new disputes was much lower. Furthermore, the existence of the UDRP system may act as a deterrent for users engaged in mass registration of names or for those looking to make quick profits by registering proprietary names and brands of others. Second, the economic downturn of technology-related economic activities, especially in respect to e-commerce, could have impacted the number of complaints and disputes for domain names.

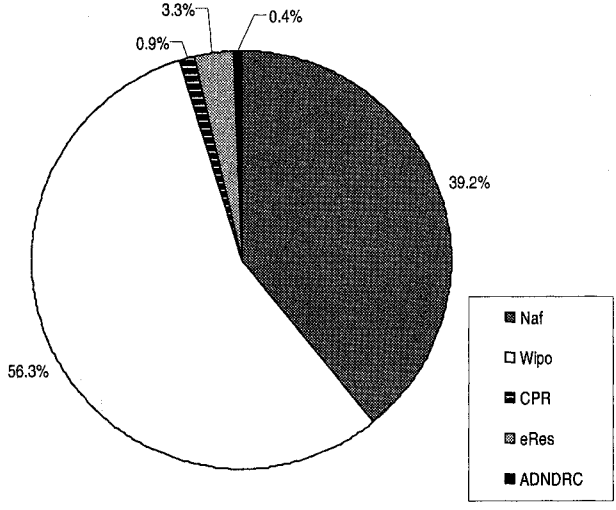
The number of disputes will likely increase in the future, as the Internet increasingly expands into a more international environment and becomes more popular in other countries outside of the United States and the European Union. Between January 2000 and June 2003, the UDRP has evaluated 8,549 cases, and most of them have been divided among two main providers, NAF and WIPO (Figure 3). As Figure 3 illustrates, WIPO and NAF have decided 95.5% of the cases. The closest competitor, with just 3.3%, eRes, is no longer a provider for the UDRP regime.

Examining the evolution of the number of cases received by each provider over time shows how the system has evolved around two main providers (Figure 4). During the first year, the dominance of WIPO, an active participant in the process of delineating the UDRP, is apparent. Accordingly, the number of cases received by WIPO (60% of the total) strongly surpassed those of NAF (32%), eRes (7.6%) and CPR (0.7%).

FIGURE 2
UDRP NUMBER OF CASES PER MONTH

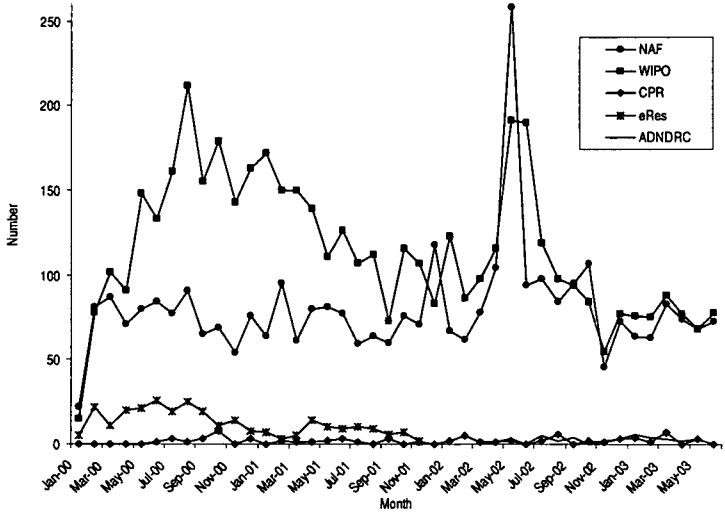
Source: Own Elaboration based on data on UDRP cases at www.icann.org

FIGURE 3
TOTAL NUMBER OF CASES BY PROVIDER
(JANUARY 2000 TO JUNE 2003)



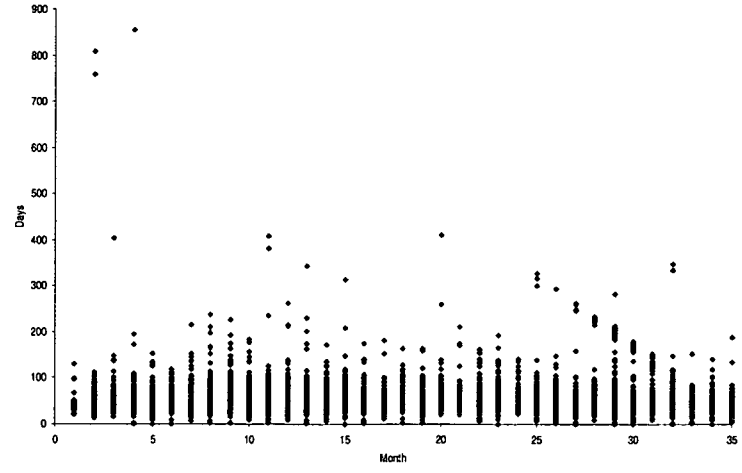
Source: Own Elaboration based on data on UDRP cases at www.icann.org

FIGURE 4
UDRP NUMBER OF CASES BY PROVIDER



Source: Own Elaboration based on data on UDRP cases at www.icann.org

FIGURE 5
DURATION OF CASES BY MONTH



Source: Own Elaboration based on data on UDRP cases at www.icann.org

In the second year, there was still a tendency for WIPO to receive more cases than NAF. Although WIPO received 60% of the cases, NAF

increased its participation to 37%. NAF's increased participation was due to a reduction in the number of cases handled by eRes to 3.4%. Meanwhile, CPR remained at 0.6%. In 2002, the tendency changed as a result of a convergence in the number of cases between NAF and WIPO. NAF increased its participation to 46% and WIPO decreased its participation to 52%. At the same time, eRes went out of business in the end of 2001, and CPR continued to have an insignificant share. In 2002, ADNDRC was created, but it managed just 0.8% of the total number of cases. In 2003, the tendency continued with the two main providers polarizing the cases. WIPO received 50% of the cases, NAF 46%, CPR 1.6% and ADNDRC 2%. At this time, the system seems to have reached equilibrium with two main providers receiving an almost similar quantity of cases.

In the future, ADNDRC will increase its number of cases to reflect its exclusive geographic region of operations. The actual duration of cases from month to month suggests that there were almost no differences in the duration of the cases over time (Figure 5). There were, however, some outliers at the initial stages of the system. But, most of the months show average similar values for the duration. In the next section we present the econometric results on the performance of the UDRP system.

The predominance of the United States and Europe is present in the geographic distribution of cases (Table 7). Moreover, we considered both the origin of complainants and respondents in each case in our database from December 1999 to July 2001. A higher proportion of complainants come from developed countries in Europe, the United States, Canada and Japan, which represent 80% of all the complaints. On the other hand, these same countries represent 73% of all the respondents. This increase in the number of respondents in developing countries could be consistent with the lack of both secure trademark protection and cyber squatting enforcement (Table 7).

Interestingly, in classifying the cases of each provider with respect to the geographic origin of the complainants, the complaints of the NAF (83%) and CPR (76%) came mainly from their host country, the United States (Figure 6).

TABLE 7
GEOGRAPHIC DISTRIBUTION OF COMPLAINANTS AND RESPONDENTS

Respondents	Number	Percentage	Complainants	Number	Percentage
United States	1,983	51.5	United States	2,124	55.1
Great Britain	201	5.2	Great Britain	206	5.3
Canada	153	4.0	France	121	3.1
Spain	134	3.5	Spain	113	2.9
Republic of Korea	107	2.8	Canada	104	2.7
Australia	67	1.7	Germany	89	2.3
Italy	50	1.3	Italy	64	1.7
France	41	1.1	Australia	49	1.3
India	35	0.9	India	48	1.2
Sweden	34	0.9	Japan	46	1.2
China	34	0.9	Netherlands	44	1.1
Russia	30	0.8	Switzerland	42	1.1
Switzerland	29	0.8	Sweden	40	1.0
Germany	27	0.7	Brazil	34	0.9
Ireland	24	0.6	Other European	104	2.7
Brazil	23	0.6	Asia	60	1.6
Hong Kong	22	0.6	Rest of Latin America	58	1.5
Netherlands	21	0.5	Africa	17	0.4
Japan	16	0.4	Middle East	10	0.3
Africa	7	0.2	Unknown	480	12.5
Rest of Latin America	101	2.6			
Rest of Europe	74	1.9			
Rest Asia	69	1.8			
Middle East	61	1.6			
Unknown	510	13.2			
Total	*3,853*	*100.0*		*3,853*	*100.0*
United States	1,983	51.5	United States	2,124	55.1
Europe	665	17.3	Europe	823	21.4
Latin America and North America	277	7.2	Latin America and North America	196	5.1
Asia	350	9.1	Asia	203	5.3
Middle East	61	1.6	Middle East	10	0.3
Africa	7	0.2	Africa	17	0.4
Unknown	510	13.2	Unknown	480	12.5
Total	*3,853*	*100.0*		*3,853*	*100.0*

Source: Own elaboration based on Convergence Center database

Although the dominant country of origin for Swiss-based WIPO is also the United States with 41%, Europe accounts for 32% of WIPO's cases. This is substantially larger than the 4% and 15% European cases represent for the US providers. Additionally, eRes received 44 % of its cases from the United States, 26% from Canada, and 10% from Europe. The rest of the regions of the world participate marginally in each of these providers, though WIPO is the recipient of the majority of these claims. Furthermore, duration also varies across providers and regions, and NAF is much faster than WIPO in all the different regions (Figure 6).

Some of the cases decided by the UDRP providers have been challenged in the United States courts. We identified a total of fifteen such cases since the inception of the UDRP regime. Of these cases, nine were handled by WIPO, five by NAF, and one by eRes. In three of these cases, the federal court reversed in total the UDRP providers' decision. In four cases, it reversed the decision in part. In eight cases, it affirmed the providers' decisions. In one case, the court declared that it did not have jurisdiction because the case involved a government from another country.

