COMPETITIVE JUSTICE?: THE ROLE OF DISPUTE RESOLUTION PROVIDERS UNDER ICANN’S UDRP

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I INTRODUCTION

In 1999, the Internet Corporation for Assigned Numbers and Names (‘ICANN’) implemented a Uniform Dispute Resolution Policy (‘UDRP’) designed to resolve the pressing issue of cyber-squatting. Prior to the development of the UDRP, the World Intellectual Property Organisation (‘WIPO’) was asked to prepare a report on the best procedural method to use when resolving such disputes. WIPO’s report suggested that the features of the Domain Name System (‘DNS’) should be reflected in any such dispute resolution process. This meant that the process had to be quick, cheap and able to handle a high volume of complaints. On that basis, the UDRP was drafted to include a quasi-arbitral form of dispute resolution with multiple private sector service providers (‘Providers’).

As the bodies that would provide such dispute resolution services would operate in the private sector, WIPO recommended that they should compete against each other. ICANN’s policy organ, the Domain Name Supporting Organisation (‘DNSO’) recommended to ICANN that WIPO’s position be adopted.

Therefore, the UDRP established the means by which Providers compete. Through the UDRP, ICANN required that Providers appoint skilled and impartial individuals (‘Panelists’) to resolve domain name disputes. Trademark owners (‘Complainants’) that seek to reclaim a domain name from a third party that has already registered

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1 ICANN’s domain name policy organ, the Domain Name Supporting Organisation (DNSO) agreed with WIPO’s Report which stated (para 225) '[i]t is suggested that the administration and decision-maker’s fees should be set freely by the dispute-resolution service providers that may be mandated to administer the procedure. Allowing the institutions to set their own rates should stimulate competition and ultimately benefit the public.’ See World Intellectual Property Organisation, The Management of Internet Names and Addresses: Intellectual Property Issues – Final Report of the WIPO Internet Domain Name Process (1999) <http://wipo2.wipo.int/processI/report/finalreport.html> 27 November 2002.
that domain name on the DNS (‘Respondent’) must select a Provider with whom to lodge their complaint. The Complainant must pay the Provider’s entire fee unless the Respondent seeks to have three Panelists determine the dispute. The Panel will resolve the dispute by applying the UDRP and if the Respondent is found to have been cybersquatting, the Panel will order the appropriate registrar to transfer contractual control of the domain name to the Complainant.

This article will briefly explain how the DNS was created and examine the process by which the Provider provisions of the UDRP developed. It will then examine the operation of the Provider marketplace, as it has evolved over the past three years, to determine whether ICANN’s goal of a low price, high speed, high volume dispute resolution system with competitive Providers has eventuated.

The article will compare four quantitative and four qualitative means by which a Provider could differentiate their service offerings and therefore compete against the other Providers. Quantitative means of Provider differentiation include: the number of prior complaints resolved by a Provider; the speed by which Panels appointed by that Provider reach decisions; the overall success rate of Complainants that have previously used that Provider and the availability of Panelists from different jurisdictions on that Provider’s roster. Qualitative means of Provider differentiation include: the perceived reputation of each Provider; the perceived experience or prestige of the Panelists employed by that Provider; the rigour of the analyses provided by Panelists when determining each complaint; and the Supplemental Rules used by each Provider.

A recently released anecdotal study of public attitudes towards Providers and the UDRP will also be considered to assist in determining whether the Provider marketplace has achieved the goals set by ICANN.

II THE CREATION OF THE DOMAIN NAME SYSTEM

Precursors to the modern Internet were developed in the early 1960’s by the US government’s Defence Advanced Research Projects Agency (‘DARPA’) to facilitate communication between researchers and to also link government agencies in a decentralised manner that could withstand a nuclear attack.²

These new networks differed fundamentally from the telephone network, which relied upon circuits to route communication (voice) from one location to another. Instead, the DARPA-designed networks communicated by breaking messages into

small subsets (called packets) which were then individually addressed with a
destination and transmitted.3

The advantage of using this packet-based method of communication as opposed to a
circuit system was that if a part of the infrastructure over which the message was
transmitted was damaged, as long as at least one other route (network) existed,
packets could be re-routed around the damaged section.4

A packet-based communication method requires that each node in the network that
receives or transmits a message must have its own unique address. A centralized
directory of all of those unique addresses is also essential, together with a technique
which enables a node to contact that directory to find out where another node is
located.5

The method to allocate node addresses and generate the centralized directory for the
DARPA-designed networks that was developed by Dr David Mills, Dr Jon Postel,
Zaw-Sing Su and others became known as the Domain Name System.6

Each node on the multitude of inter-connected networks that constitute the Internet
is issued with an Internet Protocol address (IP address), which is a series of up to
twelve digits, grouped into four sub-groups of three digits. There is a maximum of
256 numbers in each sub-group, so IP addresses range from 0.0.0.0 to
255.255.255.255.7

In the 1960’s through to the early 1980’s, when a researcher wished to access
another node (computer) on the Internet, the researcher had to know the twelve-
digit IP address of that node.8 Since memorising twelve digit IP addresses is a
tiresome and non-intuitive system, it was proposed that human-friendly names be
linked to IP addresses so that network nodes could be accessed by an easily
remembered name, rather than by an obscure number.9

After the development of the DNS, a researcher could access information from a
node through simply typing in a command to connect to the name of that node, eg,
mit.edu.10 The researcher’s computer could contact a DNS server which would
consult its DNS Index to match the request for information from the computer with
that domain name with the IP address which had been issued to that domain name.

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3  Ibid.
4  Ibid.
5  Ibid.
6  Ibid.
7  Philip Catania, Lisa Cohn and Lucy Turner, Domain Names and Trademarks (2001) 7-8;
   Adam Goldstein, ‘ICANN Sucks.biz (and Why You Can’t Say That): How Fair Use of
   Trademarks in Domain Names is being Restrained’ (2002) 12 Fordham Intellectual Property
   Media and Entertainment Law Journal 1151, 1152-3.
8  Ibid.
9  Ibid.
10 WebHosting Magazine Online, above n 2.
The DNS server would then inform the requesting computer of that IP address and the requests would be routed to the target computer. A similar process would occur when the target computer attempted to respond to the researcher’s request.\footnote{Ibid.}

As more and more nodes were added and additional networks inter-connected, the administrative burden of updating and maintaining the DNS index became too heavy for individuals. In the early 1990’s, a small company named Network Solutions was hired as a sub-contractor to maintain and administer the DNS for the Defence Data Network Information Center, which had grown out of the separation of ARPANET\footnote{The Advanced Research Projects Agency Network – for a history of ARPA NET, see M Hauben, History of ARPA NET http://www.dei.isep.ipp.pt/docs/arp.html.} and MILNET.\footnote{The US Government’s Military Network. See Internet History, www.clarkson.edu/~jnm/networks/slides/02-history.ppt.} In 1992, Network Solutions Inc tendered to maintain the DNS index for the NSFNET\footnote{The National Science Foundation Network. See http://moat.nlanr.net/Infra/NSFNET.html.} that had replaced ARPANET.\footnote{Webhosting Magazine Online, above n 2.}

The development of the Mosaic browser by Tim Berners-Lee in 1994 led to an explosion in the growth of the Internet.\footnote{Ibid.} Network Solutions (which had until 1995 issued domain names for free), began to charge $US50 per domain name to reduce the rate of speculative registration which was occurring. Significant segments of the general public became involved in not only using the Internet, but also in the speculative registration of domain names.\footnote{Ibid.}

In 1998, Network Solutions lost its monopoly on the registration of domain names. Instead, the US Department of Commerce entered into a Memorandum of Understanding\footnote{National Telecommunications Infrastructure Administration (1998) Memorandum of Understanding <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm> 12 December 2002.} with a Californian non-profit corporation, the Internet Corporation for Assigned Numbers and Names (‘ICANN’). ICANN then separated the business of registering domain names from the business of maintaining the registry itself, permitting the opening of five additional registrars and distributing the maintenance of the DNS over 13 root servers.\footnote{Webhosting Magazine Online, above n 2.}

In 1999, ICANN developed the (UDRP) to facilitate the resolution of disputes between trademark holders and domain name registrants over the ownership of the contractual rights that exist when a domain name is registered.\footnote{ICANN, Background (1999) <http://www.icann.org/general/background.htm> 12 December 2002.} The most commercially important contractual right of the registered owner of a domain name is to specify the IP address of a computer that they control which will be matched to
that domain name in the DNS root server’s hosts file.\footnote{21} This ensures that when a person sends a request to access information from that domain name, that person will receive the information that the domain name registrant wants to provide.\footnote{22}

The process through which ICANN developed the UDRP has been covered extensively in both the press and academic writings, so it will only be discussed briefly.\footnote{23} Instead, this article will focus upon the development of one particular element of the dispute resolution process, namely the means by which a provider of dispute resolution services is selected.