FIGURE 6
DISTRIBUTION OF CASES BY ORIGIN OF COMPLAINANT

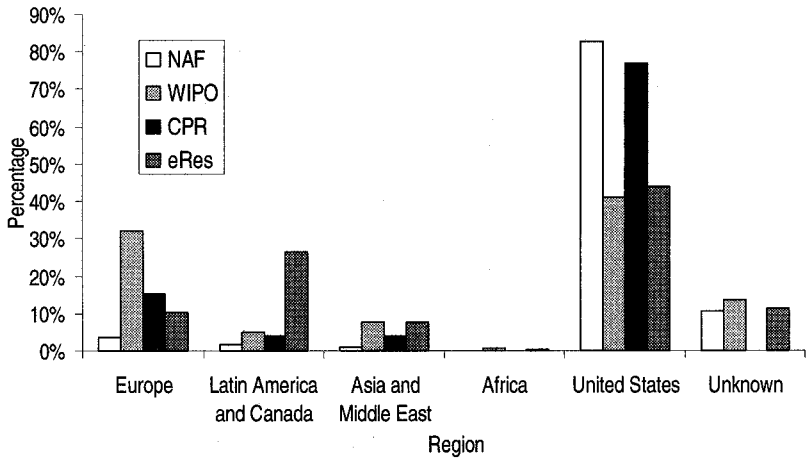


FIGURE 6 (CONTINUED)
DURATION OF CASES BY ORIGIN: NAF

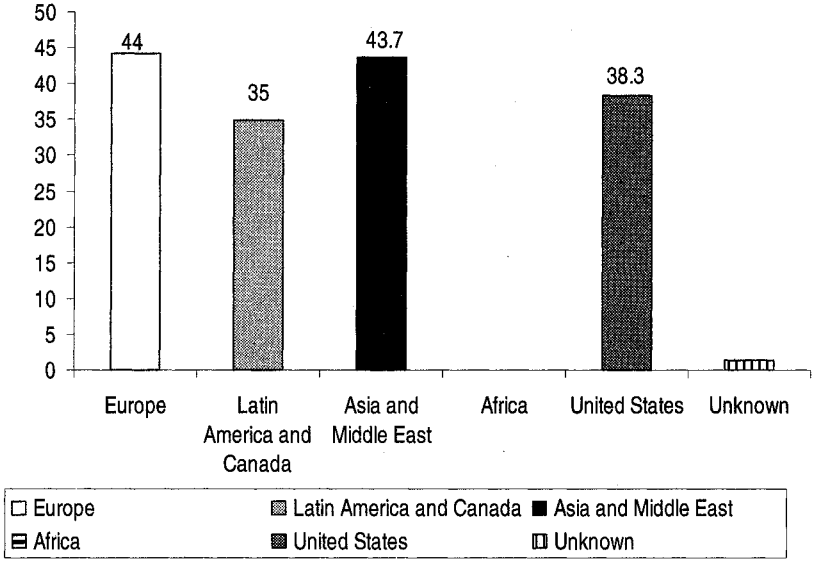
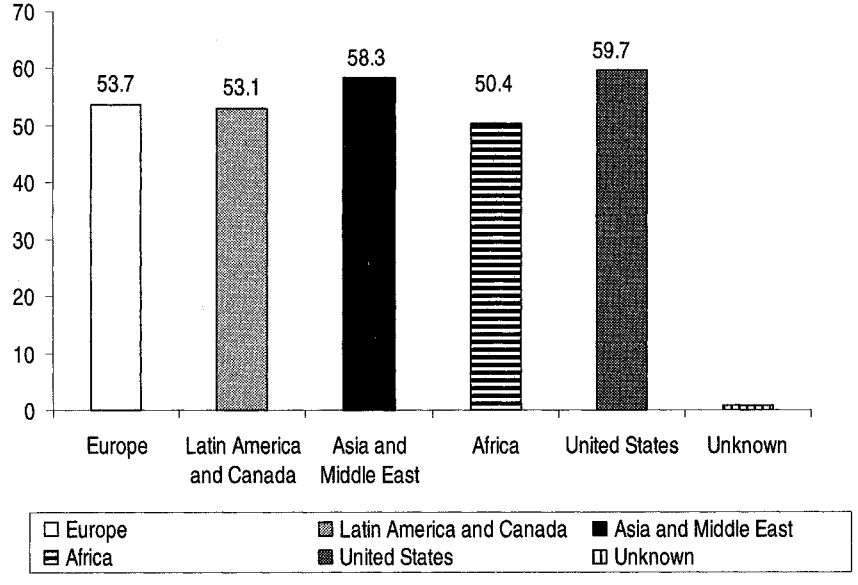


FIGURE 6 (CONTINUED)
DURATION OF CASES BY ORIGIN: WIPO



Source: Own elaboration based on Convergence Center database

D. *Econometric Results*

In this section, we present the factors that determine the expected number of days that a case is under review. The duration variable is extremely important because, as we have shown, it is one of the main variables providers can manage in order to achieve their goal of having complainants select them. With the results obtained based on the database covering the months from January 2000 to November 2002 we would like to answer two main questions. First, what are the general duration characteristics of the system as a whole? Second, are there differences in duration among providers? The first question will help to describe the procedure and determine the expected duration of the system as a whole. Forum shopping is the goal of the second question.

One of the main objectives of ICANN is to establish a system with many private providers and a common set of rules and regulations. However, because the complainant picks the provider, differences among them may include a bias that could be exploited by the complainants. Consequently, the duration depends on many factors and characteristics of each provider and is also different for each provider.

Although the structural differences among providers results in forum shopping opportunities, we have shown that duration is the most significant factor influencing choice of provider. Thus if the duration functions can be made statistically the same among providers, the ICANN system would be successful in providing a homogeneous system for dispute resolution on the Internet. Figure 7 illustrates the Kaplan-Meyer survival function. This function allows us to analyze the performance of the entire system. The horizontal axis measures the duration of the cases in days, and the vertical axis shows the probability of surviving one extra day. Accordingly, the expected mean duration for the whole system is 54 days (Table 8). Furthermore, the results of the different probabilities of survival are: up to 31 days the probability of survival is higher than 90%; up to 40 days it is higher than 70%; for a duration of 47 days the probability is higher than 50%; the probability of survival is higher than 30% for duration above 56 days; and finally, for duration of up to 83 days, the probability of survival is at least 10%. These results suggest that the system is providing a relatively fast procedure for evaluating complaints, because the median duration is just 47 days for the system as a whole.

The second question considers the importance of the differences in duration among providers. Figure 8 shows the results obtained by drawing a different survival function for each provider. A simple inspection of Figure 8 suggests that there are two extreme providers, NAF with the lowest duration function and WIPO with the highest duration function. The other

providers are located somewhere in between these two extremes and are the ones that polarize the number of complaints of the whole system.

In order to determine the statistical differences among duration curves, we use a set of tests designed to compare survival functions. The tests are the log-rank test, the Wilcoxon test, and the Cox test. Table 9 shows the values for these tests, which support the contention that the duration functions between providers are statistically different. This result is very important because there are differences in the structure and procedure of each of the providers that provide the possibility of forum shopping under the UDRP system. Furthermore, the duration function, and consequently the technology function, is different for each court. In the next section, we will analyze the factors that determine this difference in duration among providers.

E. *Duration Analysis by Provider*

In the previous section, we showed that the duration functions for each provider are different and, therefore, should be evaluated separately. In this section, we will analyze the different factors behind the specific structure of each provider and how these factors produce a different duration function. Accordingly, we use a Cox semi-parametric duration model for the analysis of the cases in each provider. This model will allow us to introduce independent variables to explain the differences in behavior in each provider, without imposing any specific structure on the hazard function.

FIGURE 7
KAPLAN-MEYER SURVIVAL ESTIMATE

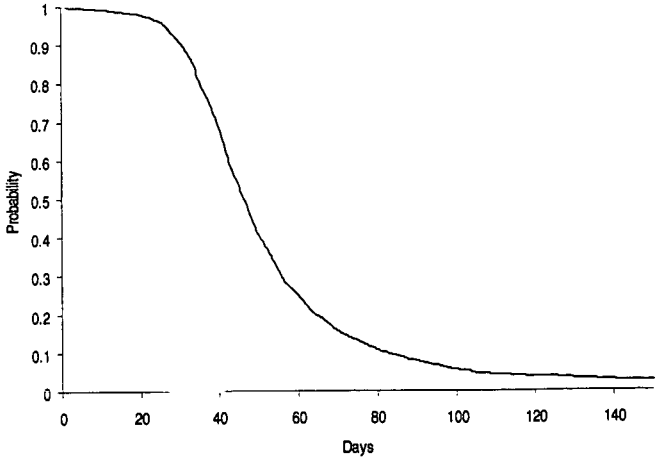


TABLE 8: DURATION CHARACTERISTICS

Category	Total	Mean	Min	Median	Max
no. of subjects	7,330				
no. of records	7,330	1	1	1	1
(first) entry time		0	0	0	0
(final) exit time		54.368	1	47	856
subjects with gap	0				
time on gap if gap	0				
time at risk	398,521	54.368	1	47	856
Failures	7,148	0.975	0	1	1

FIGURE 8
KAPLAN-MEYER SURVIVAL ESTIMATE BY PROVIDER

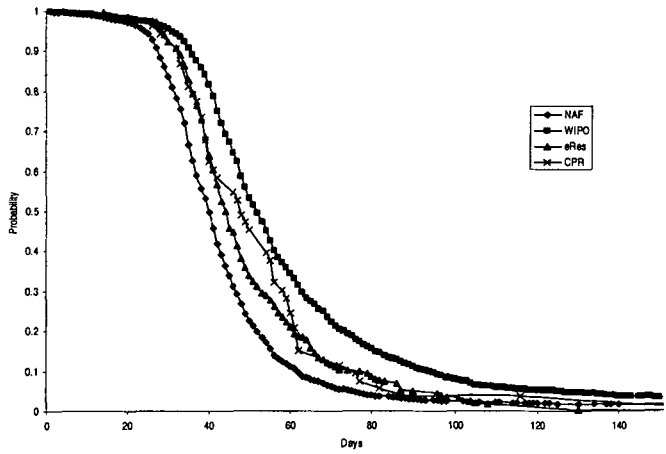


TABLE 9: TESTS OF EQUALITY OF SURVIVAL CURVES

Cox Regression-Based Test			
Provider	*Observed*	*Expected*	*Hazard*
NAF	2731	1740.85	1.674
WIPO	4079	5110.42	0.830
eRes	286	246.24	1.223
CPR	52	50.48	1.081
Total	7148	7148	1.000
LR $Chi^2(4)$=734.45 Prob. Chi^2=0.000			

Log-Rank Test		
Provider	*Observed*	*Expected*
NAF	2731	1740.85
WIPO	4079	5110.43
Eres	286	246.24
CPR	52	50.48
Total	7148	7148
$Chi^2(3)$=834.61Prob. Chi^2=0.0000		

Wilcoxon Test			
Provider	*Observed*	*Expected*	*Sum of Ranks*
NAF	2731	1740.85	5440025
WIPO	4079	5110.43	-5562113
Eres	286	246.24	126492
CPR	52	50.48	-4404
Total	7148	7148	0
$Chi^2(3)$=1131.40 Prob. Chi^2=0.0000			

In order to analyze the structure of each provider, we utilize the database constructed by Mueller that contains more than 3000 cases compiled during 2000–2001.[182] Table 10 shows the differences between each provider in terms of duration based on the Kaplan-Meier estimator.[183] WIPO is the provider with the greatest expected duration, a mean duration of 57 days and a median duration of 51 days. The fastest provider is NAF, with a mean duration of 38 days and a median of 35. This difference between the providers located at the extremes is very important. WIPO takes 48% more than the average time expected under NAF. In fact, even when NAF concentrates most of its efforts on cases in the United States, NAF has a consistently shorter duration than WIPO (Figures 8 and 9). The same behavior is observed with respect to eRes and CPR, which, in general, are faster than WIPO, but slower than NAF (Figure 9).

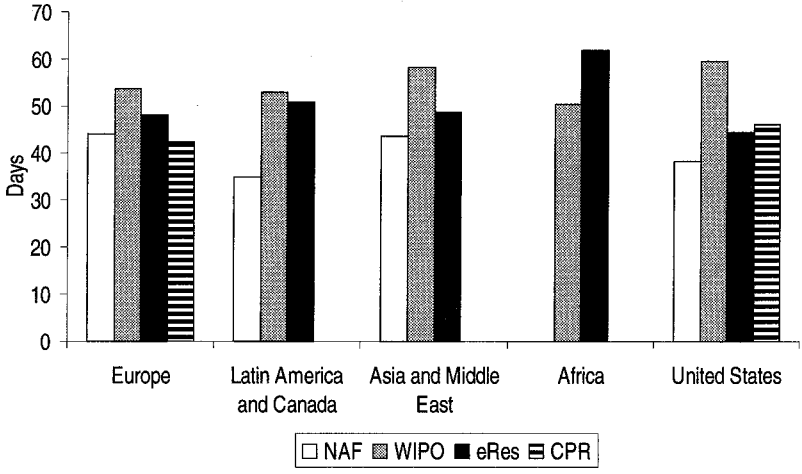
Table 10 presents the variables that best explain the behavior of each of the providers based on the Cox model. After running a general model

182. *See* Appendix C for a complete list of the variables used in this analysis.

183. These results are based on the different duration functions calculated in the previous section for each provider.

for each provider we tested for the fulfillment of the main assumption of the Cox model, the proportional hazard assumption.[184] The test results suggested that the variables for some of the panelists included in our models did not pass the proportional hazard tests. For these judges, the structure of the duration function is different than for the rest of the provider's cases.

FIGURE 9
AVERAGE DURATION BY PROVIDER AND REGION



184. *See* Appendix D for the complete presentation of the results.

TABLE 10
CHARACTERISTICS OF DURATION FUNCTIONS
FOR EACH PROVIDER

WIPO						CPR					
Category	*Total*	*Mean*	*Min*	*Median*	*Max*	*Category*	*Total*	*Mean*	*Min*	*Median*	*Max*
no. of subjects	1,999					no. of subjects	25				
no. of records	1,999	1	1	1	1	no. of records	25	1	1	1	1
(first) entry time		0	0	0	0	(first) entry time		0	0	0	0
(final) exit time		57.39	6	51	420	(final) exit time		46.32	20	43	72
Subjects with gap	0					subjects with gap	0				
time on gap if gap	0					time on gap if gap	0				
time at risk	114,719	57.39	6	51	420	time at risk	1158	46.32	20	43	72
Failures	1,999	1	1	1	1	Failures	25	1	1	1	1
NAF						e-Res					
Category	*Total*	*Mean*	*Min*	*Median*	*Max*	*Category*	*Total*	*Mean*	*Min*	*Median*	*Max*
no. of subjects	1,123					no. of subjects	209				
no. of records	1,123	1	1	1	1	no. of records	209	1	1	1	1
(first) entry time		0	1	1	1	(first) entry time		0	0	0	0
(final) exit time		38.73	4	35	407	(final) exit time		47.84	20	44	130
subjects with gap	0					subjects with gap	0				
time on gap if gap	0					time on gap if gap	0				
time at risk	43,489	38.73	4	35	407	time at risk	9999	47.84	20	44	130
Failures	1,123	1	1	1	1	Failures	209	1	1	1	1

The results of Table 11 indicate some curious results. For WIPO, the following variables have a positive impact on the duration function, implying a faster resolution of the cases and a lower probability of survival: Default, Respse, Compse, Compca, Complaw, Dorf, P., and Limbury, A.

The variables that have a negative impact, implying a longer resolution time, are: Split, Respus, Compus, Compin, and Bernstein. Default represents those complaints where the respondent does not reply to the charges of the complainant. Split represents those cases where the panel has a split decision. The positive sign implies that the panelists have less trouble in quickly deciding these types of cases; the cases are generally decided in favor of the complainant. The negative

impact on the duration is because of the time needed by the panel to decide the case.[185]

Judicial represents those cases in which the panelists reviewed previous cases in order to reach a decision. The positive sign for this variable indicates that as the panelist, or panelists, find cases similar to the one they were considering, the panel will need less time to decide the case.

The variables Respus and Compus represent cases in which both the respondent and the complainant are from the United States. Because the effect of both variables is negative, we can conclude that a negative bias exists with respect to claims or responses coming from the United States.[186] The same effect is present for Compin, which represents complainants coming from India. Alternately, the variables Respse and Compse represent cases where the respondent, the claimant, or both, are from Switzerland. For these variables, the coefficient is positive. A positive coefficient indicates that, on average, the WIPO panels take less time to resolve disputes having a positive bias toward Switzerland. Because the geographical headquarters of WIPO is in Geneva, Switzerland, this effect could be due to a more comprehensive knowledge of laws and institutions of the country. We observe the same effect for the variable, Compca, which represents claims where the complainant is from Canada.

The presence of either positive or negative bias acts as a general negative indicator of the performance of the provider. Bias implies that the provider is not up to the task of generating a universal and objective dispute resolution system for the Internet.

185. Usually, split cases are more difficult to resolve, causing the panel to spend more time on them.

186. A negative bias exists in the sense that the panel is taking more time to decide the cases.

TABLE 11
COX SEMI-PARAMETRIC DURATION MODEL

WIPO		NAF		CPR		eRes	
Variables	*Coefficient*	*Variables*	*Coefficient*	*Variables*	*Coefficient*	*Variables*	*Coefficient*
Default	1.238 *(0.05767)*	Default	1.411 *(0.09149)*			Default	1.914 *(0.29431)*
Split	0.530 *(0.08911)*	Respru	2.400 *(0.43334)*	Split	41.193 *(53.71631)*	Employee	2.608 *(0.68328)*
Respus	0.907 *(0.04657)*	Compde	2.069 *(1.0989)*	Ascomp	18.704 *(30.42342)*	Namecan	5.748 *(3.66312)*
Respse	1.650 *(0.34673)*	Compnac	3.908 *(1.76611)*	Asresp	4.418 *(2.229)*	Respciii	3.408 *(1.81084)*
Compus	0.882 *(0.04643)*	Complaw	1.106 *(0.04206)*			Compca	0.739 *(0.10688)*
Compse	1.468 *(0.32872)*						
Compin	0.679 *(0.10055)*						
Compca	1.518 *(0.24300)*						
Judicial	1.085 *(0.03865)*						
Buchele, J.	1	Buchele, J.	2.640 *(0.40042)*	Buchele, J.	8.763 *(6.425)*	Buchele, J.	9.317 *(3.21267)*
Carmody, J.	1	Carmody, J.	1			Carmody, J.	14.829 *(4.83855)*
Dorf, P.	2.672 *(0.70459)*						
Johnson, C.	1						
Kalina, H.	1	Kalina, H.	2.322 *(0.30927)*				
Yachnin, R.	1	Yachnin, R.	1			Yachnin, R.	22.241 *(6.26071)*
Limbury, A.	1.779 *(0.38403)*						
Bernstein	0.684 *(0.08541)*						
Nr Observations	1996	1119		25		209	
Nr Failures	1996	1119		25		209	
Time at risk	114471	43313		1158		9999	
Wald Chi2(df)	135.8 (df=12)	156.61 (df=7)		11.46 (df=4)		154.87 (df=8)	
Probability Chi2	0.000	0.000		0.0219		0.000	
Log Likelihood	-12292.70	-6141.25		-53.40		-884.87	

All of the panelists except one have a positive impact on the duration function.[187] This implies that the panelists, having received the highest number of cases, proceed with the cases with certain independence. Furthermore, for WIPO, panelists Buchele, Carmody, Johnson, Kalina, and Yachnin not only have a positive impact on the duration function, but also lack the same assumed proportional hazard for all the cases. This implies that these panelists do not follow the same general procedures as other WIPO panelists. Figure 10 shows the differences in the duration function between these panelists and the rest of the cases. Figure 11 also shows the differences in hazard functions.[188] Although in all cases the hazard function appears to be exponential, indicating that the cases face an increasing probability of being solved, this hazard is still higher for the panelists under analysis.

Table 12 shows the different duration for each panelist under different probabilities of survival. The different results indicate the importance of the effect specific panelists can have on the system. Accordingly, the selection procedure for the panelists is not innocuous. Because the provider selects the president of the panel, or in the case of sole panels, selects the arbitrator in charge, the differences between the panelists can have important implications for the results of the cases.

Table 13 illustrates how the types of cases received by the judges along with the verdict they render are significantly different from the rest of the panelists and the provider system as a whole. The t-statistics suggest that there is no difference in the results between these panelists and the rest of the cases. Therefore, WIPO's optimal behavior is to rely on these panelists, who are fastest, in order to improve the performance of the provider and attract more complainants. In the next section, we will explore the performance of judges across providers.

187. In our initial model we considered all panelists for the four providers that participated in at least twenty cases. However, the ones showed in the econometric results are those that have a statistically significant impact on the duration function.

188. A hazard function shows the probability that a given process will end in any defined period of time. For example, in our case that hazard function will show the probability that any case being adjudicated by a given provider will end the following day. *See* RUSSELL DAVIDSON AND JAMES MACKINNON, ECONOMETRIC THEORY AND METHODS 489–95 (2004) (describing general duration models).

FIGURE 10
WIPO: SURVIVAL FUNCTIONS BY JUDGE

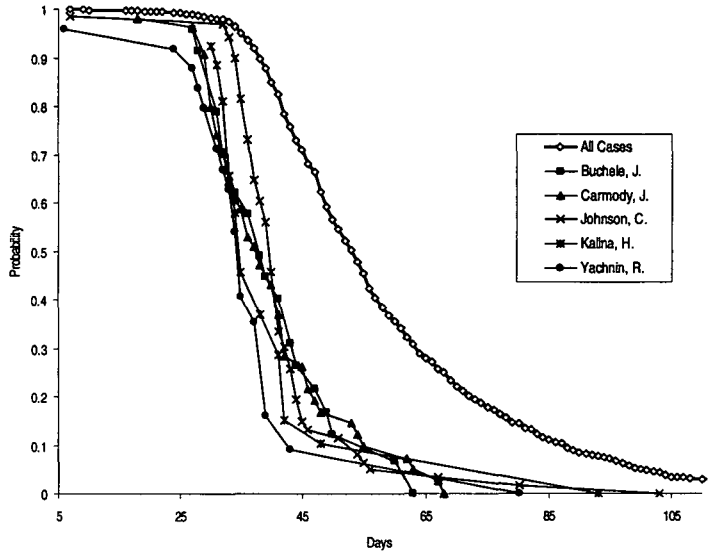


FIGURE 11
WIPO: HAZARD FUNCTIONS BY JUDGE

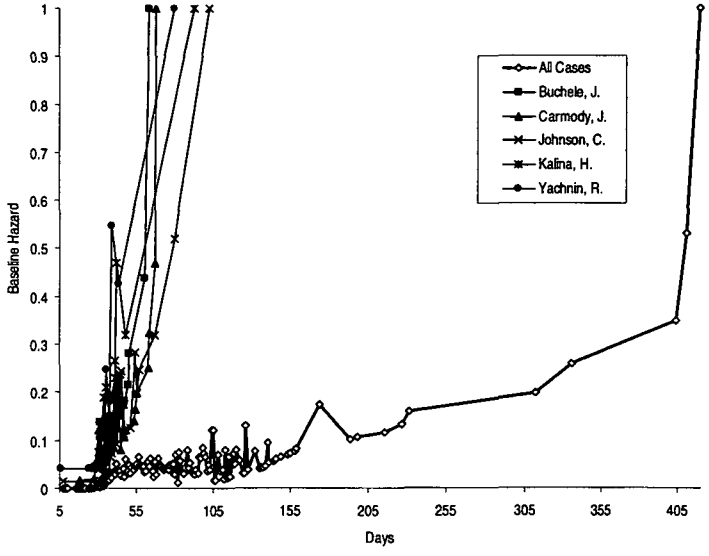


TABLE 12
WIPO, DURATION FOR EACH PANELIST

Probability of Survival	All Cases	Buchele, J.	Carmody, J.	Johnson, C.	Kalina, H.	Yachnin, R.
0.9	38	28	29	34	30	24
0.7	45	32	32	36	33	31
0.5	53	38	37	40	35	34
0.3	64	43	42	42	41	37
0.1	87	60	55	54	48	43