III DEVELOPMENT OF THE METHOD OF CHOSING THE PROVIDER IN THE UDRP

On 5 June 1998, the US Department of Commerce issued a White Paper asking the World Intellectual Property Organisation (WIPO) to conduct a consultative study on domain name and trademark issues. Although the White Paper stated that it favoured the use of Alternative Dispute Resolution services for resolving trade mark disputes involving domain names, it did not discuss procedural issues.\footnote{24}

Eleven months later, WIPO delivered a detailed report to ICANN, entitled ‘The Management of Internet Names and Addresses: Intellectual Property Issues.’ Chapter three of that report was titled ‘Resolving Conflicts in a Multi-Jurisdictional World with a Global Medium: A Uniform Dispute Resolution Policy’.\footnote{25} WIPO recommended that domain name registration and dispute resolution processes should not ‘interfere with the functionality of the DNS as a cheap, high-speed, high volume system for obtaining an Internet address’ and that ‘considerable support existed for the development of expeditious and inexpensive dispute-resolution procedures, which are comprehensive in the sense of providing a single means of resolving a dispute with multiple jurisdictional manifestations’.\footnote{26}

The WIPO report argued for the introduction of an administrative procedure that, whilst similar to arbitration, was not entirely arbitral in process.\footnote{27} By requiring a party seeking to register a domain name to contractually agree to participate in the administrative procedure before registration would take place, WIPO proposed to make the administrative procedure mandatory.\footnote{28}

\begin{footnotes}
\footnote{21} A simple text file named hosts.txt contains the DNS list of IP addresses and the related domain name.
\footnote{22} WebHosting Magazine Online, above n 2.
\footnote{24} United States Department of Commerce, above n 2.
\footnote{25} World Intellectual Property Organisation, above n 1.
\footnote{26} Ibid para 129 and 134.
\footnote{27} Ibid para 153.
\footnote{28} Ibid para 153, 158-161.
\end{footnotes}
The ability of the domain name registrar to alter the DNS entry which linked a particular IP address to a particular domain name meant that enforcement of decisions made under an administrative procedure would be simple and brutally effective (i.e. if a DNS entry is changed on a root server, as soon as the other DNS servers are updated to reflect that change, from the view of a user of the Internet, information that was previously available from a website hosted on a server using the prior IP address effectively disappears and is replaced by information from the website hosted on the (different) server with the IP address newly added to the DNS root server). 29

WIPO argued that the administrative procedure should not be used to resolve disputes between parties that each have legitimate intellectual property rights. 30 Rather, it should be limited to cases of abusive registration or cybersquatting. 31

The remedy that could be granted by a Pane list would be limited to an order to the registry to transfer/not transfer the domain name registration to the successful party and the payment of the costs of the proceeding by the unsuccessful party. 32 Such an order would require the registry to alter/not alter the DNS to reflect the IP address of the computer controlled by the successful party. Monetary damages would not be available. 33 Panelists would also be unable to alter any underlying intellectual property rights held by the parties.

To ensure procedural fairness during the dispute resolution process and to inform parties how the procedure would operate, WIPO proposed that procedural rules should apply. These procedural rules would also specify which party to the dispute would appoint and pay for the Provider of the administrative procedure. 34

In an interim report, WIPO suggested that the procedural rules should reflect common practice in international arbitral proceedings by allowing the parties to appoint the decision-makers in an administrative procedure. 35 WIPO altered its position in the finalised version of the report. WIPO was no longer in favour of permitting the parties to appoint the decision makers as the nature of the proposed disputes to be resolved by administrative procedures had been narrowed as discussed above. 36

WIPO proposed that Providers should be permitted to set their own fees for the administrative procedure as this would "stimulate competition and ultimately

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30 Ibid para 160.
31 Ibid.
32 Ibid para 183.
33 Ibid.
34 Ibid para 180.
36 Ibid.
benefit the public’ and that ‘the third party-complainant should advance the fee in full prior to the procedure occurring’.

In an earlier Request for Comment (RFC-2) WIPO proposed that arbitration could be used to resolve domain name disputes. Significant public comment was received which contradicted this position on the grounds that arbitrations are usually confidential, there was uncertainty over the finality of arbitral awards and a concern that arbitration could preclude ultimate recourse by the parties to the courts to resolve a dispute. WIPO instead proposed that arbitration should be an option for the parties to a domain name dispute and that any such arbitrations should proceed online.

ICANN resolved to have the Domain Name Supporting Organisation (DNSO) study WIPO’s recommendations. The DNSO formed Working Group A which also recommended the establishment of a uniform dispute resolution policy for all registrars. On 4 August 1999, Working Group A delivered its report to ICANN. The report supported the recommendations of Chapter 3 of the WIPO report in relation to the uniform dispute resolution policy. The Working Group A report did not comment on the issue of which party should appoint the Provider.

On 24 August 1999, ICANN’s staff presented a draft of the first ICANN Staff Report: Uniform Dispute Resolution for gTLD Registrars (‘First ICANN Staff Report’) to the ICANN Board. The First ICANN Staff Report sought comment on a number of issues left open in the draft report. In particular, the First ICANN Staff Report suggested four possible procedures for selecting Providers and Panelists:

1. Allow the complainant to select the Provider by filing the complaint with that Provider. Allow the Provider to select the Panelists. This approach has the advantage of fostering competition among Providers on price, timeliness, responsiveness and service, but gives the complainant influence over the Panel's composition, whilst eliminating any balancing influence by the domain-name holder.

2. Allow the domain-name holder to select the Provider and allow the Provider to select the Panelists. This alternative not only suffers from an imbalance like alternative 1, but would also frustrate effective competition among
Providers on price because the party paying (the complainant) would not have a voice in selecting the Provider.

3. Allow the registrar to select the Provider and allow the Provider to select the Panelists. One feature of this option is that the complainant and domain-name holder each have equal influence (i.e. None) over selection of the Panelists. Its disadvantages include (i) it thwarts effective price competition among Providers by depriving the Complainant, who pays the Provider's fee, of any influence over choosing the Provider; (ii) it creates administrative burdens for registrars and involves them in domain-name disputes, contrary to the overall design of the policy; and (iii) it creates a (perhaps irresistible) potential for registrars to seek to differentiate themselves in the marketplace by the outcomes under Providers they select, thereby undercutting uniformity among registrars. This last feature would, in the view of ICANN staff and counsel, severely impair the principal that the dispute resolution policy should be uniform among the registrars.

4. Allow the complainant to select the Provider by filing the complaint with that Provider. Allow the parties jointly to select the Panelists (if three Panelists are elected) by giving each party the ability to select one Panelist from the universe of Panelists presented by all providers and having the third Panelist selected by agreement of the first two Panelists, or failing agreement, by the Provider. This approach avoids many of the pitfalls of the above approaches. Because the complainant selects the Provider, effective price competition will be fostered. It gives both parties influence over the composition of the Panel. It ensures that outcomes are not affected by the identity of the registrar and promotes the goals of minimising registrar involvement in domain-name disputes. It would, however, require Providers to use Panelists presented by other Providers.

On 26 August, the board of ICANN accepted the DNSO recommendation and instructed its staff to convene a drafting committee to formulate wording for a UDRP and implementation documents for public comment.43

On 29 September 1999, ICANN released the First ICANN Staff Report and the implementation documents for public comment.44 ICANN received over 90 public responses in relation to the issues posed by the First ICANN Staff Report, twelve of which commented on the procedures for selecting Providers and Panelists described above.45 Of those twelve comments, one favoured option 1, one favoured option 2,

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45 Ibid.
none favoured option 3, six favoured option 4, and four proposed alternative methods for appointing Providers and Panelists.\textsuperscript{46}

Commentators in favour of option 4 included three representatives of trade mark holders, two network infrastructure managers and one individual.\textsuperscript{47} Of the four commentators that proposed alternative methods for appointing Providers and Panelists, two were ICANN critics, one represented existing domain name holders and one was a major Internet Service Provider (‘ISP’).\textsuperscript{48} Only one network infrastructure manager favoured option 1 and one ICANN critic favoured option 2.\textsuperscript{49}

The most common reason given for supporting option 4 was the belief that ‘it would foster competition among Providers’,\textsuperscript{50} although one proponent believed that it ‘was unlikely to create price competition’.\textsuperscript{51} Another proponent of option 4 stated that ‘as the Complainant is paying for the resolution of the dispute, the Complainant should be able to choose the Provider that fits their budget ... this is fairly close to the way typical arbitration proceedings are carried out’.\textsuperscript{52} The commentator that supported option 1 believed that ‘trade mark owners would not use the UDRP Process if they were not permitted to select a trusted Provider who would then appoint a fair and unbiased panel’ and that ‘as the UDRP was designed to deal with cybersquatting and not ordinary arbitration, it would be inappropriate to allow a cybersquatter to select Panelists as this could make the system subject to abuse’.\textsuperscript{53} It was also stated that ‘if the UDRP did not result in

\textsuperscript{46} ICANN, Public Comment Archive (1999) <http://www.icann.org/comments-mail/comment-udrp/current/maillist.html> 27 November 2002.

\textsuperscript{47} Ibid.


\textsuperscript{49} Bell Atlantic Services, Please Find Bell Atlantic's Comments Attached (1999) ICANN http://www.icann.org/comments-mail/comment-udrp/current/msg00090.html 27 November 2002 and John Gilmore, Comments on Proposed Uniform Dispute Resolution Policy (1999) ICANN <http://www.icann.org/comments-mail/comment-udrp/current/msg00030.html> 27 November 2002, respectively.

\textsuperscript{50} MCI WorldCom, above n 48, 2; National Basketball Association, above n 48, 5.
\textsuperscript{51} Japan Network Information Center, above n 48, 1.
\textsuperscript{52} National Basketball Association, above n 48, 5.
\textsuperscript{53} Bell Atlantic, above n 49, 1.
predictable outcomes for trade mark holders, they would resort to litigation instead of using the UDRP’. 54

The commentator who favoured option 3 believed that the Respondent should be entitled to choose the Provider as the default situation should be that the Respondent who had registered a domain name should be innocent until proven guilty. It was stated that:

both sides have an interest in forum shopping, but the default must be to assume that the status quo is legal ... and therefore that the Respondent should be assumed to be picking a Provider more honestly than the Complainant. 55

Of the four commentators that disliked all four options in the First ICANN Staff Report, each had a different view of the best replacement system for selecting Providers and Panelists. Professor Michael Froomkin argued that the selection procedure ‘needed to encourage price and service competition amongst Providers whilst discouraging forum shopping by either party’. He proposed that the complainant should select the Provider and believed that option 4 would be ‘an administrative nightmare’. 56

The Electronic Frontiers Foundation (‘EFF’) stated that the goal of the Panel selection procedure should be to avoid bias in favour of either party and that a ‘compulsory judicial process should not be forced to operate in a free market economy’. 57 The EFF believed that Providers and Panelists needed to be autonomous to be free and fair and that competitive forces would only lead to the selection on a price or appointer success basis. Instead, the EFF proposed that complaints should be made to a central clerk who chose the Provider on a rotating basis. The Provider would then appoint the Panelists. 58 In its comment, AOL stated that it wanted the registrar to randomly appoint the Provider from the list of accredited Providers appointed by ICANN. 59 The submission by the Domain Name Rights Coalition called for the abandonment of the UDRP entirely as it ‘skewed the playing field towards trade mark holders, and against domain name holders’ and that the registrant of a domain name should be able to select the Provider with no input from the complainant. 60 On 24 October 1999, ICANN’s staff presented the

54 Ibid.
55 Gilmore, above n 49, 2.
58 Ibid.
60 Domain Name Rights Coalition, Comments on UDRP (1999) ICANN <http://www.icann.org/comments-mail/comment-udrp/current/msg00046.html> 27 November 2002, 1 and 4.
Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy (‘Second ICANN Staff Report’) to the ICANN Board. In that Second ICANN Staff Report, a variant of option 4 was selected as the most appropriate method for appointing Providers.

That variant of option 4 proposed that the complainant would select the Provider by submitting the Complaint to that Provider. Whilst the default Panel would consist of a sole Panelist, either party could elect to have three Panelists hear the complaint. If both parties agreed on using a sole Panelist, the Provider would select that Panelist and the complainant would pay all of the fees. If the complainant elected to have three Panelists, the complainant would pay all fees, however if the domain name holder elected to have three panelists, whilst the complainant wanted a sole Panelist, the fees for the three panel decision would be split equally between the parties. Each of the parties would nominate one Panelist in a three-Panelist dispute and the third Panelist would be the candidate most preferred by both of the parties from a five-person list selected by the Provider.

Whilst ICANN staff recognised the existence of, and need to study, the alternative methods of selecting Providers that were proposed in the comments, the Second ICANN Staff Report stated that given the need to establish the UDRP promptly, ‘implementation should not be deferred until that study is complete’.

ICANN’s Board approved the amended implementation documents based upon the public comments received and the Second ICANN Staff Report. Five weeks later, ICANN appointed its first dispute resolution service provider, WIPO. The National Arbitration Forum (‘NAF’) was appointed on 23 December 1999. eResolution was appointed on 1 January 2000 and the CPR Institute for Dispute Resolution (‘CPR’) on 22 May 2000. eResolution ceased accepting proceedings on 30 November 2001.

IV ASSUMPTIONS IN THE SELECTION OF THE PROVIDER

In its initial White Paper, the US Department of Commerce stated that any domain name dispute resolution process should mirror the advantages of the domain name system in that it should be cheap, operate at a high speed and be able to handle a high volume of complaints. The DNSO Working Group A report to ICANN

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63 Ibid.
64 Ibid.
65 Ibid 2 and 8.
66 ICANN, above n 44.
67 Ibid.
68 United States Department of Commerce, above n 2, 12-14.
endorsed WIPO’s report which had recognised that one of the goals of the UDRP was also to promote competition amongst providers, especially price competition.\(^6^9\)

It is therefore relevant to consider whether the UDRP has achieved these objectives.

### A Low-cost Process of Resolving Disputes

When compared to the cost of international litigation between a trademark owner and a domain name registrant, resolving a domain name dispute under the UDRP is undoubtedly a cheaper option. The Providers appointed by ICANN to implement the UDRP have charged between USD750\(^7^0\) to USD2000\(^7^1\) for the determination of a complaint in relation to a single domain name by a sole Panelist. Slightly higher fees (up to USD4500) are charged when multiple domain names are in dispute between the same parties, or one or both of the parties have requested a three-person Panel.\(^7^2\) If the Complainant requests a three-person Panel, the Complainant will bear the full cost, which is payable in advance. If the Respondent wishes to have a three-person Panel hear the Complaint, the parties will split the cost equally.\(^7^3\)

Whilst there is no requirement for the parties to a complaint under the UDRP to be legally represented, it is common for Complainants to use either in-house or external legal counsel to prepare submissions.\(^7^4\) A significant number of Respondents have failed to submit any response to complaints lodged under the UDRP.\(^7^5\)

A survey conducted by the DNSO suggests that Respondents are more likely to prepare their own response to a complaint than hire counsel to do so.\(^7^6\) Given that the rate at which individuals are Respondents is higher than the rate at which individuals are Complainants, this may suggest that the lower propensity of Respondents to use legal counsel may be due to a combination of factors including the relatively low cost of registering a domain name and the relatively high cost of

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\(^{6^9}\) World Intellectual Property Organisation, above n 1, para 225.
\(^{7^0}\) Prior to its bankruptcy, eResolution charged USD 750 for a single Panelist to resolve a dispute involving a single domain name.
\(^{7^1}\) The CPR currently charges USD 2000 to resolve the same type of dispute: CPR Institute for Dispute Resolution, Supplemental Rules and Fee Schedule <http://www.cpradr.org/ICANN_RulesAndFees.htm> 12 December 2002.
\(^{7^2}\) Ibid. The CPR currently charges USD 4500 to resolve a single domain name dispute if three Panelists are requested by either of the parties.
\(^{7^5}\) Ibid 14-17.
retaining counsel to defend that registration.\textsuperscript{77} It is, however, entirely possible for a self-represented Respondent to win a domain name dispute under the UDRP against a legally-represented Complainant.\textsuperscript{78}

\textbf{B A High-speed Process of Resolving Disputes}

International litigation is commonly a tortuously slow process. Determining the best jurisdiction in which to sue the defendant can be a lengthy and challenging issue. Once this has been determined, it may take months for a plaintiff to locate and serve notice of the action on the defendant. Depending on the jurisdiction involved, the court may not schedule the hearing for several months or years and the defendant may not even show up on the appointed day! Clearly, such a process would not meet ICANN’s requirement for a high-speed process for resolving domain name disputes.\textsuperscript{79}

On the other hand, the ease with which the appropriate registrar of a particular domain name can be located\textsuperscript{80} (and hence a determination of the potential dispute resolution Providers may be chosen from when filing the complaint) means that the UDRP can operate in a far more time-efficient manner than litigation. Complainants may take advantage of the ability to file electronically a complaint and can usually expect a resolution of the complaint within approximately six weeks. According to statistics compiled by Dr Milton Mueller, the average time taken to resolve a domain name dispute across all Providers is 43 days.\textsuperscript{81} The Provider that averages the shortest time to publish decisions is NAF (37 days). In contrast, WIPO averages 45 days and eResolution averaged 55 days prior to its bankruptcy.\textsuperscript{82}

\textbf{C A High volume Method of Resolving Domain Name Disputes}

There can be no doubt that the UDRP process has managed successfully to handle a high volume of domain name disputes. Since late 1999, WIPO has resolved over 4400 disputes, the NAF over 2600, eResolution resolved 283 disputes before its bankruptcy and CPR has resolved 55 disputes.\textsuperscript{83} By mid-December, 2002, the newest Provider, the ADNDRC had resolved 11 disputes.\textsuperscript{84} Thus, within a three-

\begin{itemize}
\item\textsuperscript{77} Mueller, above n 74.
\item\textsuperscript{78} For example, see Rogers Cable Inc v Arran Lal WIPO D2001-0201, <http://arbiter.wipo.int/domains/decisions/html/2001/d2001-0201.html> at 20 November 2002.
\item\textsuperscript{79} World Intellectual Property Organisation, above n 1, 5.
\item\textsuperscript{80} A Complainant need only visit websites such as <http://www.netsol.com/cgi-bin/whois/whois> or <http://www.geektools.com/whois> to find a search tool which will enable them to find who is the current registered owner of a domain name and which registrar currently holds that registration.
\item\textsuperscript{82} Ibid.
\item\textsuperscript{83} ICANN, List of Proceedings by Dispute Number (2002) <http://www.icann.org/udrp/proceedings-list-number.htm> 27 November 2002.
\item\textsuperscript{84} ICANN, List of ADNDRC Resolved Disputes (2002) <http://www.icann.org/udrp/Detail1
year period the UDRP Providers have resolved almost 7500 disputes, a feat that would have been virtually impossible to achieve if complainants only had resort to litigation.

D A Dispute Resolution Service that Promotes Competition

Paragraph 225 of the WIPO Report proposed that the dispute resolution process permit Providers to set their own fees for resolving domain name disputes, as this would stimulate competition amongst Providers.\(^{85}\) Public comments received in relation to the First ICANN Staff Report distinguished between two types of competition amongst Providers, namely price competition and service competition. This article will now analyse the Provider market from 1999 till 2002 to determine whether such competition has arisen.