TABLE 13
WIPO RESULTS OF CASES BY TYPE OF JUDGES

	Type of Respondent					
	Unaffili	*Licensee*	*Competit*	*Employee*	*Criticor*	*Unknown*
Bernstein	0.72	0.05	0.05	0.05	0.08	0.05
Limbury, A.	0.76	0.03	0.17	0.03		
Yachnin, R.	0.75	0.10	0.05	0.05	0.05	
Kalina, H.	0.92			0.08		
Johnson, C.	0.70	0.03	0.09	0.06	0.04	0.07
Dorf, P.	0.88				0.04	0.08
Carmody, J.	0.86		0.04	0.04		0.06
Buchele, J.	0.75		0.08		0.04	0.13
Total Panelists 1	*0.78*	*0.03*	*0.06*	*0.04*	*0.03*	*0.05*
Abbot, F.	0.70	0.04	0.07	0.04	0.04	0.09
Barker, L.	0.82	0.07	0.02	0.04	0.02	0.02
Donahey, M.	0.78	0.02	0.12			0.08
Samuels, J.	0.89		0.05			0.05
Page, R.	0.72		0.15		0.05	0.08
Foster, D.	0.78	0.03	0.09	0.06	0.03	
Bianchi, R.	0.69		0.14			0.17
Total Panelists 2	*0.77*	*0.03*	*0.09*	*0.02*	*0.02*	*0.07*
Rest of Cases	*0.66*	*0.02*	*0.07*	*0.02*	*0.02*	*0.20*
T-Test Panelists1 vs Panelists2	0.9870	0.4790	-0.4510	-	0.9180	-1.8000
Probability	0.3617	0.6792	0.6756		0.4557	0.2136

TABLE 13 (CONTINUED)

	Type of Response		Panel Decision				
	Default	*Lateresp*	*Transfer*	*Dismiss*	*Termin*	*Namecan*	*Split*
Bernstein	0.38		0.69	0.26	0.03		0.03
Limbury, A.	0.41		0.69	0.28		0.03	
Yachnin, R.	0.50		0.80	0.20			
Kalina, H.	0.58		0.83	0.13			0.04
Johnson, C.	0.40		0.69	0.28	0.01	0.01	
Dorf, P.	0.69		0.92	0.04			0.04
Carmody, J.	0.57	0.02	0.90	0.10			
Buchele, J.	0.50		0.83	0.08	0.08		
Total Panelists 1	*0.49*	*0.00*	*0.78*	*0.19*	*0.01*	*0.01*	*0.01*
Abbot, F.	0.40		0.70	0.30			
Barker, L.	0.40	0.02	0.71	0.24			0.04
Donahey, M.	0.55		0.82	0.10	0.04	0.02	0.02
Samuels, J.	0.47		0.84	0.16			
Page, R.	0.36	0.03	0.69	0.28	0.03		
Foster, D.	0.34	0.03	0.66	0.31			0.03
Bianchi, R.	0.59		0.76	0.07	0.17		
Total Panelists 2	*0.44*	*0.01*	*0.74*	*0.22*	*0.03*	*0.00*	*0.01*
Rest of Cases	*0.43*	*0.01*	*0.67*	*0.15*	*0.17*	*0.00*	*0.01*
T-Test Panelists1 vs Panelists2	1.1500	-	1.1760	-0.5440	-	-	-
Probability	0.2940		0.2843	0.6062			

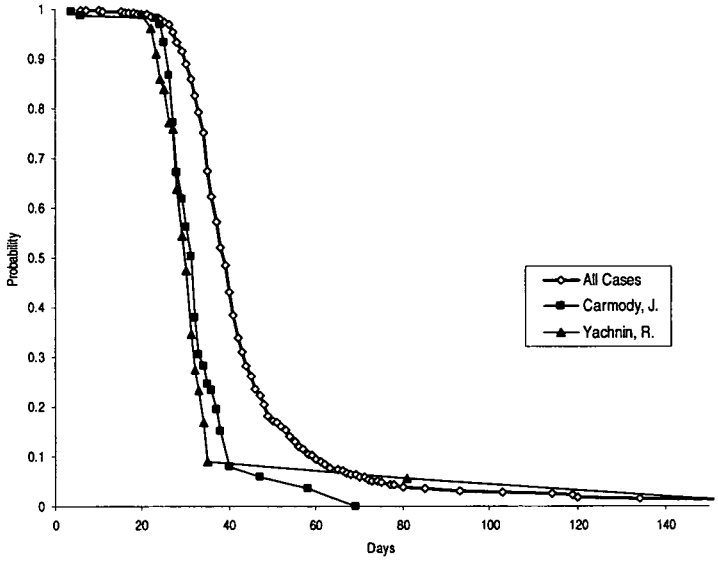
Each of NAF's variables has a positive impact on the Survival function, *i.e.,* these variables decrease the expected duration of the cases. Default and Complaw have a positive effect, thereby decreasing the duration of the review process. Respru, Compde, and Compnac correspond to the bias for certain complainants or responses coming from specific countries. Respru, representing those respondents coming from Russia, has a lower resolution time. Compde and Compnac are the variables for the complainants from Germany and North America. Complainants from Germany and North America receive a faster resolution of their cases as compared with other complainants. For North American complainants, the bias could be the consequence of the geographical location of NAF in the United States and the high proportion of panelists also from the United States. This type of bias could present a problem for reaching a homogeneous system of dispute resolution in the Internet. In summary, fewer of these panelists have specific duration functions when compared with WIPO.

Only two panelists, Carmody, J. and Yachnin, R. do not fit in the proportional hazard assumption of the general model. The survival and

hazard functions for these two panelists are shown in Figures 12 and 13. Similar to the previous results, these panelists are much faster in resolving cases than the rest of the judges for NAF. Moreover, although the hazard functions are much steeper for both panelists, the hazard functions are exponential. Table 14 shows the difference in duration for specific probabilities of failure.

Table 15 illustrates the data and t-statistics that help to determine if the resulting verdicts of the panelists are significantly different from other panelists. Clearly, there are no major differences among panelists, with the exception that the panelists with a different hazard received a higher number of cases where the respondent was in default. Of interest is that the all the judges that managed a relatively large number of cases have produced a higher proportion of verdicts favoring the complainant.[189]

FIGURE 12
NAF: SURVIVAL FUNCTIONS BY JUDGES



189. The variable Transfer is much higher for the panelist selected than for the rest of the cases.

FIGURE 13
NAF: HAZARD FUNCTIONS BY JUDGES

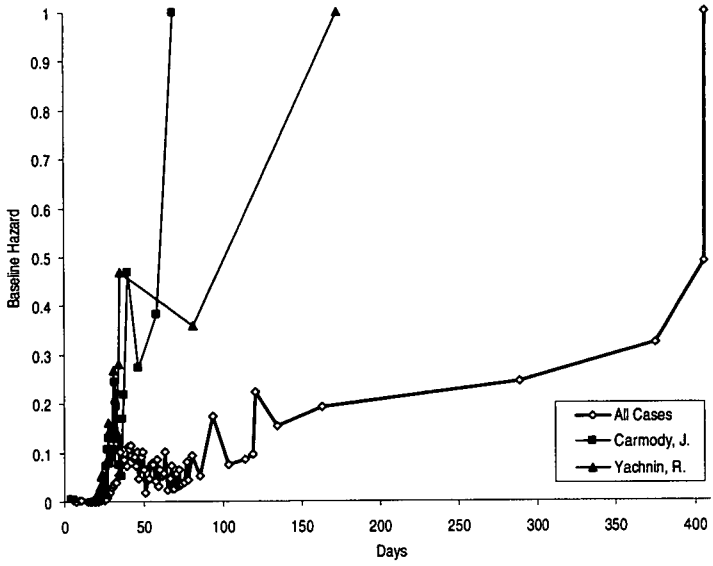


TABLE 14
NAF, DURATION FOR EACH PANELIST

Probability	All Cases	Carmody, J.	Yachnin, R.
0.9	30	25	23
0.7	35	28	27
0.5	39	31	30
0.3	43	33	32
0.1	59	40	35

TABLE 15
NAF RESULTS PER PANELISTS

	Type of Respondent					
	Unaffili	*Licensee*	*Competit*	*Employee*	*Criticor*	*Unknown*
Buchele, J.	0.74	0.05	0.16	0.02	0.02	0.02
Carmody, J.	0.81	0.04	0.09	0.04		0.03
Kalina, H.	0.73	0.03	0.18	0.03		0.03
Yachnin, R.	0.86	0.03	0.06	0.01	0.01	0.03
Total Panelists 1	*0.80*	*0.04*	*0.11*	*0.03*	*0.01*	*0.03*
Bernstein	0.89		0.11			
Bianchi, R.	0.84	0.05	0.05			0.05

	Type of Respondent					
	Unaffili	*Licensee*	*Competit*	*Employee*	*Criticor*	*Unknown*
Foster, D.	0.65		0.29	0.06		
Limbury, A.	0.61	0.11	0.11	0.17		
Page, R.	0.90		0.10			
Samuels, J.	0.86	0.07	0.00		0.07	
Johnson, C.	0.63	0.08	0.13	0.10	0.04	0.02
Dorf, P.	0.65	0.10	0.13	0.13		
Donahey, M.	0.60	0.10	0.10	0.10		0.10
Barker, L.	0.65	0.04	0.22	0.09		
Abbot, F.	0.64	0.07	0.14	0.14		
Total Panelists 2	*0.69*	*0.06*	*0.13*	*0.08*	*0.01*	*0.01*
Rest of Cases	*0.58*	*0.05*	*0.13*	*0.04*	*0.02*	*0.18*
T test Panelists 1 and 2	0.9794	-0.9324	-0.1253	-1.4330	-0.1676	0.6169
Probability	0.3453	0.3681	0.9022	0.1755	0.8695	0.5480

	Type of Response		Type of Decision				
	Default	*Lateresp*	*Transfer*	*Dismiss*	*Termin*	*Namecan*	*Split*
Juez 36	0.60	0.00	0.86	0.14	0.00	0.00	0.00
Carmody, J.	0.73	0.00	0.93	0.06	0.01	0.00	0.00
Kalina, H.	0.52	0.03	0.76	0.24	0.00	0.00	0.00
Yachnin, R.	0.71	0.01	0.90	0.07	0.03	0.00	0.00
Total Panelists1	*0.67*	*0.01*	*0.89*	*0.10*	*0.01*	*0.00*	*0.00*
Bernstein	0.44	0.00	1.00	0.00	0.00	0.00	0.00
Bianchi, R.	0.58	0.00	0.89	0.05	0.05	0.00	0.00
Foster, D.	0.47	0.00	0.82	0.18	0.00	0.00	0.00
Limbury, A.	0.50	0.00	0.83	0.17	0.00	0.00	0.00
Page, R.	0.60	0.00	0.90	0.10	0.00	0.00	0.00
Samuels, J.	0.57	0.00	0.79	0.14	0.00	0.07	0.00
Johnson, C.	0.40	0.00	0.71	0.27	0.00	0.02	0.00
Dorf, P.	0.52	0.00	0.77	0.19	0.00	0.03	0.00
Donahey, M.	0.30	0.00	0.80	0.10	0.10	0.00	0.00
Barker, L.	0.57	0.00	0.87	0.13	0.00	0.00	0.00
Abbot, F.	0.64	0.00	0.64	0.21	0.00	0.14	0.00
Total Panelists 2	*0.50*	*0.00*	*0.80*	*0.17*	*0.01*	*0.02*	*0.00*
Rest of Cases	*0.38*	*0.00*	*0.64*	*0.17*	*0.17*	*0.01*	*0.01*
T test Panelists 1 and 2	2.2583		0.7457	-2559.0000	-0.2553		
Probability	0.0418		0.4691	0.8020	0.8025		

All the variables of the CPR have a positive impact on the duration function; the variables reduce the expected evaluation time for the cases. Strangely, even the cases where the panel had a divided opinion, Split,

had a positive coefficient. We should ordinarily expect that the cases having a split decision should be more difficult. This is the only factor, among the different characteristics of the cases and the proofs presented, that has an impact on the duration of the cases. Ascomp and Asresp both have positive signs, implying a faster resolution for cases in which the respondent and/or the complainant come from Asia. This represents a geographical bias for this provider.

Although Buchele, J. is the only panelist that has a positive impact on the duration function, Buchele, J. stays within the same proportional hazard function as the rest of the cases for the provider. Figures 14 and 15 illustrate the survival and hazard functions for CPR.[190]

For eRes, all of the variables have a positive sign except for Compcan. As expected, Default has a positive effect on reducing case duration. Employee, which represents those cases where the respondent is an employee of the complainant, has a positive sign. This implies a faster resolution rate for those cases. In reality, it is easier to solve for variables representing the final decision of the panel.[191]

The provider resolved cases especially fast when the respondent presented proof of its rights over the domain name according to the rule 4.c.iii of the UDRP (variable Respciii in the model).[192] This could be proof of a general bias within eRes in favor of respondents, in contrast with WIPO and NAF, whose systems were more receptive to the presentation of proof by complainants.

190. The hazard function is exponential, meaning that cases have an increasing rate of being solved.

191. Those cases in which the panel decided that the name should be changed have been solved more rapidly.

192. *See* Appendix A.

FIGURE 14
CPR SURVIVAL FUNCTION

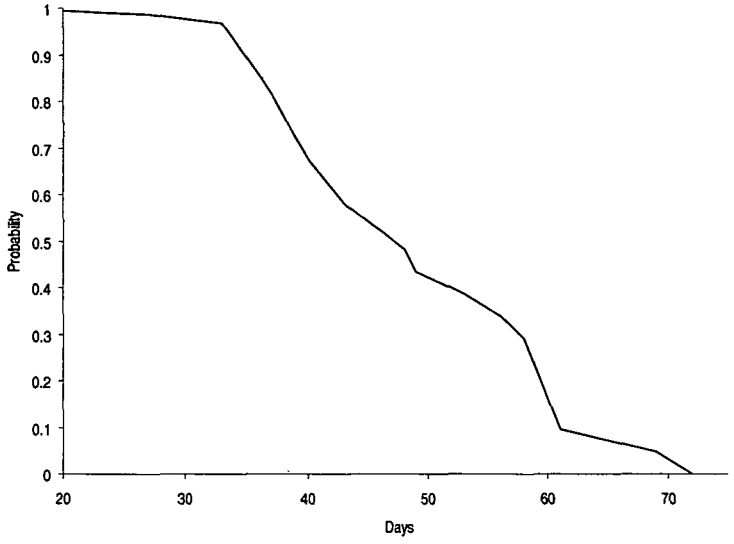


FIGURE 15
CPR HAZARD FUNCTION

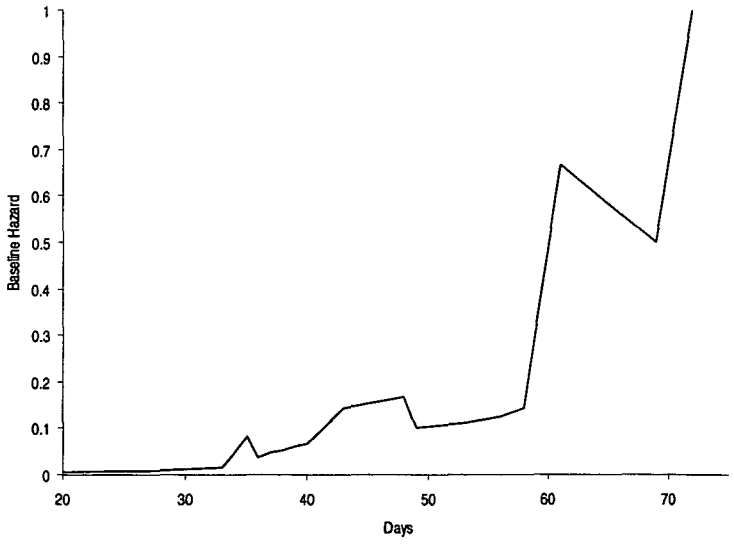


FIGURE 16
eRES SURVIVAL FUNCTION

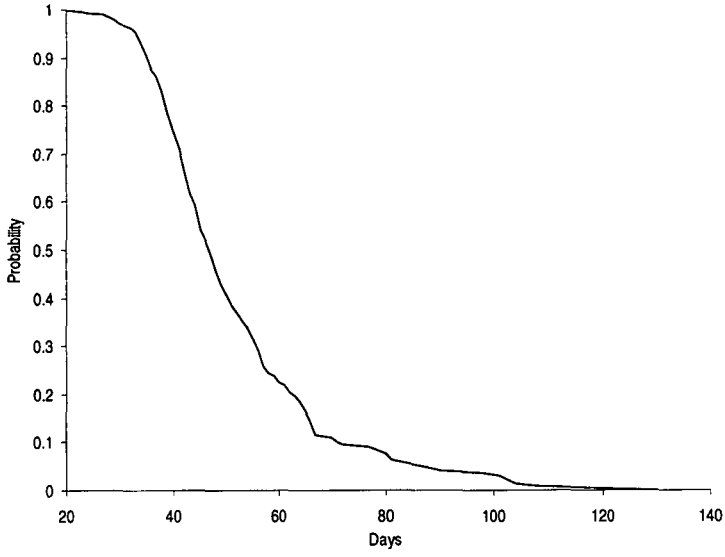
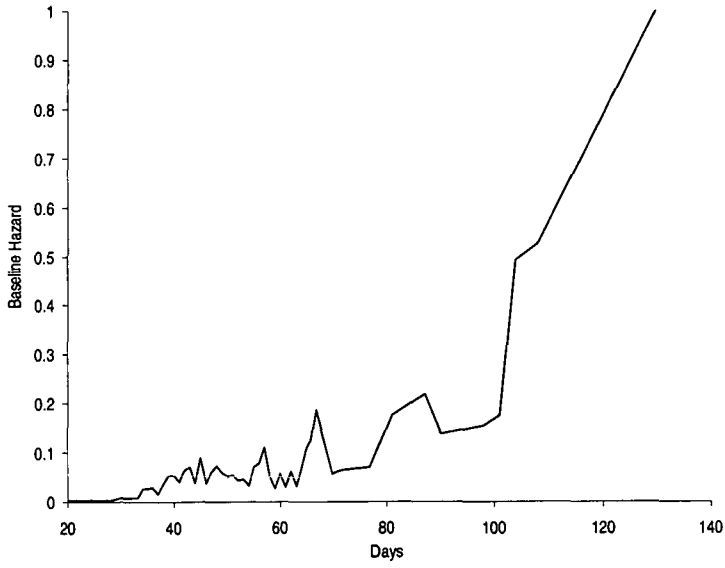


FIGURE 17
eRES HAZARD FUNCTION



The variable Compca represents those claims where the complainant is from Canada and has a negative sign, implying a longer duration. This bias suggests that the panel of eRes devoted more time to analyzing complaints coming from Canada. Not surprisingly, eRes' headquarters is in Quebec, Canada.

Three of the panelists had a positive sign. This decreased the expected duration. None of these variables violate the assumption of a proportional hazard function. Figures 16 and 17 illustrate the survival and hazard functions for eRes.

Finally, those variables that are not included in the results because they are not statistically significant are nonetheless important. We found that it does not matter which type of respondent we have in each case, for only employees for the case of NAF have an impact on the results. This is an important attribute of the UDRP system because the relationship of the parties in a case should have no bearing on the eventual decision. Additionally, we observed several key features of the UDRP system: (1) the respondent delivering its response late does not effect the duration model; (2) the number of late response cases is low, only 48; (3) it is not significant that the complainant and respondent are from different countries; (4) with the exception of eRes, the presentation of proof supporting the complainant or the respondent does not speed up the case;[193] and (5) all the countries and panelists that are not included in the econometric model were eliminated because of their lack of statistically significant results.

1. Panelists across Providers

Although some panelists are influenced by providers, other panelists are completely independent of providers' influence.[194] To see if these panelists behave in a similar fashion regardless of the provider they are working for, in this section we evaluate the performance of the panelists across providers. If panelists have a similar duration function regardless of the provider they work for, then the panelists are totally independent.[195] On the other hand, if panelists act differently for different

193. *See* Appendix A (describing the UDRP rules for providing evidence for complainants and respondents).

194. "In some UDRP cases, arbitration panelists may ignore critical aspects of the policy, define the criteria in the UDRP so broadly that they become meaningless. Some level variation among individual arbitrators based on their experience, their views of trademark laws and varying interpretations of the facts should be expected." Brooks, *supra* note 21, at 323.

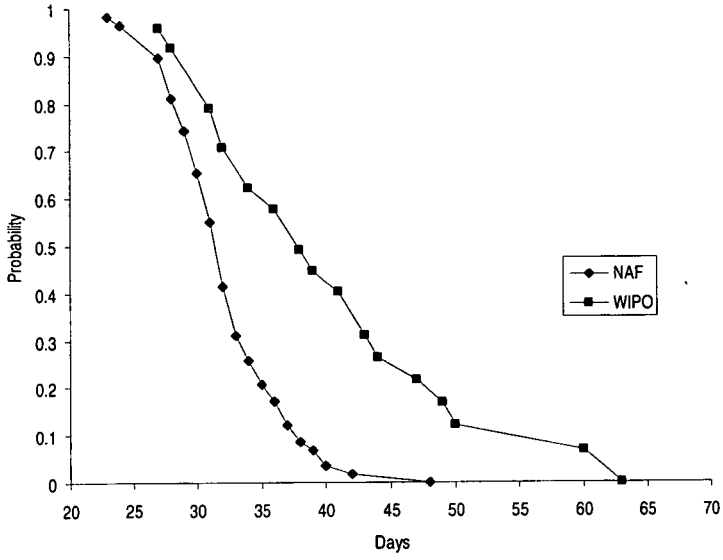
195. This would mean that the institutional structure of the provider did not influence their activities.

providers, then the institutional arrangement of the different providers becomes very important in determining the procedure and, ultimately, the efficiency and speed of the entire system.