1 Price Competition amongst Providers

As its name indicates, the requirement that each Provider must apply the Uniform Dispute Resolution Policy when resolving domain name disputes would suggest that, at least from a theoretical position, the decision rendered should not depend upon which Provider a Complainant chose to resolve their dispute. A Complainant should reasonably be able to expect that the decision that would be reached by the Panelists employed by a Provider would be reasonably consistent with the decision that a Panelist appointed by a different Provider would reach as each would apply not only the Uniform Dispute Resolution Policy, but also the quite similar Supplemental Rules of their respective Providers.\(^{86}\)

In a free market, if several businesses provide an identical product, then a commodified market should quickly arise, wherein price is the only distinguishing factor. The WIPO Report appears to have assumed that the implementation of the UDRP would operate in a similar manner as it focused solely on price competition between Providers.

A number of events would be expected to occur if the Provider market was in fact a commodified market. For example, the price charged by the competing Providers for resolving a domain name dispute should eventually stabilise at a point that reflected a normal market return for each Provider. If one Provider was earning an above-normal market return, another Provider could increase its market share relative to the first Provider by simply undercutting the first Provider’s fee for resolving disputes. The Provider with the lowest cost structure could undercut its competitors and still achieve a normal market return. The lowest cost Provider would be expected to have resolved the largest number of disputes and therefore have the largest market share.

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\(^{85}\) WIPO, above n 1, para 225.

\(^{86}\) See the discussion on Provider Supplemental Rules below. The main differences between each Provider’s Supplemental Rules affect the Respondent, not the Complainant.
Anyone who has observed the activities of the Providers appointed by ICANN since 1999 would quickly recognise that the above expectations are far removed from the reality of the Provider marketplace. Even after engaging in heavy marketing, the lowest-cost of the four Providers (at just USD750 for a single domain name dispute resolved by a sole Panelist), eResolution, received only a relatively small number of complaints (288) before it filed for bankruptcy.

The slightly more expensive National Arbitration Forum has received over one-third of all complaints filed (2675 of almost 7500). The second-most expensive Provider, WIPO, has received a majority of the complaints (over 4400 of the almost 7500 filed by mid-December 2002) and the most expensive Provider, the CPR Institute for Dispute Resolution, has received only 55 complaints. The CPR Institute for Dispute Resolution was appointed by ICANN as a Provider approximately six months after the other three Providers. This may be another reason for its small market share, as will be discussed shortly. At the time of writing, the newest (and cheapest) Provider, the Asian Domain Name Dispute Resolution Centre (‘ADNDRC’) had commenced resolving domain name disputes and charged USD 1000 per dispute. The ADNDRC received only 20 complaints during its first ten months of operation.

As discussed by Dr Milton Mueller, price has not been a distinguishing factor between Providers over time. Dr Mueller published his essay, ‘Rough Justice: An Analysis of ICANN’s Dispute Resolution Policy’ in mid-2001 after only 621 domain name disputes been resolved by the Providers. Eighteen months and almost 7000 additional disputes later, it is clear that price competition between Providers has not been a feature of the domain name dispute resolution process. As the table below shows, Providers that offer a low price service do not necessarily attract a significant proportion of all domain name complaints.

<table>
<thead>
<tr>
<th>Provider</th>
<th>Market Share</th>
<th>Single Panelist</th>
<th>Three Panelists</th>
</tr>
</thead>
<tbody>
<tr>
<td>ADNDRC</td>
<td>0.20%</td>
<td>USD 1000</td>
<td>USD 2500</td>
</tr>
<tr>
<td>NAF</td>
<td>35.90%</td>
<td>USD 1150</td>
<td>USD 2500</td>
</tr>
<tr>
<td>WIPO</td>
<td>59.06%</td>
<td>USD 1500</td>
<td>USD 4000</td>
</tr>
<tr>
<td>CPR</td>
<td>0.74%</td>
<td>USD 2000</td>
<td>USD 2500</td>
</tr>
</tbody>
</table>

89 Ibid.
92 Mueller, above n 74, 15-16.
93 Ibid and see the analysis of market share compared to Provider fees below.
It is still apparent that ‘prices are almost inversely related to market share’, particularly when three person Panels are requested by a party. The lowest priced Provider has less market share than the more expensive Providers.

2 Why is the Provider Market not Price-Competitive?

One reason that may explain why Providers are not competing on the price of their services is the nature of their target market, potential Complainants. The majority of Complainants are corporations that have paid to register trademarks and who are represented in the domain name dispute by legal counsel. If a Complainant pays an average cost of approximately USD300-500 per hour for legal advice in determining whether to file a complaint in the first place and then to have their legal counsel draft the complaint, the total cost to a Complainant to lodge a complaint could easily exceed USD5000-10 000. As this is a sunk cost (i.e. a Complainant cannot recover legal costs from a Respondent even if the Complainant wins the domain name dispute) the difference between the fee charged to resolve the complaint by the lowest-cost Provider and the highest-cost Provider is relatively insignificant from the point of view of the Complainant. The average Complainant is therefore likely to be price-insensitive when selecting a Provider.

A second reason why the average Complainant is likely to be price-insensitive when selecting a Provider is that the overall cost of resolving a domain name dispute (including legal fees and the Provider’s fee) under the UDRP is still significantly smaller than the cost of litigating the same dispute in a court. This can be seen by the much lower rate of actions under the US ACPA as compared to actions brought under the UDRP. Although a successful litigant may be awarded damages and is likely to be awarded some of their legal costs by the court, it is unlikely that a Complainant would find those amounts to be sufficient compensation for the costs and time delays involved when compared with the option of lodging a complaint with even the most expensive Provider under the UDRP.

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94 Three-person Panels heard 9.5% of all domain name disputes under the UDRP from 1999 till 7 July 2001. Three-person Panels are not analysed in this paper as the Panelists are selected by the parties to the dispute, rather than by the Provider. Therefore, such decisions cannot be influenced by the Provider. See also Geist, Fair.com? An examination of the Allegations of Systemic Unfairness in the ICANN UDRP (2001) [17] <http://aix1.uottawa.ca/~geist/geistudrpd.pdf> 3 August 2002.
95 Mueller, above n 74, 9.
96 Ibid.
97 Ibid.
98 Ibid. The top-15 Complainants that Mueller lists reads like a Who’s Who of the corporate world: AOL, Alta Vista, Yahoo, GE, Telstra, Wal-Mart, Microsoft, etc.
99 Mueller, above n 74, 9.
As it appears that price competition is not a significant factor between Providers, it is necessary to examine non-price factors to determine whether the ICANN-desired competition between Providers actually exists.

V NON-PRICE COMPETITION AMONGST PROVIDERS

Public comments received in relation to the First ICANN Staff Report would suggest that at least some participants in the process did not believe that the Uniform Dispute Resolution Policy would lead to the creation of a market that distinguished Providers on price alone. Instead, commentators claimed that competition between providers should operate at two levels, competition on price and competition on service offerings.\footnote{National Basketball Association and MCI Worldcom, above n 48.}

Unfortunately, the commentators did not specify the means by which they foresaw Providers competing over service offerings. Presumably, a Provider could distinguish their service offering on either or both quantitative or qualitative bases.\footnote{Some of these quantitative and qualitative methods that Providers could use to distinguish their service offerings were briefly suggested in: International Trademark Association, *The UDRP by all Accounts Works Effectively: A Rebuttal to Analysis and Conclusions of Professor Michael Geist in ‘Fair.com?’ and ‘Fundamentally Fair.com?’* (2002) [3, 7-8] <http://www.inta.org/downloads/tap_udrp_2paper2002.pdf> 12 December 2002.} Quantitative bases through which Providers could distinguish their services (and therefore compete) include the:

1. number of prior complaints that had been resolved by that Provider;
2. speed by which Panels appointed by that Provider reached decisions;
3. overall success rate of Complainants that have previously used that Provider; and
4. availability of Panelists from different jurisdictions on that Provider’s roster.

Qualitative bases for distinguishing Provider offerings could include the:

1. perceived reputation of each Provider;
2. perceived experience or prestige of the Panelists employed by that Provider;
3. rigour of the analyses provided by Panelists when determining each complaint; and
4. Supplemental Rules used by that Provider.

Each of these areas will be discussed below.
A Quantitative bases for Provider Competition

1 Number of Prior Complaints Resolved

Complainants have not demanded the services of each of the four Providers at an equal rate. A single Provider, WIPO, has resolved over 60% of all domain name disputes made between 1999 and 2002. At the other extreme, the CPR has been accepting complaints for only six months less than WIPO, yet it has only received 55 complaints (0.74% of all domain name disputes). Given the broad range of factual issues and different defences that can arise during a domain name dispute, a Complainant may feel more comfortable that a random WIPO Panelist would be more likely to have practical experience through drafting decisions on that topic than a CPR Panelist.

This attitude can create a catch-22 situation for Providers with low market share. If potential Complainants are reluctant to make complaints to a Provider whose Panelists have not had the experience of resolving a significant number of prior complaints, that Provider may never achieve the critical mass of market share that it requires to attract many complaints.

2 Speed by which each Provider’s Panelists reach decisions

The average time taken to resolve a domain name dispute under the UDRP is 43 days. As the table below shows, the Providers that resolve disputes faster than average do have larger market shares. The NAF resolves disputes in an average of 37 days and has 35.90% market share. WIPO resolves disputes in an average of 45 days and has almost 60% market share. Information is not available on the average time taken by CPR or ADNDRC Panels to resolve disputes. Prior to its bankruptcy, eResolution averaged 55 days to resolve a dispute.