In this analysis, we determined that the differences among providers affect the performance of the system. In our analysis, we used four panelists that received cases from two providers: Buchele, J., Kalina, H., Carmody, J. and Yachnin, R. Figure 18 compares the survival function for each of these panelists using the different providers. In most of the cases there are notable differences in the survival functions. These differences are more easily seen in Table 16, which shows the duration for different probabilities of survival. Table 16 suggests that NAF has a more efficient mechanism to handle claims. Accordingly, the same panelists are faster in NAF than they are in WIPO.[196]

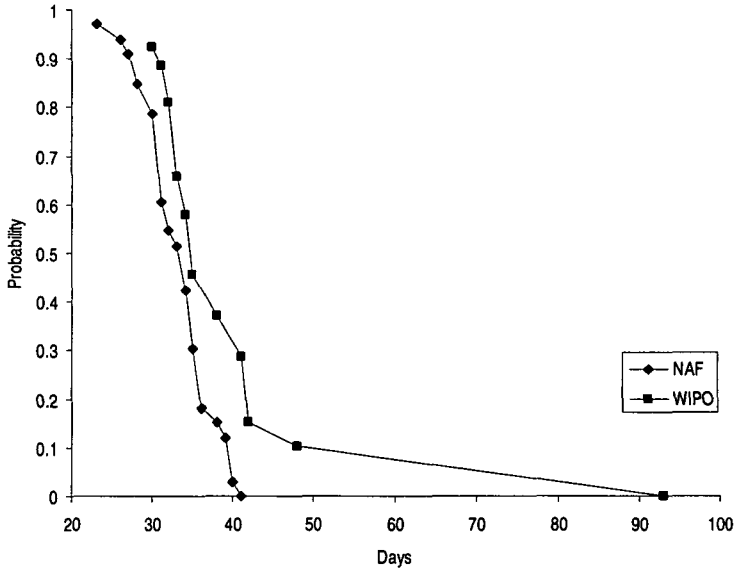
FIGURE 18

SURVIVAL FUNCTION PANELIST BUCHELE

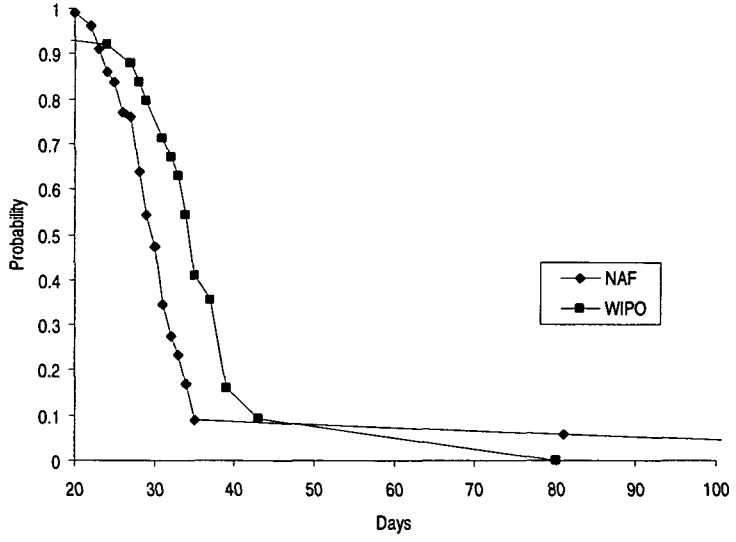


196. If we take each panelist and run a Cox proportional model, we find that one of the most important variables that explain the duration is the provider under which the panelist is analyzing the claim.

SURVIVAL FUNCTION PANELIST KALINA



SURVIVAL FUNCTION PANELIST YACHIN



SURVIVAL FUNCTION PANELIST CARMODY

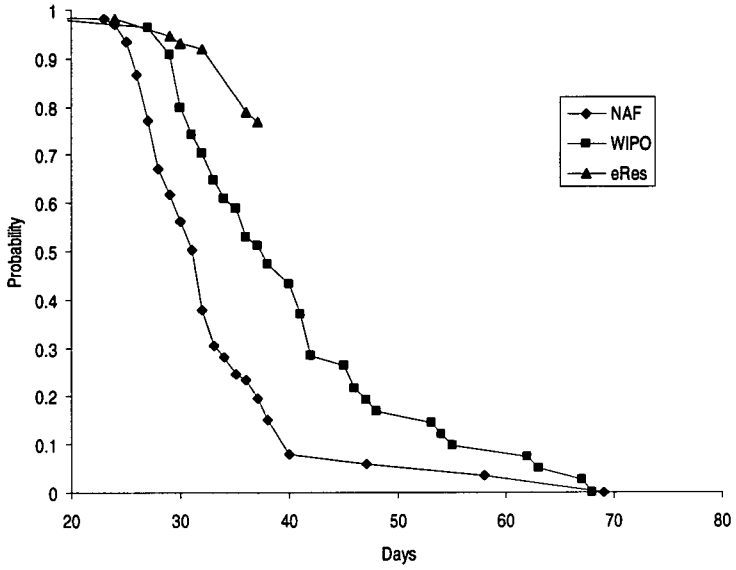


TABLE 16
COMPARISON OF PANELISTS ACROSS PROVIDERS

	Buchele, J.			Carmody, J.			Kalina, H.			Yachnin, R.		
Probability	*WIPO*	*NAF*	*Diff.*	*WIPO*	*NAF*	*Diff.*	*WIPO*	*NAF*	*Diff.*	*WIPO*	*NAF*	*Diff.*
0.9	28	27	1	29	25	4	30	27	3	24	23	1
0.7	32	29	3	32	28	4	33	30	3	31	28	3
0.5	38	31	7	38	31	7	35	33	2	34	30	4
0.3	43	33	10	42	33	9	41	35	6	37	32	5
0.1	50	38	12	55	40	15	48	39	9	43	35	8

2. Default

Many respondents fail to respond to the providers and also fail to defend themselves from complainants' claims, thus making it easier for the panel to give a verdict favoring the complainant. The absence of documentation from the respondent challenging the complainant's allegations makes it simpler for the panelists to evaluate such cases. Consequently, we found that the duration in these cases is much lower than for other cases. In each regression, except for CPR, the cases in default were important to the explanation for the duration function of the respective provider. In this section, we analyze whether a given case that is in default yields a

different duration depending on the provider. This analysis should produce further evidence of fundamental structural differences among providers.

Table 17 illustrates the expected duration of cases where the respondent is in default and also shows the different survival probabilities. NAF is still faster than WIPO and eRes, and eRes is faster than WIPO. Additionally, as the probability of survival decreases, the difference in expected duration increases between NAF and WIPO, NAF and eRes, and eRes and WIPO. Accordingly, this result reinforces our previous analysis and conclusions that the providers have structural differences among them.

3. Type of Panels

Another main issue surrounding the UDRP debate is the type of panels that should be put in place. Currently there are two types of panels, single member panels and three member panels. According to Geist, the bias of the UDRP that favors complainants could be solved by simply changing to a general three member panel system and abandoning the one member panel. In this section we evaluate the efficiency implications of such a change, *i.e.,* the impact of having three member panels in the UDRP system on the duration of the process. Accordingly, we test the duration function, using a Kaplan-Meyer estimator for those cases with three member panels as compared with those with one member panels. Figure 19 shows both duration functions.

TABLE 17

Cases in Default Across Providers									
Probability	*WIPO*	*NAF*	*eRes*	*Dif WIPO-NAF*	*Dif WIPO-eRes*	*Dif eRes-NAF*	*Percentage Difference*		
	(1)	(2)	(3)	(4)=(1)-(2)	(5=(1)-(3)	(6)=(3)-(2)	(4)/(1)	(5)/(1)	(6)/(3)
0.9	36	26	30	10	6	4	27.8	16.7	13.3
0.7	42	30	37	12	5	7	28.6	11.9	18.9
0.5	48	33	40	15	8	7	31.3	16.7	17.5
0.3	57	37	46	20	11	9	35.1	19.3	19.6
0.1	76	42	56	34	20	14	44.7	26.3	25.0
Cases That Are Not in Default									
Probability	*WIPO*	*NAF*	*eRes*	*Dif WIPO-NAF*	*Dif WIPO-eRes*	*Dif eRes-NAF*	*Percentage Difference*		
0.9	36	27	34	9	2	7	25.0	5.6	20.6
0.7	44	34	41	10	3	7	22.7	6.8	17.1
0.5	53	37	45	16	8	8	30.2	15.1	17.8
0.3	64	42	55	22	9	13	34.4	14.1	23.6
0.1	92	55	71	37	21	16	40.2	22.8	22.5

FIGURE 19
SURVIVAL FUNCTION BY TYPE OF PANEL

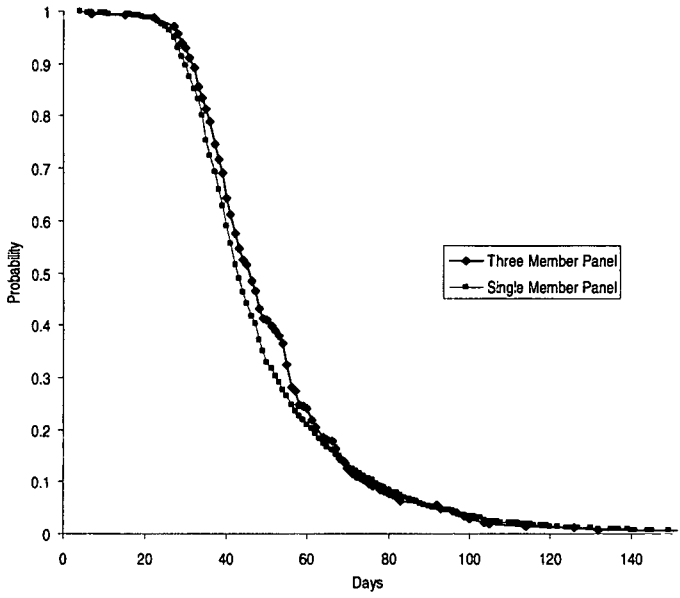


TABLE 18

Log-rank Test for Equality of Survivor Functions			
	Events		
Type p	*Observed*	*Expected*	
0	271	293.68	
1	2681	2658.32	
Total	2952	2952	
chi2(1) = 2.04 Pr>chi2 = 0.1527			
Cox Regression-Based Test for Equality of Survival Curves			
Events		*Relative*	
Type p	*Observed*	*Expected*	*Hazard*
0	29	293.68	0.9228
1	26	2658.32	1.0089
Total	2952?	2952	1
LR chi2(1) = 2.00			
Pr>chi2 = 0.1573			

As the results indicate, there is almost no change between the duration curves. Also, the duration for the three member panels seems to be slightly above the mean duration for single member panels.

Table 18 shows the log-normal and Cox tests of survival functions. These tests suggest that we cannot reject the null hypothesis that both duration functions are the same. As a result, duration does not decline merely as a result of changing from the actual system to one in which only three member panels are allowed. Therefore, changing to three member panels could promote the system's fairness without compromising efficiency.

V. Results and Policy Implications for Other ADR Initiatives

The implementation of the UDRP regime and its wide application to a number of jurisdictions and countries has prompted attempts to transplant this regime to other types of disputes, both within and outside Internet markets. Nonetheless, there are several problems that should be addressed in order to ensure that ICANN's UDRP remains a model dispute resolution regime for both Internet and other markets.

The regression analysis in the previous sections provides several insights and general observations about the UDRP system. First, the system is not as homogeneous as ICANN has consistently maintained. Even though the providers have the same stringent rules for every case, our duration model suggests that the providers have significantly different system and technology functions, causing differences in performance. Accordingly, these differences give rise to the possibility of forum shopping by complainants. This possibility is reinforced by the fact that the two most popular providers are located at the extremes of technological diversity, polarizing the supply of dispute resolution services. Other less significant providers, who adjudicate fewer cases, are located somewhere in between. The variation in performance is also reinforced by different factors and variables that determine the different behaviors between these providers. As a result, complainants will choose a provider according to the importance they attach to the different factors which influence their decision.

Further standardization of the general procedures for handling and deciding claims can probably solve the problems caused by extreme dif-

ferences among providers.[197] On the other hand, if the current system remains, the market demand for short duration cases could drive down the number of cases handled by WIPO. NAF's share of cases would subsequently increase, thus causing WIPO to improve its performance.