<table>
<thead>
<tr>
<th>Provider</th>
<th>Average Time to resolve a dispute (days)</th>
<th>Market Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>WIPO</td>
<td>45</td>
<td>59.06%</td>
</tr>
<tr>
<td>NAF</td>
<td>37</td>
<td>35.90%</td>
</tr>
<tr>
<td>eResolution</td>
<td>55</td>
<td>&lt;8% (at time of bankruptcy)</td>
</tr>
<tr>
<td>ADNDRC / CPR</td>
<td>unknown</td>
<td>&lt;1%</td>
</tr>
</tbody>
</table>

From this information, although the time differences are not that great between the slowest and fastest Provider’s Panels, it would appear that there is a slight

104 Mueller, above n 81, 17, 18.
105 Ibid.
correlation between the time taken to resolve a dispute and the market share of each Provider. This does not mean necessarily that a Provider with a history of slower than average decision making Panels would actually discourage potential Complainants from choosing to use its service.

For commercial reasons, some Complainants are desperately keen to recover their domain names. On the other hand, the average time elapsed between the registration of a domain name and the challenging of that registration under the UDRP was 477 days in 2000.106 Thus, an 18 day difference between the average time required to resolve a dispute appears to be particularly insignificant compared to the almost 16 month period prior to the complaint being lodged. More research into actual Complainant preferences is necessary to determine whether this issue actually influences Provider selection.

Therefore, it is unclear whether Provider market share is significantly affected by the average time taken by that Provider’s Panelists to resolve a dispute. Anecdotal evidence in the DNSO Questionnaire discussed below suggested that Complainants had greater issues with delays taken by Registrars to implement UDRP Panel decisions than with the time taken to make the decision itself.107 It may be advisable for a Provider seeking to increase its market share of disputes to encourage its Panels to resolve disputes promptly (whilst still maintaining the quality of the decisions made) as this could lead to higher Complainant and Respondent goodwill.

3 Overall Complainant Success Rate

In ‘Fundamentally Fair.com? An Update on Bias Allegations and the ICANN UDRP’, Professor Michael Geist stated that across all single-Panelist non-default cases from 1999 till 18 February 2002, Complainants won 70% of decisions made by WIPO Panelists, 69% of decisions made by NAF Panelists and 50% of decisions made by eResolution Panelists.108 Given that WIPO and NAF have resolved over 90% of all domain name disputes and eResolution is in bankruptcy, this reveals a clear correlation between Provider market share and the single-Panel Complainant success rate.

The Complainant success rate in three member Panel non-default disputes did not correlate with Provider market share. 48% of such Panels appointed under WIPO, 42% of NAF Panels and 47% of eResolution Panels, respectively, found in favour of the Complainant.109 The percentage of potential Complainants that actually consider the success rate of previous complainants under each Provider before deciding which Provider to select is unknown. This is an issue that warrants further study. In single-Panel

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106 Mueller, above n 81, 9.
107 See responses to Question 11 of the DNSO Questionnaire, above n 76, 12-13.
109 Ibid.
disputes, Panelists are appointed by their Provider rather than selected by the parties to resolve the dispute. In such situations, a Provider could not directly control its Complainant success rate. It is interesting that when a Provider has no control over its Complainant success rate, such as in three-person Panel disputes where the parties select the Panelists, Provider market share does not correlate with Complainant success.

It is possible that a Provider that sought to encourage potential Complainants to use its dispute resolution service (i.e. increase its market share) could indirectly influence its Complainant success rate by directing a greater number of complaints to sole-Panelists who had previously resolved a high rate of disputes in favour of Complainants. The way in which Providers allocate disputes amongst Panelists will be discussed in more detail below.

Whether publicising a Provider’s Complainant success rate would cause forum-shopping by Complainants (as Geist suggests\textsuperscript{110}) is unknown. There is a clear correlation between Complainant success in single-Panel disputes and Provider market share. Whether there is a causal link between those two statistics is a matter for further investigation. If such a causal link were found, then the historical success rate of Complainants in single-Panelist disputes would be a clear means for a Provider to distinguish itself in a competitive market.

4 Availability of Panelists

Providers could attempt to distinguish their service from that of their competitors on the basis of their Panelist roster. For example, it is possible that a potential Complainant could be induced to select a Provider on the basis of which Provider has the most Panelists in total in its roster, or alternatively, has Panelists on its roster who are experienced with the local laws or culture of the Complainant’s country.

As the table below shows, WIPO has by far the largest list of Panelists among the four Providers. Of the 517 Panelists listed by the four Providers on 12 December 2002, 312 (60%) work for WIPO. If the 58 Panelists that work for more than one Provider are removed, WIPO lists 254 of the remaining 393 (64.5%) sole-Provider Panelists.

\textsuperscript{110} Ibid.
Comparison of Provider Rosters and Sole Panelists

<table>
<thead>
<tr>
<th>Provider</th>
<th>Total Panelists on Provider’s roster</th>
<th>Total Panelists working only for that Provider</th>
<th>Percentage of Panelist roster working only for that Provider</th>
<th>Percentage of all Sole-Provider Panelists that work only for that Provider</th>
</tr>
</thead>
<tbody>
<tr>
<td>WIPO</td>
<td>312</td>
<td>254</td>
<td>81%</td>
<td>64.5%</td>
</tr>
<tr>
<td>NAF</td>
<td>135</td>
<td>91</td>
<td>67%</td>
<td>23.1%</td>
</tr>
<tr>
<td>ADNDRC</td>
<td>34</td>
<td>25</td>
<td>68%</td>
<td>6.4%</td>
</tr>
<tr>
<td>CPR</td>
<td>36</td>
<td>23</td>
<td>64%</td>
<td>5.8%</td>
</tr>
<tr>
<td>Total</td>
<td>517</td>
<td>393</td>
<td></td>
<td>100%</td>
</tr>
</tbody>
</table>

With Providers in 46 countries, WIPO also has the deepest international coverage of any of the Providers. The NAF has appointed Panelists from 29 countries, the ADNDRC from 14 countries and the CPR from only 6 countries. If, for language reasons or due to unique local trademark laws, a Complainant and a Respondent sought to appoint a three-person Panel from Panelists that operated within a single country, WIPO could accommodate their request across 25 jurisdictions. The NAF could only do so for five countries, the ADNDRC for three countries and the CPR for one (the USA).

Comparison of Provider Market Share, Panelist and Complainant Locations

<table>
<thead>
<tr>
<th>Provider</th>
<th>Market Share</th>
<th>Panelist Countries</th>
<th>Panelist Countries with at least three Panelists rostered</th>
<th>Disputes involving Complainants from USA (73% of all Complaints)</th>
<th>Disputes involving Non-USA Complainants (23% of all Complainants)</th>
</tr>
</thead>
<tbody>
<tr>
<td>WIPO</td>
<td>59.06%</td>
<td>46</td>
<td>25</td>
<td>60%</td>
<td>40%</td>
</tr>
<tr>
<td>NAF</td>
<td>35.90%</td>
<td>29</td>
<td>5</td>
<td>92%</td>
<td>8%</td>
</tr>
<tr>
<td>ADNDRC</td>
<td>0.20%</td>
<td>14</td>
<td>3</td>
<td>0%</td>
<td>100%</td>
</tr>
<tr>
<td>CPR</td>
<td>0.74%</td>
<td>6</td>
<td>1</td>
<td>Unknown</td>
<td>Unknown</td>
</tr>
</tbody>
</table>

Another issue which Providers could use to distinguish their dispute resolution services is the extent to which their Panelist roster is concentrated in only a few countries, or if it is spread more evenly across many countries. Comparing the

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number of Panelists from the five most populous Panelist-countries of each Provider to the total number of Panelist-countries available from that Provider reveals that WIPO’s concentration rate is only 54%. The ADNDRC’s concentration rate is 73%, the NAF’s 75% and CPR’s is 97%. Put another way, almost 46% of WIPO’s Panelists are from countries outside of the five countries where that Provider has rostered the most Panelists. ADNDRC only has 26.5%, the NAF 25% and CPR less than 3%.\(^{112}\) Depending upon whether a Provider was seeking to increase its market share in a small number of high-volume dispute jurisdictions, or across all jurisdictions, a higher or lower concentration of Panelists countries could be appropriate.

### Geographic Concentration of Provider Rosters

<table>
<thead>
<tr>
<th>Provider</th>
<th>Number of Panelists on Provider’s entire Roster</th>
<th>Number of Panelists from outside five countries where Provider has appointed the most Panelists</th>
<th>Percentage of Panelists from outside five countries where Provider has appointed the most Panelists</th>
</tr>
</thead>
<tbody>
<tr>
<td>WIPO</td>
<td>312</td>
<td>143</td>
<td>45.8%</td>
</tr>
<tr>
<td>NAF</td>
<td>135</td>
<td>34</td>
<td>25.2%</td>
</tr>
<tr>
<td>CPR</td>
<td>36</td>
<td>1</td>
<td>2.8%</td>
</tr>
<tr>
<td>ADNDRC</td>
<td>34</td>
<td>9</td>
<td>26.5%</td>
</tr>
</tbody>
</table>

WIPO’s website reveals the geographic location of its complainants.\(^{113}\) 72.45% of the Complainants that have referred disputes to WIPO under the UDRP have been located in only five countries, the USA, UK, France, Spain and Germany. 42.5% of WIPO’s Panelists are also from those countries. WIPO would appear to have recognised the high level of demand for dispute resolution services coming from the USA and UK as those jurisdictions have been the source of the highest number of both complainants and Panelists for that Provider.