Cases in which the respondent is in default have a direct impact on reducing the general duration of cases.[198] The amount and quality of the evidence presented by the complainants and respondents have an impact on the performance of the providers. Interestingly, even though WIPO and NAF have been accused of favoring complainants, they are the providers that are most affected by complainants' evidence. Conversely, eRes, recognized as being more favorable to respondents, is strongly affected by the evidence presented by the respondents. The results obtained with respect to the source of law are important in the sense that the providers are paying attention to the procedural and substantive compliance by both complainants and providers with the general rules established by ICANN. This compliance determines the provider performance.

Cases with split decisions also influence WIPO's and CPR's procedures. Although the results are different for both providers, CPR's results are more consistent with the expected results.[199] For eRes, there are other two factors affecting duration. First, cases are solved faster when the respondent is an employee of the complainant. Second, in cases when the panel decided to change the domain name, the duration was also shorter. These two effects are likely to be the result of characteristics other than incentives.

By designing this system for the Internet, the UDRP's creators hoped to avoid geographical biases. Despite this planning, the UDRP providers are still susceptible to such bias. For WIPO, there is a bias toward the United States, Canada, India, and Switzerland. For NAF, the bias is toward Germany, North America (the U.S. principally), and Russia. CPR has a bias for Asian complainants and respondents. Finally, eRes has a bias for those cases where the complainant is from Canada.

Each provider's bias can be attributable to many different causes. WIPO's headquarters is located in Switzerland, a fact that can explain

197. For example, the extra fees that NAF charges in order to generate an incentive to promote short responses and complaints and to reduce the total length of the case could be increased.

198. The duration is not the same for all providers, thus supporting the claim that the providers are structurally different.

199. The cases in which the panel could not make a definitive decision should be more difficult to solve and should take longer to solve.

the bias for parties from this country. NAF is located in the United States and it is biased toward North American complainants. CPR, with headquarters in Asia, naturally has a bias for Asian complainants and respondents. Finally, eRes' headquarters in Quebec, Canada, explains the bias toward Canadian complainants.

Location greatly affects each of the main providers. This geographical bias suggests that the UDRP could be ill-equipped to handle cases arising from places where the rules and institutions are different from the provider's location. Furthermore, bias could be prejudicial for complainants or respondents facing a case against a party coming from one of the countries that is favored by the provider. The solution to this problem is not easy because the diversity of the panelists does not necessarily improve the situation. For example, although WIPO is the provider with the greatest panelist diversity, WIPO is also the provider biased towards the highest number of countries. It could be that the introduction of new regional providers, as in the case of the new Asian provider, is a solution to this problem. Accordingly, the creation of regional providers could decrease the bias for some countries and improve the efficiency of the system. Nonetheless, some rules and procedures should be provided for cases where the parties are from diverse regions.

Some panelists depart from the general performance observed in the rest of the cases under a given provider. This could be a problem if these panelists had a behavior completely different from other panelists within a provider who received an important number of cases. The panelists that have a different behavior in terms of performance do not have a significant effect on the results of the system. Accordingly, the providers are improving efficiency by favoring these panelists by giving them more cases to resolve. However, there are some noteworthy differences, such as bias toward complainants, among panelists that received a high number of claims compared to the rest of the panelists.

In conclusion, we show that, even though some panelists have a different performance than the providers they are working for, they are affected by the structure of the providers. Moreover, although three member panels are as efficient as single member panels, panelists' behavior differs depending on the provider for which they work. Therefore, the system's efficiency could be improved by identifying the characteristics of these panelists that make them different and faster than the rest of the system. These characteristics could be implemented within the rules and procedures of the providers, thereby improving the efficiency of the system as a whole.

The procedural rules should be changed to provide an equitable procedure for both parties. Because of the well-known pro-complainant

"bias," the geographic differences and the disparate behavior of panelists, the selection of providers should be independent of the decision of each party. Therefore, ICANN should introduce a system of assigning claims to different providers without delegating this task to one of the parties, in this case, the complainants. This change will not hurt competition based on prices because there is currently very little price competition. In addition, here we have competition in a very concentrated market because ICANN does not allow any private ADR provider to participate. Alternatively, in an oligopolistic market, competitors tend to collude and to compete on the quality of the service, which, in this case, is based on speed and complainant bias, rather than on prices.

Another change that should be introduced to improve the performance of the UDRP is increasing the availability of appeals. The parties should be able to appeal the verdict of any of the providers, thereby providing a chance to review procedures and outcomes at a lower level. Even though this change could increase the cost of the service, it is important for this regime to gain the trust of consumers and the private sector.

Given the problems and challenges facing the UDRP today, we do not advocate simply copying these procedures for use in another sector or for another set of disputes or issues, especially for topics related to Internet markets.[200] Issues about fairness, availability of regional providers, and the incentives that these private providers face, given the design of the procedural rules, will tend to undermine people's trust for Internet markets, instead of enhancing their willingness to participate. Consequently, in order to succeed in implementing private ADR regimes, we should provide a thorough analysis of the different characteristics that permit such a regime to provide effective dispute resolution services that go beyond the simple "fast and cheap" service.

VI. CONCLUSIONS

Numerous scholars and commentators have analyzed ICANN's UDRP regime. Most of these studies have concentrated on the general empirical results of the system. Using different perspectives, these studies have generally criticized the UDRP providers for being biased towards complainants and for leaving the respondents without a fair

200. For example, the implementation of an ADR regime for electronic commerce similar to the UDRP will produce uneasiness among consumers and businesses engaging in transactions on the Internet.

defense. In this paper, we showed that the emphasis of the different empirical studies of this bias problem was also "biased" or at least incomplete.

The alleged bias of the providers towards the complainants is not the main variable complainants are looking at in order to decide the most suitable provider. Instead, complainants seem to regard provider performance as the main concern in choosing a provider. Consequently, future analyses should pay more attention to the relative performance of the different UDRP providers. Accordingly, the procedural UDRP rules should be analyzed not just in terms of bias and fairness, but also in terms of the incentives the rules generate for the rapid and efficient resolution of claims presented under the UDRP policy. A better understanding of the UDRP is attainable by paying more attention to the efficiency and performance indicators of providers and panelists.

Based on our findings about the importance of the UDRP's performance, we analyzed the procedural structure of each provider. From this analysis, we identified the procedure's duration as the main indicator of an efficient system. Accordingly, we used duration models to identify the different factors that influence provider performance.

Even though the providers consider important factors such as the evidence provided by the parties, there are still ways to improve the global performance of the system. First, the providers have different systems and technologies for resolving cases, thereby creating opportunities for forum shopping. Despite ICANN's attempts to provide uniform rules and policies, the providers still have exploitable differences. In general, we found that NAF is the most efficient provider and WIPO is the least efficient. The other providers rank somewhere between these two extremes.

Second, panelists are important. Although some panelists have totally different performance functions than the providers they work for, the specific rules of each provider affect these differences. The existence of these different panelists could improve efficiency if they function more quickly, as is true for WIPO.

Third, because the UDRP is supposed to avoid geographical discrimination and bias by using a standard set of rules across the Internet, we should find no discrimination in favor of a particular country or region. However, we find that the UDRP providers are geographically biased. Specifically, they are more efficient at handling cases from places where their headquarters are located. This bias could have important implications for handling inter-jurisdictional cases. As a result, splitting UDRP services into regions could be desirable in the event that this bias is not eliminated in the medium term.

Finally, we have found that the election of either a single member panel or three member panels has no effect on the performance of the dispute resolution system. This suggests that a move to three-member panels could improve fairness without sacrificing efficiency.

The empirical results presented in this work have significant implications for the business of designing fair and efficient private dispute resolution services as a whole. Issues such as the incentives that the ADR providers face given a specific design for the procedural rules, the availability of regional dispute resolution providers, concerns about fairness, and cultivating the trust of consumers and businesses in order to enhance participation are but a few of the considerations that deserve careful attention when designing effective private dispute resolution systems.

APPENDIX A
UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY[201]

A. APPLICABLE DISPUTES. You are required to submit to a mandatory administrative proceeding in the event that a third party (a "complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure, that

(i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and

(ii) you have no rights or legitimate interests in respect of the domain name; and

(iii) your domain name has been registered and is being used in bad faith.

In the administrative proceeding, the complainant must prove that each of these three elements is present.

B. EVIDENCE OF REGISTRATION AND USE IN BAD FAITH. For the purposes of *Paragraph 4(a)(iii)*, the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

(i) circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or

(ii) you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or

(iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other online location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location.

C. HOW TO DEMONSTRATE YOUR RIGHTS TO AND LEGITIMATE INTERESTS IN THE DOMAIN NAME IN RESPONDING TO A COMPLAINT. When

201. At, http://www.icann.org/dndr/udrp/policy.htm.

you receive a complaint, you should refer to *Paragraph 5* of the Rules of Procedure in determining how your response should be prepared. Any of the following circumstances, in particular but without limitation, if found by the Panel to be proved based on its evaluation of all evidence presented, shall demonstrate your rights or legitimate interests to the domain name for purposes of *Paragraph 4(a)(ii)*:

(i) before any notice to you of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or

(ii) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or

(iii) you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

APPENDIX B

Variable	Obs	Mean	Std. Dev.	Min	Max
Cmwipo	6907	0.695196	0.058988	0.556604	0.78
Cmeres	3207	0.598404	0.208998	0.25	1
Ldwipo	6907	4.031995	0.16402	3.367296	4.304384
Lderes	3042	3.981898	0.230907	3.684704	4.584968
Cmnafl	6801	0.74789	0.070263	0.553846	0.9
Cmwipol	6801	0.692952	0.05711	0.556604	0.78
Cmeresl	3077	0.575869	0.191426	0.25	1
Ldnafl	6801	3.718587	0.14358	3.328627	4.044888
Ldwipol	6801	4.026402	0.183573	3.367296	4.304384
Lderesl	3077	3.983243	0.228455	3.684704	4.584968
Cwipo	6874	0.697	0.028	0.583	1.000
Ldunaf	6907.000	3.657	0.063	3.234	3.765
Lduwipo	6874.000	3.953	0.157	3.308	4.086

APPENDIX C
VARIABLES MUELLER DATABASE

	Variable	Description
Dependent Variable	*Duration*	*Duration, in days, of each case*
Type of Respondent	Unaffiliated	No relationship with the complainant
	Licensee	Respondent is licensee of the Complainant
	Competitor	Respondent is competitor
	Employee	Respondent is an employee
	Critic	Respondent is a critic
	Unknown	The status of the respondent is unknown
Type of Response	Default	The respondent fails to answer to the Provider
	Lat Response	Respondent is late in his/her response
Panel Decision	Transfer	Decision favorable to complainant
	Dismiss	The complaint is dismissed, favorable to respondent
	Terminated	The complaint is terminated, without clear result (maybe there is a private agreement or a court action)
	Name Change	The panel forces one of the parties to change the name of the domain.
	Split	The decision favored the complainant in some aspects and the respondent in others.
	Judicial	Panelists have reviewed other judicial cases from other courts in the countries of the parties
Country of Respondents (Complainants)	RespUS (CompUS)	Respondent (Complainant) from the United States
	RespFR (CompFR)	Respondent (Complainant) from the United States
	ResAU (CompAU)	Respondent (Complainant) from Australia
	ResMX (CompMX)	Respondent (Complainant) from Mexico
	ResSE (CompSE)	Respondent (Complainant) from the Switzerland
	ResIN (CompIN)	Respondent (Complainant) from India
	ResCA (CompCA)	Respondent (Complainant) from Canada
	ResNZ (CompNZ)	Respondent (Complainant) from New Zealand
	ResGB (CompGB)	Respondent (Complainant) from Great Britain
	ResJP (CompJP)	Respondent (Complainant) from Japan
	ResBE (CompBE)	Respondent (Complainant) from Belgium
	ResDE (CompDE)	Respondent (Complainant) from Germany
	ResIT (CompIT)	Respondent (Complainant) from Italy
	ResES (CompES)	Respondent (Complainant) from Spain
	ResNL (CompNL)	Respondent (Complainant) from Netherlands
	ResRU (CompRU)	Respondent (Complainant) from Russia
	ResCH (CompCH)	Respondent (Complainant) from Czech Republic
Country of Respondents	ResME (CompME)	Respondent (Complainant) from Middle East
	ResNAC (CompNAC)	Respondent (Complainant) from North America