Whilst the NAF’s tendency to appoint retired judges and attorneys from within the United States of America has made it popular with American Complainants, it has been claimed that this is a reason why the NAF has received few complaints from Complainants located outside of the USA.\(^{114}\) A re-examination of the NAF’s roster of Panelists on December 12, 2002 indicates that the NAF has made a significant effort to broaden the range of Panelist nationalities it has available. Of the 135 NAF Panelists, fifty are now from twenty-nine countries outside the United States.\(^{115}\)

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\(^{112}\) Ibid.


\(^{115}\) NAF, above n 111.
CPR has appointed only 36 Panelists, mainly with backgrounds as attorneys in the USA. The CPR has the least geographically-diverse Panelist roster. As of December 12, 2002, 84% of CPR’s Panelists were from the United States. It had appointed only six Panelists from five other countries (two from Spain and one each from Australia, Italy, Canada and Hong Kong).

The newest Provider, ADNDRC would at first glance appear to have appointed a reasonably wide geographical range of Panelists to its roster (34 from 14 countries). However, 67% of these are from China, Hong Kong or Korea. The ADNDRC is the only Provider that has not sourced the largest number of its Panelists from the USA. Therefore, the ADNDRC would appear to have specialised its roster deliberately to target a different market to the other Providers. It will be interesting to see whether the ADNDRC’s Asian-focused strategy is sufficiently popular with Complainants to ensure the Provider’s viability. If the total volume of domain name disputes arising out of China, Hong Kong or Korea is too small, or the ADNDRC is unable to attract a significant percentage of those Complainants to use its services rather than those of the more established WIPO and NAF, it is possible that the ADNDRC may follow eResolution into Provider-oblivion.

(a) Cross-Fertilization of Provider Rosters

ICANN’s rules for prospective Providers states clearly that before ICANN will approve a Provider to resolve domain name disputes, that prospective Provider must ‘give a commitment to ICANN that it will not prevent or discourage any of its listed Panelists from serving as Panelists for domain-name disputes administered by other approved Providers’.

As a result, it is now reasonably common for Panelists to be listed by more than one Provider.

If Complainants were more concerned with who the actual or potential Panelist that could be appointed to resolve their dispute is, rather than which Provider is used per se, the fact that a Panelist could appear on the roster of more than one Provider would suggest that it would be difficult for Providers to distinguish their services (and therefore compete) on the basis of their roster of Panelists.

On 31 July 2001, 63 Panelists were listed on the roster of at least two providers. On 12 December 2002 (subsequent to the demise of eResolution and commencement of the Asian Domain Name Dispute Resolution Centre), only 58 Panelists were listed by more than one Provider. This constitutes 13% of the total

117 CPR, above n 111.
118 ADNDRC, above n 111.
120 Geist, above n 94, 7.
Panelist population. Of these 58, five were listed as Panelists by three of the four Providers. A Canadian, Mr Edward Charles Chiasson QC, has the distinction of being the only Panelist who is listed to resolve disputes under the UDRP by each of the four current Providers. Mr Chiasson QC was also a Panelist with eResolution prior to its bankruptcy.

eResolution's bankruptcy is the main reason that the total number of multi-Provider listed Panelists has declined slightly over the past 18 months. As at 31 July 2001, 42 of eResolution's 100 Panelists were listed by more than one Provider. The Provider that replaced eResolution, ADNDRC, has only 10 multi-Provider listed Panelists. It is clear that the rate at which Panelists are appearing on more than one Provider’s roster is actually increasing.

Of the four Providers, the rosters of the NAF and the WIPO are the most similar, with 43 Panelists appearing on both rosters. However, the NAF’s geographical spread of Panelists does not match its rate of multi-Provider Panelists. Eighty-five of the NAF’s 135 Panelists are from the United States. However, only 10 of those eighty-five American NAF Panelists are dual-listed as Panelists with WIPO. Of those 10, only one is a retired judge. This is despite the fact that retired judges make up over 71 percent of the American Panelists appointed by the NAF. It is unclear whether WIPO is uninterested in appointing retired US judges as Panelists, or retired US judges are uninterested in presiding on WIPO Panels.

The NAF would appear to have reacted to the heavily publicised analysis by Geist that it had concentrated its roster on US-based Panelists. To widen the geographical range of Panelist roster, the NAF would appear to have sourced many of its non-US panelists from WIPO. Two-thirds of non-US NAF Panelists are also Panelists with WIPO. Over 91% of all NAF Panelists that work for more than one Provider work for WIPO and of those, 86% work only with NAF and WIPO.

How many WIPO Panelists are listed on other Provider's Rosters?

<table>
<thead>
<tr>
<th>Provider</th>
<th>Number of US-based Panelists</th>
<th>US-based Panelists that are also on WIPO’s roster</th>
<th>Non US-based Panelists</th>
<th>Non US-based Panelists that are also on WIPO’s roster</th>
<th>Percentage of Non US-based Panelists that are also on WIPO’s roster</th>
</tr>
</thead>
<tbody>
<tr>
<td>NAF</td>
<td>85</td>
<td>10</td>
<td>50</td>
<td>33</td>
<td>66%</td>
</tr>
<tr>
<td>CPR</td>
<td>30</td>
<td>10</td>
<td>6</td>
<td>2</td>
<td>33%</td>
</tr>
<tr>
<td>ADNDRC</td>
<td>1</td>
<td>1</td>
<td>33</td>
<td>6</td>
<td>18%</td>
</tr>
</tbody>
</table>

121 58 multi-Provider Panelists / (393 sole-Provider Panelists + 58 multi-Provider Panelists).
122 Geist, above n 94, 33.
123 Compare WIPO and NAF Panelist rosters, above n 111.
124 NAF, above n 111.
125 Above n 123.
WIPO Panelists make up 32% of the NAF’s roster, 30% of the CPR’s roster and 23% of the ADNDRC’s roster. Therefore, it is difficult to claim that WIPO’s dominant market share can be attributed to the Panelists on its roster alone. These Panelists also form a significant percentage of the rosters of the other Providers. The result of ICANN’s deliberate requirement of Panelist freedom has meant that Providers cannot effectively compete with each other by using the geographic spread of their Panel roster as a defining feature.

B Qualitative bases for Provider Competition

1 Perceived Provider Reputation

The perceived stature, experience and history of a Provider could also affect Complainant demand for its dispute resolution service. As discussed above, a new Provider would face the catch-22 situation of potential Complainants being unwilling to try its untested service, which would preclude the development of a substantial body of resolved complaints through which Complainants could develop the trust necessary to use the service.

There would appear to have been definite first-mover advantages for those Providers that were initially approved by ICANN in 1999/2000. The pent-up demand amongst Complainants that led to the development of the UDRP ensured that the earliest-appointed Providers were able to develop significant technical experience and a body of resolved complaints that could be used to distinguish their services from those provided by newer, less experienced, Providers.

John Berryhill has written an interesting, if slightly tongue-in-cheek, analysis of the implicit incentives for Complainants (and their lawyers) within the UDRP. He states that:

Clients do not pay their attorneys to obtain ‘justice’. Clients pay attorneys to win. The last thing the [attorney] wants in an arbitrator is someone who is going to think. The [attorney] wants someone who is going to listen to be persuaded to find in the client’s favour.

A practical attorney would not, ‘... pick an arbitration provider wherein at least one of the members is known to have some kind of association with material critical of the interests of trademark holders with regard to the UDRP’. Especially not, ‘... to save $250’.

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126 Compare WIPO, NAF, ADNDRC and CPR rosters, above n 112.
127 Lee, above n 114, 6.
129 Ibid 1.
130 Ibid 2.
As Complainants choose which Provider will resolve their dispute, Providers are implicitly encouraged to offer a service which is attractive to potential Complainants. Berryhill cites the [un-named] Provider advertising on the index page of their website that ‘a cybersquatter has been evicted from a domain name’. Berryhill quotes another Provider that ‘boasts of how they are the first to ‘go after cybersquatters’ with their online filing system’.  

Professor Michael Geist has claimed that Providers do attempt to distinguish their service offerings through marketing techniques. He received ten press releases from the NAF in a four month period in 2001, all of which promoted decisions in which Complainants won. These featured headlines such as ‘Arbitrator Delivers Internet Order for Fingerhut’ and ‘May the Registrant of magiceightball.com Keep the Domain … Not Likely’.  

The reputation and status of eResolution, the only Provider to have fallen into bankruptcy since the UDRP commenced, may shed light on the nature of the Provider market. Prior to its closing, eResolution had appointed a large number of university professors from the USA and Canada as Panelists, with few Panelists located in Europe or Asia.  

Unfortunately, eResolution’s original website is no longer operational. However, the WayBack Machine (http://www.archive.org) has retained copies of a number of different versions of eResolution’s website. The earliest copy is dated April 7, 2000 which is four months after eResolution was appointed by ICANN as a Provider. At that time, eResolution had appointed 49 Panelists, twenty-five of whom were academics and twenty-three practicing lawyers. Seventy-three percent of eResolution’s Panelists were US-based, with the remaining thirteen Panelists spread across ten other countries. The Complainant market regarded eResolution as being more Respondent-friendly than the other Providers. This was attributed to eResolution’s higher concentration of academic Panelists compared to the other Providers and the criticism of the UDRP by some of its founders. 

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131 Ibid 2-3.
132 Geist, above n 94, 4-5.
134 <http://www.disputes.org/eresolution/> now only lists the decisions made by eResolution prior to its bankruptcy – complying with an requirement to publish all UDRP decisions.
136 ICANN, above n 90.
138 Geist, n 94, 3.
It would appear that, prior to its bankruptcy, eResolution had made significant efforts to increase the number of practitioner-Panelists on its roster. On the most recent copy of eResolution's website stored by the Wayback Machine (dated September 26, 2001), eResolution had increased its roster of Panelists from 49 to 100. Virtually all of these additional Panelists were practitioners, not academics. In fact, 76% of eResolution's Panelists were practitioners at that date. eResolution had also widened its Panelist base to include members from 18 countries. Non-US based Panelists increased their representation from 27% to 48% in only sixteen months.

**E-Resolution’s changing Panelist composition**

<table>
<thead>
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<th>Practitioner Panelists</th>
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<td>23</td>
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Unfortunately, the changes made by eResolution to its Panelist base were not sufficient to improve its standing within the Complainant market. eResolution was only able to attract 288 complaints before its bankruptcy in November 2001. The criticisms of ICANN and the UDRP that were made by academics involved in the management of eResolution and statistical analysis which revealed that it had the lowest rate of Complainant-success of the four Providers (at a mere 61%) appear to have influenced potential Complainants (and their advising legal counsel). Those Complainants voted with their feet, took their complaints to other Providers and starved eResolution into bankruptcy less than two years after it opened.

As the discussion above has highlighted, the prestige and reputation of a Provider would appear to be a significant factor in determining the market share of that Provider. It would therefore appear to be a significant factor that drives competition between Providers.

2 **Perceived Experience or Prestige of Panelists Employed by that Provider**

Whilst Providers may not be able to effectively distinguish their service offerings on the basis of the sheer number of Panelists on their rosters, it may be possible for Providers to distinguish themselves on the basis of the perceived experience or prestige of the Panelists that they employ. eResolution’s bankruptcy and anecdotal evidence from the DNSO survey suggest that some Complainants are influenced by Panelist roster backgrounds when selecting the Provider that will resolve their complaints.

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142 ICANN has stored copies of eResolution Panel decisions at: <http://www.icann.org/udrp/Detail155.htm>.
143 See generally Froomkin, above n 56; Froomkin and Post, above n 139 and Mueller, above n 81 11.
complaint. WIPO’s appointment of arbitrators from 46 countries, together with the tendency for WIPO Panelists to be practitioners or academics with significant trade mark experience (particularly with regard to European and international trade mark laws) may be one reason for that Providers dominant market share.

If Complainants were motivated to have their complaint resolved by a Panelist with a particular reputation and that Panelist appeared on the roster of more than one Provider, it is possible that the Provider selected could be chosen on the basis of the number of times that the Panelist has been appointed by that Provider. It is therefore worth investigating whether different Providers appoint the same Panelists at different rates.

(a) Distribution of Disputes amongst Panelists appearing on more than one Provider’s roster

At least one Provider, NAF, has claimed that it randomly appoints Panelists to determine complaints. It is therefore worthwhile to examine whether Providers tend to favour the appointment of some Panelists and ignore others, or share their overall complaint workload relatively evenly.

Panelists that have been appointed more often when working with one Provider would appear to remain popular when they are appointed by a subsequent Provider. Of the forty-three Panelists appearing on the rosters of both the NAF and WIPO, six names appear on the list of the top-10 most commonly appointed dual-listed Panelists by each of those Providers. In fact, the most commonly appointed dual-listed Panelist for each of the NAF and WIPO was the same person, Alan Limbury. Those top-10 most commonly appointed dual-listed Panelists have between them been appointed to 85% of the NAF complaints and 73% of the WIPO complaints resolved by Panels containing dual-listed Panelists.

Conversely, a dual-listed Panelist that has not been appointed to resolve many disputes by WIPO is unlikely to be appointed to resolve disputes by the NAF. Of the 43 dual-listed WIPO – NAF Panelists, 26 have not been appointed by the NAF to resolve any disputes. One dual-listed Panelist has never been appointed by either WIPO or NAF to resolve a domain name dispute. Those same 26 dual-listed Panelists who had never been appointed by the NAF to resolve a dispute were appointed by WIPO to make 24% of the 862 panel decisions made by dual-listed

\[144\] See responses made to Question 5 of the DNSO Questionnaire: Domain Name Support Organisation, above n 76, 4-6.

\[145\] Geist, above n 94, 4.

\[146\] Ibid 8.

\[147\] Searches conducted using ICANN’s text-searchable database of UDRP decisions <http://www.icann.org/udrp/udrpdec.htm>.

\[148\] Ibid.

\[149\] Ibid.

\[150\] Ibid – Mr Daniel Peña of Colombia.
WIPO Panelists.\textsuperscript{151} This equates to one fewer WIPO panel appointments than have been resolved by the two most commonly appointed dual-listed WIPO and NAF Panelists.\textsuperscript{152}

eResolution appears to have distributed its decisions more widely amongst its Panelists than some of the other Providers. No single eResolution Panelist had decided more than 2.8\% of the 288 complaints resolved by that Provider before its bankruptcy.\textsuperscript{153} The six most commonly appointed eResolution Panelists had decided 16.3\% of all complaints received by that Provider and thirty eResolution Panelists made 61\% of all decisions. This contrasts with six NAF Panelists who had decided 53\% of all NAF decisions and the six WIPO Panelists who had decided 17\% of all WIPO decisions (as at 7 July, 2001).\textsuperscript{154}

Many former eResolution Panelists can now be found on the lists of other Providers. Of the fifty-eight Panelists that currently appear on more than one Provider’s roster, fourteen were also Panelists with eResolution.\textsuperscript{155} Mr Chiasson QC of Canada is an eResolution alumnus, which means that he has served as a Panelist with every UDRP Provider. Of the six Panelists that are currently on three Provider rosters, half were also eResolution Panelists.\textsuperscript{156}

3 Rigour of the Analyses Provided by Panelists when Determining each Complaint

Whilst the Panelists on each Provider’s roster must apply the same UDRP, a Provider could potentially distinguish its service offering on the basis of the quality of analysis rendered by its Panelists. One method of determining how rigorous a decision is to look at how many times it is cited by other decision-makers.

Although there is no formal precedent system under the UDRP, an analysis of several thousand domain name disputes decided before July 2001 by Dr Milton Mueller revealed that more than half cited previous decisions.\textsuperscript{157} The 20 most commonly cited decisions were all in favour of the Complainant. Three-quarters of those decisions were also default cases. Of those 20 most commonly cited decisions, 17 were decided by WIPO Panelists and three by NAF Panelists. No eResolution, CPR or ADNDRC decisions were amongst the 20 most commonly cited.\textsuperscript{158}

\textsuperscript{151} Ibid.
\textsuperscript{152} Ibid.
\textsuperscript{153} Ibid.
\textsuperscript{154} Ibid.\textsuperscript{n 94, 8.}
\textsuperscript{156} Ibid.
\textsuperscript{157} Mueller, above n 74, 19-20.
\textsuperscript{158} Ibid.
WIPO’s dominant market share is one potential reason why it dominates such a list. The mere fact that WIPO Panelists have resolved such a large number of disputes is an innocent explanation for the fact that its decisions are cited more often than those of any other Provider. Another possibility is that WIPO Panelists simply prefer to cite other WIPO decisions. The rate at which non-WIPO rostered Panelists cite WIPO decisions would be a more powerful indication of whether WIPO is producing more rigorous decisions than its competitors.

4 Supplemental Rules used by each Provider

Geist has argued that the Supplemental Rules used by each Provider can be used to distinguish Provider service offerings. The major difference between each Provider’s Supplemental Rules is in relation to a domain name registrant’s right to respond to the allegations made by the Complainant. WIPO’s Supplemental Rules do not regulate such registrant responses. Neither the ADNDRC’s or CPR’s Supplemental Rules alter the ICANN rules substantially. In contrast, Geist cites the NAF’s Supplemental Rule 6(a) which places a higher burden on Respondents before additional time to file a response will be granted. This burden includes negotiating with the Complainant and paying a $100 fee to the NAF. As 90% of domain name disputes are single-Panelist decisions for which the Complainant must pay all fees, the imposition of a fee on the Respondent by the NAF would appear to be a significant distinguishing factor between its service offering and that of WIPO, the CPR or the ADNDRC.

VI DNSO SURVEY OF COMPLAINANT AND RESPONDENT ATTITUDES TO PROVIDERS

In early November 2002, the DNSO’s UDRP Review and Evaluation Task Force submitted a questionnaire for public comment. That questionnaire sought information to identify potential areas of reform and to find ways to improve the UDRP. By mid-December, 2002, 165 responses had been received, 51 of which identified their author as being a Complainant, eight had been Respondents and nine had been appointed as Panelists.

Whilst this article has focused on competition on the supply side of the Provider industry, the results of this questionnaire are particularly timely because they provide the first anecdotal evidence of the reasons why Complainants choose to use one Provider over another, i.e. how Complainant demand works. It also provides some insights into the ways in which Providers could improve their services to better satisfy that demand which would improve the level of competition in the Provider marketplace.

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159 Geist, above n 94, 5-6.


161 Domain Name Support Organisation, above n 76, 1-2.
When asked for the main reason why a party to a domain name dispute had elected to use the UDRP, the two most common answers were the low cost of the proceedings and the speed with which the decision would be made. The most popular factors when determining which Provider to use were the Provider's reputation and the quality of decisions made by Panelists.