	Variable	Description
Dependent Variable	*Duration*	*Duration, in days, of each case*
(Complainants) (continued)	ResSA (CompSA)	Respondent (Complainant) from South America
	ResOC (CompOC)	Respondent (Complainant) from Oceania
	ResAS (CompAS)	Respondent (Complainant) from Asia
	ResEU (CompEU)	Respondent (Complainant) from Europe
	ResAF (CompAF)	Respondent (Complainant) from Africa
ICANN Policy Articles	Rule 4a(i)	Evidence on the Articles of the ICANN policy, see appendix A.
	Rule 4a(ii)	
	Rule 4a(iii)	
	Rule 4c(i)	
	Rule 4c(ii)	
	Rule 4c(iii)	
	Rule 4b(i)	
	Rule 4b(ii)	
	Rule 4b(iii)	
Panelists	Panel Type	If the panel is single member or a three member panel
	Panelist1	Abbot, F.
	Panelist 19	Barker, L.
	Panelist 36	Buchele, J.
	Panelist 41	Carmody, J.
	Panelist 63	Donahey, M
	Panelist 64	Dorf, P.
	Panelist 113	Johnson, C.
	Panelist 114	Kalina, H.
	Panelist 217	Yachnin, R.
	Panelist 180	Samuels, J.
	Panelist 162	Page, R.
	Panelist 134	Limbury, A.
	Panelist 79	Foster, D.
	Panelist 27	Bianchi, R.
	Panelist 24	Bernstein

APPENDIX D
COX SEMI-PARAMETRIC DURATION MODEL WITHOUT STRATIFICATION

WIPO		NAF	
Variables	*Coefficient*	*Variables*	*Coefficient*
Default	*1.234* *(0.05748)*	*Default*	*1.355* *(0.08893)*
Split	*0.556* *(0.12954)*	*Respru*	*2.565* *(0.78246)*
Respus	*0.898* *(0.04594)*	*Compde*	*2.479* *(1.76767)*
Respse	*1.703* *(0.35442)*	*Compnac*	*3.500* *(2.02836)*
Compus	*0.892* *(0.04641)*	*Complaw*	*1.117* *(0.04553)*
Compse	1.601 *(0.30560)*		
Compin	0.693 *(0.11144)*		
Compca	1.542 *(0.26687)*		
Judicial	1.076 *(0.04162)*		
Buchele, J.	*3.523* *(0.76310)*	*Buchele, J.*	*2.640* *(0.40042)*
Carmody, J.	*3.666* *(0.53735)*	*Carmody, J.*	*2.970* *(0.313959)*
Dorf, P.	2.583 *(0.51499)*		
Johnson, C.	3.310 *(0.41969)*		
Kalina, H.	3.068 *(0.63650)*	Kalina, H.	2.135 *(0.38243)*
Yachnin, R.	*4.829* *(1.10124)*	*Yachnin, R.*	*3.124* *(0.417072)*
Limbury, A.	1.756 *(0.33117)*		
Bernstein	0.690 *(0.11368)*		
Nr Observations	1996	1119	
Nr Failures	1996	1119	
Time at risk	114471	43313	
Wald Chi2(df)	135.8 (df=12)	156.61 (df=7)	
Probability Chi2	0.000	0.000	
Log Likelihood	-12292.70	-6141.25	

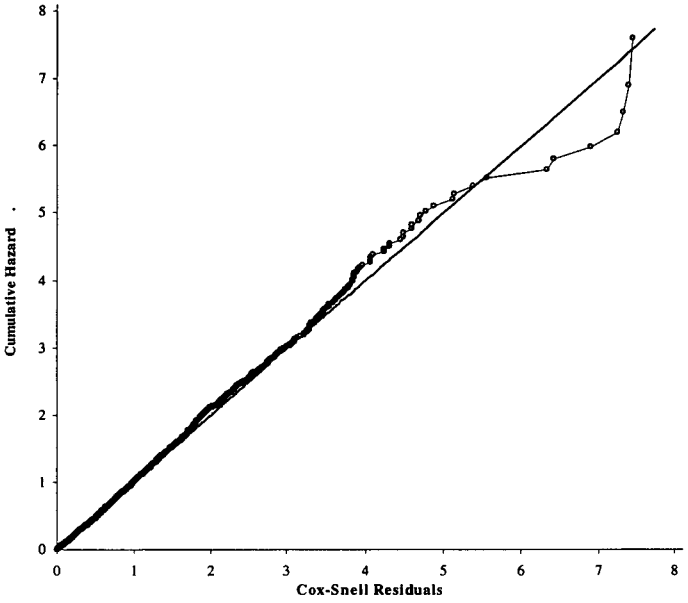
TEST OF PROPORTIONAL HAZARDS ASSUMPTION

WIPO				NAF				eRes				CPR			
	Rho	*Chi2*	*Prob*		*Rho*	*Chi2*	*Prob*		*Rho*	*Chi2*	*Prob*		*Rho*	*Chi2*	*Prob*
Default	0.038	2.97	0.088	Default	-0.013	0.20	0.652	Default	0.005	0.00	0.946	Split	0.071	0.32	0.574
Split	0.014	0.40	0.527	Respru	0.012	0.17	0.682	Employee	-0.080	1.49	0.223	Ascomp	0.059	0.19	0.661
Respus	0.001	0.00	0.955	Compde	0.018	0.37	0.541	Namecan	-0.015	0.04	0.846	Asresp	0.096	0.30	0.582
Respse	0.017	0.51	0.474	Compnac	-0.006	0.04	0.842	Respciii	-0.022	0.11	0.744				
Compus	-0.004	0.04	0.842	Complaw	-0.027	0.88	0.348	Compca	0.079	1.09	0.296				
Compse	-0.020	0.74	0.389												
Compin	0.014	0.39	0.533												
Compca	-0.007	0.08	0.772												
Judicial	-0.007	0.12	0.732												
Buchele, J.	-0.037	2.71	0.099	Buchele, J.	-0.017	0.31	0.577	Buchele, J.	-0.002	0.00	0.987	Buchele, J.	0.089	0.36	0.549
Carmody, J.	-0.064	8.12	0.004	Carmody, J.	-0.134	19.28	0.000	Carmody, J.	-0.001	0.00	0.993				
Dorf, P.	-0.031	1.96	0.161												
Johnson, C.	-0.062	7.64	0.006												
Kalina, H.	-0.116	27.17	0.000	Kalina, H.	0.016	0.30	0.582								
Yachnin, R.	-0.101	20.41	0.000	Yachnin, R.	-0.232	62.48	0.000	Yachnin, R.	-0.028	0.07	0.793				
Limbury, A.	-0.017	0.58	0.447												
Bernstein	0.027	1.47	0.225												
Global test		68.32	0.000			83.24	0.000			2.45	0.964		0.40		0.983

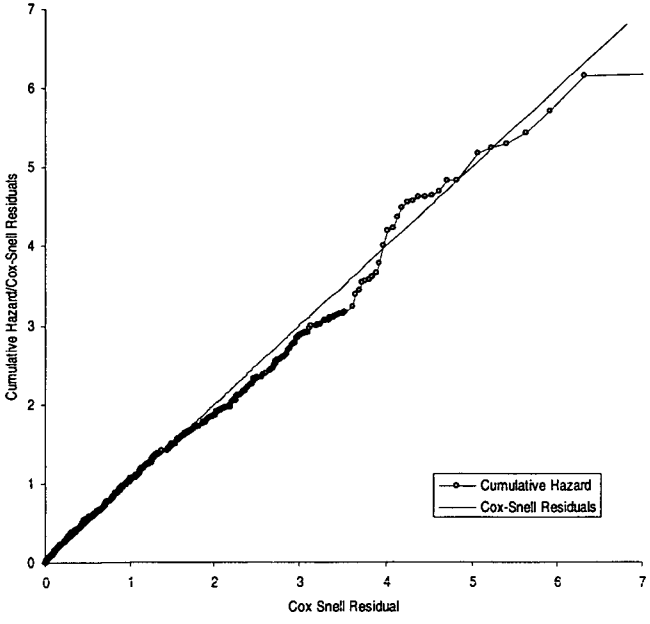
TEST OF PROPORTIONAL HAZARDS ASSUMPTION, STRATIFIED MODELS

WIPO				NAF			
	Rho	*Chi²*	*Prob*		*Rho*	*Chi²*	*Prob*
Default	0.032	2.10	0.147	Default	-0.010	0.10	0.747
Split	0.025	0.73	0.394	Respru	0.015	0.09	0.771
Respus	-0.001	0.00	0.948	Compde	0.011	0.07	0.794
Respse	0.018	0.65	0.419	Compnac	0.001	0.00	0.980
Compus	-0.002	0.01	0.937	Complaw	-0.025	0.63	0.429
Compse	-0.024	1.49	0.222				
Compin	0.017	0.48	0.488				
Compca	-0.005	0.04	0.839				
Judicial	-0.005	0.04	0.839				
Buchele, J.				Buchele, J.	-0.009	0.11	0.743
Carmody, J.				Carmody, J.			
Dorf, P.	-0.030	3.19	0.074				
Johnson, C.							
Kalina, H.				Kalina, H.	0.027	0.44	0.507
Yachnin, R.				Yachnin, R.			
Limbury, A.	-0.016	0.69	0.406				
Bernstein	0.029	0.98	0.321				
Global test		9.06	0.939			1.69	0.996

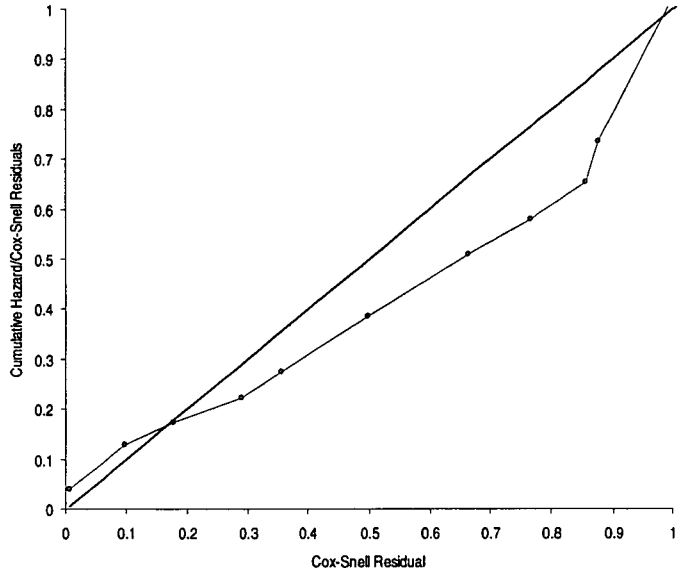
NAF: COX-SNELLS RESIDUALS TEST OF FIT



WIPO: COX-SNELLS RESIDUALS TEST OF FIT



CPR: COX-SNELLS RESIDUALS TEST OF FIT



ERES: COX-SNELLS RESIDUALS TEST OF FIT