Participants in the survey regarded most Panelists as impartial and experienced, though claims were made that some Panelists appeared to have an agenda and others lacked sufficient experience in the relevant trade mark laws. As discussed above, there were significantly more survey responses from Complainants than Respondents. The survey indicated that most participants who had been Complainants were represented by either in-house or external legal counsel when making their complaint. Although several survey responses indicated that they had acted as legal counsel for Respondents, a number of comments indicated that Respondents may sometimes be unable to afford the cost of legal representation to defend against a complaint.

Only six survey responses indicated that the party was currently involved in a court challenge to a decision made under the UDRP. Each of these responses stated that the court action was being undertaken due to the UDRP decision not reflecting the party's view of the relevant trade mark law. A number of responses stated that whilst a court challenge had been considered, cost had precluded the challenge from taking place.

Of the reasons given for not filing a complaint under the UDRP, the cost of proceeding (presumably this relates to the costs of the legal advice rather than the actual fee charged by the Provider, as in Question 42 participants stated that such fees were generally appropriate) and a fear of the quality of the decision that may be made were most common. The lack of injunctive relief or the ability to recover costs against an unsuccessful Respondent under the UDRP were also cited as reasons to avoid filing a complaint.

Survey participants had mixed opinions on which party to a complaint should be responsible for selecting the Provider. As there were far more participants that had been Complainants than Respondents, it is not surprising that 96 responses favoured the Complainant as the best party to choose the Provider, as compared to only 41 responses in favour of the Respondent. Interestingly, there was more support for a

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162 Ibid 2.
163 Ibid 3.
164 Ibid 52-3.
165 Ibid 7-8.
166 Ibid.
167 Ibid 10-12.
168 Ibid.
169 Ibid 2 and 13-14.
170 Ibid.
171 Ibid 14.
random allocation of Provider than for permitting both the Complainant and the Respondent to select the Provider.\textsuperscript{172}

The main issue that survey participants had with the Providers Supplemental Rules was the short time available to Respondents to file their defence. The inconsistencies between each Provider’s Supplemental Rules led to accusations of forum shopping and to calls for the standardisation of those Rules.\textsuperscript{173} A small number of participants were concerned with the consistency of decisions made by Panelists from different Providers, however, no particular solution to this issue would appear to have significant support.\textsuperscript{174} Some called for more ongoing Panelist training, others for peer review of decisions prior to publication and a small number called for the establishment of a UDRP appeals process.\textsuperscript{175}

In relation to Provider fees, there did not appear to be any complaints of excessive cost.\textsuperscript{176} Some participants claimed that Panelists were underpaid (9 Panelists responded to the survey) and others suggested that they were willing to pay higher fees if that would improve the quality of the decisions handed down or to enable peer review of decisions prior to publication.\textsuperscript{177} Another suggestion was to have a sliding scale of fees depending upon the nature of the Complainant, with corporations paying a higher rate than individuals.\textsuperscript{178}

Although this survey was done on an ad hoc basis and received little publicity, it provides some interesting insights into the issues which have been discussed in this article. In particular, it highlights that the true cost of a domain name dispute is more closely related to the fees paid to outside legal counsel than the amount charged by the Provider. This appears to confirm that the price competition that the First ICANN Staff Report sought to introduce between Providers has never existed.

In fact, all of the Providers could quite possibly raise their fees substantially without suffering a major loss in Complainant market share. An upper limit on such price rises would be the price level at which potential Complainants felt that other substitutable forms of dispute resolution, such as litigation or mediation, would be more cost effective. As the DNSO survey results suggest, a Provider that could convince potential Complainants that its higher fee was being used to pay for better training for its Panelists, peer review of their decisions prior to publication or an appeal body, could potentially even raise its market share over its lower-priced competitors.\textsuperscript{179} As eResolution discovered, providing a low-cost dispute resolution service does not guarantee substantial market share.\textsuperscript{180}

\begin{thebibliography}{99}
\bibitem{172} Ibid.
\bibitem{173} Ibid 21-3.
\bibitem{174} Ibid.
\bibitem{175} Ibid.
\bibitem{176} Ibid 52-3.
\bibitem{177} Ibid 59-60.
\bibitem{178} Ibid.
\bibitem{179} Ibid.
\bibitem{180} Mueller, above n 81, 15.
\end{thebibliography}
Anecdotal evidence extracted from the DNSO Questionnaire has reinforced much of the analysis in this article. Many Complainants do not select their Provider on the basis of price. Some expressed a willingness to pay a higher price if that money was spent on additional training for Panelists. Whether ICANN would permit a Provider to self-implement proposals such as the creation of an appeal body or a system of peer review of decisions prior to publication is unknown. Unless such changes would deliver more benefits to the parties through fairer decisions than those changes would cost in delays, overall Provider competition may not increase. A Provider that sought to increase its market share should probably discuss such changes with ICANN well before attempting implementation.

VII CONCLUSION

This article has examined whether ICANN’s use of competing Providers to resolve domain name disputes under the UDRP has actually achieved the goals that were enunciated when the UDRP was being developed. It has revealed that whilst the UDRP has been a low cost, high speed and high volume method of resolving domain name disputes, Providers do not compete with each other on price. Providers may compete with each other on a number of quantitative and qualitative non-price bases.

The lack of price competition between Providers is mainly due to the fact that the difference between the fees charged by the lowest-priced and highest-priced Providers is insignificant from the point of view of the average party that actually selects which Provider to use, i.e. Complainants. Complainants pay exponentially more in their own legal costs to lodge a complaint than they do in Provider fees. This means that Providers must find other non-price means by which to distinguish their service offerings from their peers if they wish to compete for a higher market share of complaints.

If the fees currently charged by all Providers are too low to enable effective price competition, an across the board increase in Provider fees could generate more competition if the overall difference between the most expensive Provider and the least-expensive Provider became a significant consideration for Complainants. However, a Provider that raised its fees too high could lose market share, not only to its competing Providers, but also to substitutable forms of domain name dispute resolution, eg negotiated settlements, mediation or litigation. Given some of the anecdotal evidence of Complainant attitudes that was revealed by the DNSO Questionnaire responses discussed above, it is possible that a Provider that justified its fee increase through adding additional features to its service offering could actually become more competitive.

Comments made by the public during the development of the UDRP revealed an awareness of the fact that non-price competition between Providers could arise.
Given that Provider market share is currently inversely related to price, such comments would appear to have been prescient.

The experience gained from resolving a significant number of disputes would appear to be one way in which Providers can distinguish their service offerings. This will make it difficult for newer, less experienced Providers to compete effectively. There does not appear to be a significant difference between the amount of time it takes for each Provider’s Panelists to resolve a domain name dispute.

As all current Providers offer a service significantly faster than the substitutable forms of dispute resolution, especially litigation, it may be difficult for Providers to differentiate their offering on the basis of the speed with which disputes filed with them are resolved. Anecdotal evidence suggests that a Provider could raise its market share if it could encourage Registrars to implement its decisions faster than is currently the case.

The rate at which Complainants succeed when using a particular Provider would appear to be a significant factor in determining Provider market share. However, as Panelists make decisions rather than Providers, it would be of concern if Providers were to attempt to compete with each other on the basis of their respective Complainant success rates. Panelists are required to decide their disputes with impartiality and integrity. If it was revealed that Providers were attempting to compete by influencing Panelist decisions, or deliberately only appointing Panelists due to their history of Complainant success, such competition could bring the integrity of the UDRP into question.

Whilst the majority of domain name disputes arise from only a few countries (particularly the USA), Providers appear to have competed on the basis of the geographical breadth and depth of their rosters. The extensive cross-fertilisation of Provider rosters which has occurred due to ICANN’s prohibition on Providers requiring Panelists to only work for them has made it harder for such competition to eventuate.

Promoting the background and experience of their Panelists would appear to be a more effective method for Providers to compete. However, if this message does not reach its target audience (Complainants) effectively, significant gains in market share may not eventuate. The demise of eResolution is evidence of this.

The newest Provider, ADNDRC, has appointed a significantly different Panelist roster than its competitors. ADNDRC appears to be expecting a significant rise in the number of disputes requiring specialist Chinese, Hong Kong or Korean trade mark expertise. If such an increase does not eventuate, ADNDRC may be forced to change its strategy to compete in a more traditional manner with the other Providers, or face bankruptcy as eResolution did.
A Provider’s reputation in the Complainant market appears to impact significantly on its ability to compete. Anecdotal evidence suggests that WIPO’s strong international reputation is one reason for its success. Criticisms of the UDRP system by members of eResolution appear to have contributed to the decline in its reputation amongst Complainants and therefore to a decline in its market share. For the purposes of Provider competition, the validity or inaccuracy of such criticisms is unfortunately irrelevant. How potential Complainants react to such criticism is of paramount importance.

The UDRP has no formal system of precedent. However, an increasing number of Panelist decisions are referring to principles enunciated in previous decisions. With WIPO Panelists having decided 17 of the 20 most commonly cited UDRP decisions, it may be difficult for other Providers to differentiate their service offering on the basis of analytical rigour.

Only the NAF has issued Supplemental Rules that differ significantly from the other Providers. The NAF has placed more stringent limitations on Respondents in its Supplemental Rules. Whether Complainants are influenced by such restrictions when determining which Provider to use is a matter for further investigation.

This article has only examined the supply-side of the Provider-competition issue. Providers can only increase competition by differentiating their services in ways that Complainants actually demand. Whilst the DNSO questionnaire provides useful anecdotal evidence of the factors that affect Complainant demand for one Provider over another, a more detailed statistical survey directed specifically at a large number of Complainants and Respondents would enable far greater insights into the true means by which Providers can effectively differentiate their service offerings and therefore compete with each other.

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